

Legitimising an Unsustainable Approach to Trade:

A discussion paper on sustainable development provisions in EU Free Trade Agreements

The incorporation of labour, environmental and sustainable development provisions in the EU's free trade agreements (FTA) has been much debated. But are the overall objectives of these FTAs truly compatible with a meaningful approach to labour rights, environmental protection and sustainable development? If not, what are these provisions actually doing?

First attempted with NAFTA in the 1990s, such provisions have proven historically weak. Meanwhile FTAs have become potent vehicles for expanding the geographical and material scope of neoliberal economic policies. In that context, the inclusion of labour clauses in particular seems designed for little more than promoting the “buy-in” of trade unions to agreements that threaten not only jobs, but also public goods and the environment.

Following the publication of a new Model Labour Chapter by the Friedrich Ebert Stiftung last year, this discussion paper looks at the pitfalls of piecemeal attempts to attach “model” provisions to FTAs.

The EU-South Korea FTA was the first of a new generation of agreements initiated after the adoption of the EU's ‘Global Europe’ initiative and the coming into force of Lisbon Treaty. Provisionally in force since 2011, it was heralded as the EU's most “comprehensive” and “ambitious” FTA to date¹ and contained the EU's first “Trade and Sustainable Development” (TSD) Chapter, including labour and environmental commitments. The TSD Chapter created institutional structures – a forum for dialogue with civil society, a Domestic Advisory Group (DAG) – and mechanisms to address implementation, through government consultations or referral to a Panel of Experts.

In its assessment of the FTA's first five years of implementation, published on 30 June 2016, the European Commission concluded that that the FTA had “worked very well”.² EU car exports to South Korea had boomed, tripling in the FTA's first five years.³ During the FTA negotiations, the EU had been careful to extract concessions from Seoul that any new emissions standards adopted by South Korea would not apply to European cars.⁴ Accounting for some 12 million jobs and 6.8% of the EU's GDP,⁵ Europe's automobile industry thereby gained access to the South Korean market under conditions – stipulated in the FTA – deferring to the EU's regulatory framework, including its regulation of diesel emissions.⁶

The failings of that regulatory system – as well as the reasons behind it – were known to the Commission as early as 2010.⁷ In 2015 European car manufacturers became steeped in industrial scandal after it was proven they had manipulated laboratory tests in order to conceal huge levels of pollution. A recent study of the pollution caused by the “Dieselgate” scandal estimated that up to 38,000 premature deaths worldwide (5,000 per year in Europe) were associated with the resulting excess emissions from diesel vehicles.⁸ Of South Korea's imports of German cars, some 79 per cent in 2014 were diesel.⁹

The Commission's triumphant assessment of the FTA's first five years made no mention of “Dieselgate”. It also said little about the impact of the FTA on the labour rights situation in South Korea.

In the TSD Chapter, the Parties had committed to ‘respecting, promoting and realising’ Core Labour Standards and to the progressive ratification and implementation of fundamental and “up-to-date” ILO Conventions.¹⁰ But widespread labour rights violations in South Korea were well known during the FTA negotiations. In 2010, one year prior to the FTA's provisional application, the International Trade Union Confederation (ITUC) reported police violence against strikers, mass detentions, and multiple violations of

workers' rights in South Korea: "*Freedom of association is seriously restricted while the principal of voluntary collective bargaining essential to the respect for collective bargaining is almost totally ignored.*"¹¹ In November 2015, ten of thousands demonstrating on the streets of Seoul were met with excessive police violence, leading to mass arrests and casualties, as well as a further crackdown on unions and police raids on union offices.¹²

In July 2016, just five days after the Commission's assessment of the FTA was published, the President of the Korean Confederation of Trade Unions (KCTU), Han Sang-kyun, was sentenced to five years in prison – later commuted to three years on appeal – for organising mass "illegal demonstrations".¹³ The DAG created under the EU-South Korea FTA has requested twice (in January 2014 and December 2016) that the European Commission initiate formal government consultations to address widespread violations of labour rights in South Korea.¹⁴ In a Resolution adopted in May 2017, the EU Parliament also urged the Commission to do so.¹⁵ The EU Commission has refused.

