CLS+ STUDY

# Conditional or Promotional Trade Agreements - Is Enforcement Possible?

## How International Labour Standards Can Be Enforced through US and EU Social Chapters

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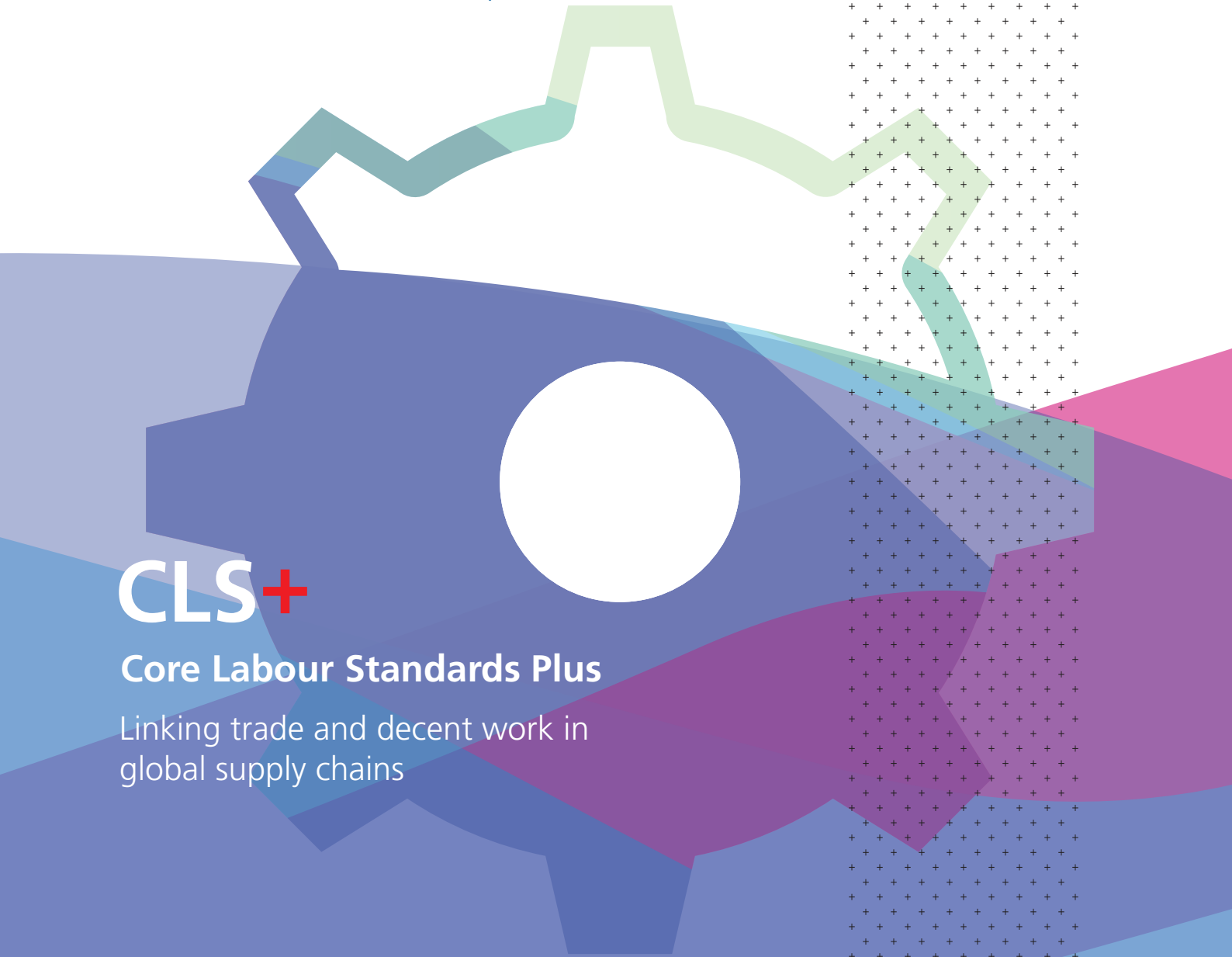