Han Sang-kyun is still in prison. On 31 December 2017, the former general secretary of the KCTU, Lee Young-joo, was arrested on the basis of warrant issued after the November 2015 protests. Lee had spent the last two years in the refuge of the KCTU offices during her term as general secretary. She has now been detained pending trial.¹⁶

1 Trade and Sustainable Development: Widening the Debate

The fanfare surrounding the EU-Korea FTA – as well as the inclusion of a dedicated TSD Chapter – has by now become ubiquitous with EU trade deals. In the Commission's eyes, each new FTA is more "*gold*" than the last.

But criticism about the demonstrable inability of the mechanisms in TSD Chapters to monitor implementation or ensure compliance with their labour and environmental commitments is widespread. In 2016, the EU Parliament explicitly demanded that TSD Chapters be covered by FTAs' general dispute settlement mechanism, "*on an equal footing with the other parts of the agreement... to ensure compliance with human rights and social and environmental standards.*"¹⁷ Such commitments should be backed up with "*effective deterrent measures*", including the "*reduction or even suspension of certain trade benefits provided under the agreement*" in order to promote compliance. In July 2017, the European Commission embarked on what it described as a "*thorough stock-taking*" of the issue.¹⁸

A significant amount of research has been produced on how to assess and improve the EU's current approach.¹⁹ The opening of re-negotiations of the North American Free Trade Agreement (NAFTA) – the first FTA to include a binding labour provision in 1994 – and the conclusion of a nine-year long dispute between the US and Guatemala over the violation of the labour clause in the Dominican Republic-Central America Free Trade Agreement (CAFTA) have given fresh impetus to re-evaluate the design of such clauses.

These provisions pose a serious dilemma. On the one hand, linking trade arrangements to compliance with labour and environmental commitments has long been mooted as a potentially potent way to address the "race to the bottom" in standards. For those still hopeful that bilateral trade arrangements can be used to combat social dumping or even to leverage improvements in labour and environmental protection, the question of how such linkage can be designed to be effective is clearly a serious one.

On the other hand, the framing of this debate risks obscuring a broader, urgently needed discussion about the impact of FTAs as a whole. Firstly, negotiations over agreements seeking to reduce non-tariff barriers to trade – such as technical standards and assessment procedures – are plainly driven by strategic attempts to penetrate new markets for certain domestic industries, and to protect those industries from foreign competition. Bargaining power in FTA negotiations is wielded primarily to strengthen the position of domestic businesses, for whom social, environmental, and human rights protection is not a priority. The objective of "*sustainable development*" in FTA negotiations is inherently subordinate to the goal of negotiating reciprocal economic opportunities.

Secondly, the world's largest economies are increasingly turning to bilateral or "*mega-regional*" FTAs in order to advance positions which were contested or opposed by poorer, developing or emerging economies in multilateral talks under the auspices of the World Trade Organisation – leading ultimately to the stalemate of the Doha Round.²⁰ FTAs have therefore become potent vehicles for the internationalisation of neoliberal economic policies, through establishing a regime of private property rights, investment protection and a putative system of "*global governance*" that is being strategically insulated from contestation.

This exclusionary strategy has a long tradition, rooted in the colonial history of international law: economic "*integration*" has long been

accompanied by efforts to ensure that dominant powers constitutionalise the rules of the game before weaker states are invited to subscribe to them.²¹ The content of the new generation of FTAs is ever-expanding: trade in goods, services, subsidies, rules of origin, agriculture, intellectual property, competition, transparency, regulatory cooperation, investment, ecommerce, state-owned enterprises, public procurement, energy... Where they create trade diversion from poorer states excluded from their remit, these negative effects will compel those states to capitulate to the same rules later.²²

In combination, these two factors severely undermine any serious or meaningful attempt to give a sustainable development “twist” to agreements that are otherwise blind to issues of both sustainability and development. There are therefore very good reasons to question whether advocating an improved TSD or Labour Chapter is an adequate response to this problem.

2 Do TSD provisions need “teeth”?

In response to concerns that the labour and environmental commitments contained in the EU’s FTAs are ineffective, the Commission last year issued a “*non-paper*” on TSD enforcement, setting out two limited “*options for discussion*”.²³

The first option is clearly favoured by the Commission, and consists of simply “*stepping up*” the current approach – based on dialogue and cooperation. Strengthening, enhancing and improving compliance with TSD commitments is to be achieved by being “*more assertive*” in these activities.²⁴ The “*non-paper*” does not however articulate the reasons as to why the Commission has been so reticent to take such “*promotional*” action to date – declining to use soft mechanisms in the case of the EU-South Korea FTA even when requested to do so by the DAC and the EU Parliament.

The second option concerns enforcement “*with sanctions*”, meaning that TSD obligations will be made subject to dispute settlement and potential suspension of FTA benefits. The “*non-paper*” erroneously suggests that were the sanctions approach to be adopted, it would have to follow the North American model, with all its limitations.²⁵

Notably, the Commission ignores the 2017 decision of the Court of Justice of the European Union (CJEU) on the EU-Singapore FTA. In its Opinion, the CJEU effectively made the question of “*with teeth / without teeth*” redundant, by stating

CAFTA: Lessons on labour and more

In its “*non-paper*”, the Commission relies heavily on the experience of the US-Guatemala arbitration, brought under CAFTA, to illustrate the shortcomings of a sanctions-based approach to FTA’s labour and environmental commitments. To date this dispute is the only labour complaint under an FTA to ever proceed beyond consultation to an arbitration panel.

There is certainly much to learn from the decision, made public in June 2017.⁵⁸ But contrary to the Commission’s claims, the outcome of the US-Guatemala dispute does not really tell us anything about the efficacy of sanctions. Rather, the failure of the Guatemala case may be attributed to two key problems. Firstly, CAFTA’s labour clause is notoriously weak in its design.⁵⁹ Secondly, the US made the perplexing decision to omit from its complaint any reference to the most egregious violations of trade union rights reported in recent years, including the eighty-three trade unionists murdered in Guatemala since CAFTA came into force.⁶⁰ Yet another trade union organiser was shot and killed in Guatemala in September 2017.⁶¹

While the failure to enforce CAFTA’s labour clause is discouraging, the only remedy available in the dispute – Guatemala being ordered to pay a fine – pales into insignificance when one considers the agreement’s impact as a whole.

Before coming into force, CAFTA was staunchly opposed by national unions across all of its member countries.⁶² Between 2002 and 2005 mass demonstrations were frequently held in Guatemala demonstrating against its potential impacts: the destruction of domestic industry and small-scale agriculture, privatisation and unemployment. The ITUC also opposed the agreement.⁶³ Before becoming President and backtracking on his promise never to engage in mega-regional FTA negotiations, even Barack Obama opposed CAFTA.

Much of what was feared from CAFTA’s opponents has come true. One report on the agreement’s first three years in force highlighted that “*patterns of growing inequality and ongoing poverty within the signatory countries*” had been exacerbated.⁶⁴ Small-scale farming in many signatory countries has been devastated due to competition from US grain imports.

The agreement has also paved the way for a huge expansion in the extractive industry, buttressed by CAFTA’s investor-state dispute settlement (ISDS) provisions. Attempts to regulate mining pollution and promote functioning public transport infrastructure have come under repeated threat. Even the risk of ISDS litigation has been sufficient. Local citizens in Guatemala rallied for two years in opposition to a gold mine development in San Jose del Golfo, citing health and environmental concerns. The company needed only to mention ISDS to the government, and in 2014 the local residents were violently evicted by the military.⁶⁵

that from the perspective of customary international law the EU is already entitled to suspend trade liberalisation commitments in the event of a breach of environmental and labour provisions undertaken in its FTAs.²⁶ In theory at least, the EU need not change anything to achieve this.