CLS+

**Core Labour Standards Plus**

Linking trade and decent work in global supply chains

FRIEDRICH EBERT STIFTUNG

# Contents

# List of Abbreviations

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| AFL-CIO | American Federation of Labour and Congress of Industrial Organizations |
| CAFTA-DR | Dominican Republic and Central American Free Trade Agreement |
| CETA | Comprehensive Economic and Trade Agreement (Canada and EU) |
| CLS | Core Labour Standards |
| DAG | Domestic Advisory Group |
| DG DEVCO | Directorate-General for International Cooperation and Development of the European Commission |
| DG Employment | Directorate General for Trade of the European Commission |
| DG Trade | Directorate General for Trade of the European Commission |
| ECOWAS | Economic Community of West African States |
| EPA | Economic Partnership Agreement |
| ETUC | European Trade Union Confederation |
| EU | European Union |
| EU-CARIFORUM | EU-Caribbean Forum |
| FTA | Free Trade Agreement |
| GATT | General Agreement on Tariffs and Trade |
| GSP | Generalized Scheme of Preferences |
| GVN | Global Value Network |
| ILO | International Labour Organization |
| ILS | International Labour Standards |
| ISDS | Investor-State Dispute Settlement |
| KORUS FTA | United States-South Korea Free Trade Agreement |
| LDC | Least Developed Country |
| MERCOSUR | Southern Common Market |
| MSI | Multi-Stakeholder Initiative |
| NAFTA | North American Free Trade Agreement |
| NAALC | North American Agreement on Labor Cooperation |
| NTB | Non-Tariff Barrier |
| OHS | Occupational Health and Safety |
| RIA | Regional Integration Agreement |
| TISA | Trade in Services Agreement |
| TPP | Trans-Pacific Partnership |
| TTIP | Transatlantic Trade and Investment Partnership |
| US | United States |
| USTR | United States Trade Representative |
| WTO | World Trade Organization |

# Foreword

The changing nature of international trade, dominated by global value chains, has led to downward pressure on working conditions. Fundamental rights at work, such as the right to organise and bargain collectively, are not upheld. Child labour exists in many supply chains, and minimum wages, when paid, are not sufficient to ensure decent living standards. Forced overtime and lack of safety measures are also common.

This publication examines social or labour chapters in trade agreements, explores the reasons for their ineffectiveness and provides policy recommendations regarding the ongoing inclusion of labour standards within trade agreements.

It is one of the outputs of the regional project Core Labour Standards Plus (CLS+), which was launched by Friedrich-Ebert-Stiftung Asia in 2016. This project aims to promote and develop binding labour standards in trade and global value chains. With growing consumer concern and strong criticism of free trade agreements in Europe, there is momentum to push for binding social clauses in international trade. If governments can show that trade agreements contribute to making the life of workers in Asia better, the growing scepticism towards such agreements could be reduced.

The scope of the CLS+ project is ambitious in the sense that it goes beyond the ILO core labour standards. These core conventions are recognised as an important element of decent work and are used by the European Union (EU) in trade agreements, but they do not cover other important rights such as living wages, maximum working hours including overtime, and safe and healthy workplaces. A living wage is, for example, crucial to lift people out of poverty.

In the first phase of the project, four countries—Bangladesh, Cambodia, Pakistan, and Vietnam—were selected to explore the link between trade and labour standards in key industries characterized by global value chains, namely garments, footwear and electronics. In Europe additional studies and research was conducted. Apart from the present study, a second study estimates the potential tariff savings for EU importing companies upon entry into force of the EU-Vietnam Free Trade Agreement. Furthermore, the CLS+ project has commissioned a model labour clause that could be incorporated in future trade agreements. Although the future of the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP) is uncertain, the EU is pursuing negotiations over bilateral free trade agreements with other countries in the world, not least in Asia.

The findings of the project could also be used to improve the schemes of generalised tariff preferences applied by the EU, both in terms of conditions to be met for the benefitting country and sanctions in case of noncompliance. In the second phase of the project, once the research is finalized, a set of policy recommendations will be drafted for advocacy purposes. The office for regional cooperation in Asia and the national FES offices in the countries concerned will carry out a number of activities together with partners to disseminate the findings of the project, and continue to work on solutions to the challenges that have been identified.

Lastly, we would like to thank all those who have contributed to the project with their knowledge and insights, and helped shape this publication.