A much more significant hurdle is identifying precisely what in a TSD Chapter could even be enforced. The provisions drafted to date are often too vague to be meaningfully invoked in a dispute.

3 Putting Flesh on the Bones? A “Model” Labour Chapter

In recent years, a variety of “model” initiatives have been developed with the aim of improving specific clauses in the EU’s FTAs. These already include a “model” TSD Chapter,²⁷ a “model” human rights clause,²⁸ a “model” investment agreement²⁹... In 2017 a new “model” labour chapter was released by the Friedrich-Ebert-Stiftung (FES) in cooperation with the Chairman of the EU Parliament’s Committee on International Trade, Bernd Lange.³⁰

Like previous attempts, the FES Model takes as a starting point existing FTAs and FTA proposals (principally CETA and TTIP) and attempts to build on their established frameworks by improving and extending certain mechanisms and obligations. Uniquely it provides for the option of dispute settlement and possible suspension of obligations.

The Model’s major innovation is a collective complaint procedure “to empower social partners to enforce labour obligations... on their own and with full control over the proceedings.”³¹ This mechanism is a response to prior experiences of enforcement, in that it attempts to make the implementation of labour standards independent of the political will of the Parties. This clearly has its appeal. Empowerment is not a word associated with these mechanisms to date. During the nine years it took for the US-Guatemala complaint to reach its conclusion, seven members of the Guatemalan Izabal Banana Workers’ Union (SITRABI) – one of the unions that co-signed the initial 2008 complaint to the US Trade Representative – were murdered.³² The case highlights an important lesson about what can happen when the initiation of labour disputes under FTAs is left to the Parties themselves: Nothing.

The Model’s independent complaint mechanism will ostensibly produce remedies enforceable in the domestic courts of either party.³³ The Model

therefore puts a new spin on calls for access to remedies for social or environmental harms, often made in critiques of the investor-state dispute settlement (ISDS) system. Precisely the same quest for remedies is fuelling discussions for a Binding UN Treaty on Business and Human Rights. And like these other drives for innovation in transnational law, its efficacy will only become known in practice. Much uncertainty remains.

However, unlike attempts to enforce human rights, labour, or environmental standards in other fora, this initiative has one major shortcoming. In order to come into existence, it would have to be attached to the rest of the FTA. The latest model Chapter – like those before it – leaves the main thrust of the EU’s FTAs untouched. The FES Model proposes just four token amendments to other FTA Chapters (including public procurement and investment protection), which are given a brief consideration in the final pages. The principle drawback of such an approach is that – while it may address certain shortcomings to specific areas of an FTA – it does not address the manifold negative implications of the agreement.

Such a limitation is explicitly acknowledged by the authors of one TSD Model Chapter previously proposed for TTIP:

“... a trade and investment agreement between the EU and US which is based on the principle of sustainable development as its primary objective and goal would be an entirely different agreement. It would include completely reformed chapters on standards (Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Standards (SPS)), services liberalisation, regulatory coherence and investment protection... a bilateral environmental safeguard clause in the trade remedies section of the trade chapter, the recognition of the precautionary principle... Such an undertaking would be beyond the scope of this study.”³⁴

4 Diluting Standards

Incorporating social, labour, human rights or environmental standards into the structures and institutions of international economic law harbours another – often overlooked – danger: what changes first are often the standards themselves. Some have already raised concern that the FES model Labour Chapter’s proposed interaction with the ILO potentially risks interfering with and politicising that institution’s supervisory and monitoring bodies.

Concerns have long been raised that transplanting labour, human rights or environmental standards into the distinct sphere of

international economic law – where economic freedoms are paramount – also spells their transformation. In a notoriously fierce exchange between two leading international lawyers – Ernst Ulrich Petersmann and Philip Alston – in 2002, Alston warned that incorporating a human rights dimension into the WTO's framework would entail the detachment of those rights “from their foundations in human dignity”; they “would instead be viewed primarily as instrumental means for the achievement of economic policy objectives”.³⁵ Such detachment is eminent when these objectives are brought into the realm of an FTA with one of the EU's trading partners: the very choice of partner countries for the FTA negotiations is dictated by the EU's economic policy objectives.

Discovering that such clauses in FTAs do not actually do anything to enhance the protection of workers' rights or the environment may result in more than mere frustration. The very meanings of environmental and labour standards as articulated in international treaties and conventions – the hard-won results of significant political struggle – risk being transformed by their incorporation into the structures and institutions of international economic law.³⁶

For a potent illustration of precisely such an effect, we need look no further than the divergent approaches to workers' freedom of association in the EU itself. In line with the ILO's interpretation, the European Court of Human Rights (ECtHR) has expressly recognised that the right to bargain collectively and the right to strike are essential elements of freedom of association. For the ECtHR, a restriction on the right to strike must be justified to be lawful.³⁷ But the CJEU has adopted almost the polar opposite approach, making the right to strike subordinate to the protection of economic freedoms in the EU's single market.³⁸ For the CJEU the right to strike is only protected when it itself is a justified interference on the right of establishment and to provide services. The ILO Committee of Experts on the Application of Conventions and Recommendations has long noted that the CJEU's position on the right to strike is far removed from its own interpretation of ILO Convention 87.³⁹

5 Taking Core Labour Standards Seriously

Attempts to link labour issues to trade agreements are as old as modern international trade law itself. Much recent analysis of linking labour standards to FTAs focuses on the inclusion and efficacy of labour clauses, or on the relative merits of “pre-ratification conditionality”.⁴⁰

However, core labour standards – and in particular freedom of association – offer another way of looking at the relationship between FTAs and workers' rights. Freedom of association is a key indicator of democratic health. In the words of the former UN Special Rapporteur on Freedom of Association and Assembly, Maina Kiai, the right to freedom of association is “a prerequisite not only for a legitimate democracy, but also for a just society.”⁴¹

The wide-ranging obligations of an FTA impact upon manifold areas of economic and public policy and can bind a state party for generations. The contents of such agreements therefore demand democratic scrutiny. When thinking about linking core labour standards to FTAs, we should remember that the right to freedom of association is a critical barometer of precisely the kind of structures we need to ensure that such a level of scrutiny is even possible. Simply put: legitimacy must come before trade negotiations, not after. Freedom of association and other core labour standards should be guaranteed, in law and in practice, prior to FTA negotiations.

This perspective has significant implications. Freedom of association and related rights are under attack in almost every corner of the globe.⁴² Some cases are more obviously egregious than others.

The conservative government that resided over South Korea's negotiations with the EU was well known to have engaged in the systematic repression of the labour movement. That government eventually collapsed at the end of 2016, following a corruption scandal and weeks of street protests. Following her impeachment, the former President Park Geun-hye is now on trial – but the FTA she signed with the EU remains in force.

At present, the EU is pushing for the swift conclusion of FTA negotiations with Mercosur, which were initiated in 1999 and re-launched in 2010, but petered out. Negotiations were rejuvenated in 2016 when Mercosur's economic powerhouse, Brazil, was taken over in a bloodless, “parliamentary coup” and Michel Temer – a neoliberal stalwart – was installed as President. In fact, Mercosur and the EU “exchanged offers for the first time since the 2010 re-launch” on 11 May 2016 – precisely one day before Temer became acting President.⁴³ His government's reforms of Brazil's labour laws have been held to violate not only the country's obligations under international human rights treaties and the fundamental ILO conventions, but also the Brazilian Constitution.⁴⁴ Many in the Brazilian labour movement hope

that Temer – like Park Geun-hye – will be sent to prison for corruption.⁴⁵ The Commission hopes that he – like the ex-President of South Korea – will sign the FTA first.