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# Introduction

Since the North American Free Trade Agreement (NAFTA) there has been an increase in the number of free trade agreements (FTAs) that include some form of social chapter[1] that specifically deals with the protection of labour rights through the provision of labour standards.[2] Although there is no multilateral resolution on the inclusion of such standards, this appears to be a new norm in unilateral, bilateral, and regional trade agreements. Yet despite the inclusion of such chapters – which shows some positive discursive shift – there have been very few cases of enforcement, and in the rare case that enforcement has occurred, the impact this has had on labour standards is in dispute. The studies that have attempted to explore the impact of social chapters in the implementation and enforcement of labour standards have been largely inconclusive, with most suggesting that some positive impact can only be seen in certain case-specific circumstances when such chapters work in partnership with, or build up, other conditions necessary for enforcement. In this way, the inclusion of social chapters signifies a necessary discursive shift in regard to the trade-labour linkage, but has fallen short on implementation and enforceability.

This study focuses primarily on the question of enforcement of International Labour Standards (ILS) in (and through) social chapters. Critically, enforcement goes beyond the ratification of new standards. It is about the response of the trading partners when a violation of those agreed-to standards occurs, the development of the necessary conditions for implementation and the political will to follow through such processes. Problematically, other parts of the FTA beyond the social chapter may impact on these conditions i.e. the role of public institutions and regulatory capacity, thus some points will be flagged regarding the integration of social chapters within the rest of the agreement and the global trade regime. Building on the existing research, which is rather unclear about whether existing social chapters have had, and from this could have, any positive impact on labour rights, this study asks the following questions:

- Why are ILS in existing social chapters not being enforced?
- What external conditions are necessary for the enforcement of ILS?
- What type of chapter design would best encourage enforcement?

This study firstly gives an overview of the approaches to the inclusion of ILS in FTAs. Next, the paper unpacks some of the reasons for a lack of enforcement, situating FTAs in the broader development of ILS including the ongoing debate over the trade-labour linkage.[3] This then leads to a normative description of what the necessary conditions are that would tackle enforcement issues. The fourth part of the paper unpacks the specific designs of social chapters: Specifically, the differences between the European Union (EU) and United States (US) (promotional/conditional) approaches and issues that each raise around monitoring, content, sanctions/ incentives, inclusion of social partners, coherence and dispute settlement mechanisms. The concluding section of the paper puts forward some policy recommendations regarding the ongoing inclusion of labour rights within trade agreements.

# An overview of existing approaches to social chapters in trade agreements

Social chapters can be grouped as either promotional or conditional in design. By definition, the possibility of economic sanctions being linked to labour provisions means that an FTA is considered conditional; those with no opportunity for the use of sanctions/incentives are promotional (International Labour Organization 2013, 21). A promotional chapter relies on dialogue and is cooperation based, employing mostly knowledge sharing and development assistance, and does not normally include sanctions or prescriptive enforcement processes. EU-led agreements tend to fall into this camp. US agreements tend to follow conditional designs and, at least on paper, rely on incentives or sanction-based compliance either ex-ante, where certain standards must be met before ratification of the agreement, or ex-post, where these conditions will be met through the life of the agreement through continued monitoring and capacity building (Ebert and Posthuma 2011, 4). Although FTAs can be loosely categorized into these two camps, each specific agreement tends to differ in its content and form. However, the 1998 ILO Declaration on Fundamental Principles and Rights at Work is increasingly becoming the basis for such chapters (Ebert and Posthuma 2011, 7). EU- and US-led agreements form the basis of this study, however, it is important to note that South-South agreements are also beginning to include social clauses and tend to prefer promotional labour provisions such as knowledge sharing, rather than the conditional approach (Ebert and Posthuma 2011, 6). Alongside these bilateral/regional agreements, there are also unilateral designs such as the Generalized Scheme of Preferences (GSP), which will be briefly mentioned below.