6 Exporting “Social” Europe

And what of the EU itself? Ramping up the rhetoric in his 2017 State of the Union Address, Commission President Jean-Claude Juncker announced that “*trade is about exporting our standards...*”⁴⁶ Such statements create a misleading impression of the state of workers’ rights in Europe.

Respect for core labour standards is in a state of gradual rot across the continent – perpetuated in some Member States by policies foisted on them by the EU institutions themselves. Since the 2008 financial crisis, “*Social Europe*” has been systematically hollowed of meaning by wage policies focused narrowly on flexibility and productivity. The destruction of the collective bargaining system in Romania (a “*guinea pig*” for the European Commission, alongside its lenders, the IMF and the World Bank) has been catastrophic.⁴⁷ Collective bargaining reforms imposed on Greece (by the Commission, the IMF and the European Central Bank) have had similar effects.⁴⁸ As well as in Portugal, in Ireland and in Cyprus. Researchers at the European Trade Union Institute argue that the efforts of the ECB, the Commission and the IMF to restrict collective bargaining are in violation of the EU Charter of Fundamental Rights.⁴⁹ France will now undergo the dismantling of its sectoral bargaining structures without any help – or discouragement – of the EU.

Some signs suggest that the situation is becoming even more acute. In Greece in 2013, a plantation guard opened fire on a protest of forty-two migrant workers – unpaid for months and living in makeshift shacks without water or toilets. Thirty were seriously injured.⁵⁰ In September 2016, a striking worker was killed on a picket line in Northern Italy.⁵¹ Two trade unionists were convicted in Spain in June 2017 for participating in a 2012 general strike.⁵² The latest Modern Slavery Index records increasing risks of modern slavery in twenty EU member states, with Romania, Greece, Italy, Cyprus and Bulgaria posing the highest risk.⁵³

It is no small irony that the EU’s TSD Chapters routinely incorporate the text of the ILO’s 2008 Declaration on Social Justice for a Fair Globalization, which states: “*the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage...*”⁵⁴ One would struggle to name a country that is *not* in breach of this provision to some

degree – and the EU is no exception. The widespread erosion of national labour market institutions across the EU has been undertaken more or less explicitly to lower wages and attract investment and growth, i. e. *for comparative advantage*.

In his 2017 State of the Union address, Juncker declared, “*We are not naïve free traders. Europe must always defend its strategic interests.*”⁵⁵ But who defines what these “*interests*” are? So long as workers’ fundamental rights are under sustained attack – both within the EU and in the territories of the EU’s trading partners – it cannot be assumed that these “*strategic interests*” have anything in common with workers’ rights, or sustainable development.

Conclusion

Given how potently the rules of international trade have contributed to the current crisis of globalisation, one might be forgiven for hoping that the same rules can be harnessed to bring about solutions. FTAs seem to offer mechanisms of enforcement, often absent from other fields of international law.

But there are very good reasons to question whether advocating an improved TSD or Labour Chapter in the EU’s FTAs is an adequate response to the challenges at hand. Even the OECD⁵⁶ and the EU⁵⁷ now acknowledge to some degree that trade liberalisation has contributed to or encouraged job losses and environmental harm. In practice, simply throwing labour (or the environment, or sustainable development) objectives into the FTA mix adds a facade of legitimacy to the process of “*deep integration*” of neoliberal economic policies which are inherently antagonistic to these objectives. When the drafted clauses are largely redundant (as many have proven to be to date), the cost of their inclusion is negligible. Meanwhile it is too late to mitigate the FTA’s wider negative impacts. Extending the reach of FTAs into new areas of social and environmental regulation also risks the possible dilution of hard-won social and environmental standards where these conflict with economic interests promoted by the FTA.

Rather than an afterthought, the objectives of labour, environmental protection and sustainable development need to be made the guiding principles of such agreements. Only this will ensure that these objectives determine the overall architecture, content and outcomes of an FTA. In practice, this means looking carefully at *everything else in the agreement*, not simply adding sections to it.

Endnotes

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