There is a common belief that because conditional agreements include the possibility of sanctions they are more effective at enforcing ILS than promotional chapters.[4] Recent research suggests that this argument needs to be critically assessed, as it seems to be much more dependent on context and political will rather than on blanket design (Van den Putte 2016, 31). Furthermore, this claim may be valid for ex-ante chapters in regard to pushing for ratification of ILS (i.e. changes on paper), but is much less clear in relation to enforcement of both the agreed-to ILS and utilizing the dispute processes outlined in the chapter.[5] Interestingly, although the literature tends to focus on the differences between promotional and conditional chapters, Ebert and Posthuma (2011) argue that in practice most labour provisions are actually promotional, as no case has yet led to sanctions, and the presence of underutilized sanctions may have little impact. Although this split is less explicit in practice, there are some key differences between the design and implementation of the US and EU approaches that will be outlined below.

**Promotional chapters: The EU**

The EU has been integrating social clauses that have included ILS provisions into FTAs since the Euro-Mediterranean association agreements (1995-2002) (Ebert and Posthuma 2011, 39).[6] Since the Treaty of Lisbon (2007), these provisions have been further merged into broader sustainable development chapters integrating free and fair trade, environmental protection and the protection of human rights (Van den Putte 2016, 24). Overall, the promotional approach can be characterized as follows: It directly references International Labour Organization (ILO) standards (usually the 1998 Declaration), the trade-labour linkage is fostered through cooperation and dialogue, there is little pressure to improve standards beyond what the partners have already agreed to in domestic legislation, and that labour norms are regarded as non-trade issues; and therefore the regular dispute settlement mechanism is not applicable (Van den Putte 2016, 70–1). Interestingly, and in contrast to the unilateral EU GSP scheme where the trade-labour linkage is explicit and linked to sanctions, the EU appears to be much more wary about doing this in bilateral agreements (Adriaensen and González-Garibay 2013). Despite this hesitation, there has been a deepening and widening of the content of social chapters, as well as added inclusion of business and civil society through Domestic Advisory Groups (DAGs) or Expert Panels (see the EU-South Korea agreement) (Putte and Orbie 2015, 268–9).

An important thing to consider with the EU approach is the history and role of social dialogue at the heart of the design and implementation of EU promotional social

chapters. The reliance upon cooperation and dialogue to enforce ILS highlights how critical political will is in the case of promotional provisions, as real power rests with governments rather than other institutions or civil society. Many have argued that because there is no recourse if dialogue fails, the EU approach has been less effective (Bull, 2007). Thus, even if there is political will, there is no space to enforce that will through sanctions or alternative repercussions.

The EU-South Korea FTA is one example: There is no process beyond continued dialogue (there are no provisions if dialogue fails) and the broad language used around the DAGs has allowed the South Korean government to cherry pick the participants of those committees (Lukas and Steinkellner 2010; FES Korea 2016). Yet, some studies have suggested that, although there is less regulatory impact,[7] there may be some improvement through the knowledge and capacity building that can occur through dialogue between state and non-state actors during the negotiation and implementation of the agreement (Van den Putte 2016, 30). Thus, there may be little direct impact, but perhaps some indirect influence.

Across the EU-led agreements there is little coherence or standard language used, creating a multiplicity of requirements with little common ground. EU-led FTAs have broadened over time in their normative content and scope, but are inconsistent between trading partners (Ebert and Posthuma 2011, 13-14). This can lead to competition between different chapters and a lack of detailed knowledge of each agreement across EU departments. There has also been a shift away from including ILS as human rights towards sustainable development – a much less defined and enforceable concept. The shift is problematic, as fundamental human rights cannot be questioned whereas sustainable development leaves more room for interpretation. This has also had problematic repercussions regarding what the right department is for managing these complaints and negotiations: Should it be DG Trade, DG International Cooperation and Development or DG Employment, or a mix of departments?[8] The growing importance of the EU parliament in the ratification of FTAs – a good thing in itself – has often further put the content of ILS at odds with the interests of the Commission and other specific departments in charge of overseeing the actual implementation of agreements. As such, there has been a lack of institutional ownership of labour issues, allowing ILS to fall into the cracks between trade and development. As Van den Putte succinctly explains, the lack of coordination between EU functions and policies can mean that the trade-labour linkage remains 'conveniently conflicted' and the EU can avoid doing anything on the issue (2016, 33).

**Conditional chapters: The US**

Unlike the EU, the US has not ratified many key ILO conventions and thus has less international legitimacy on the issue of ILS, leading to some suspicion of an underlying protectionism. Despite these contradictions, there seems to be more measurable impact of the US agreements, in part, because they have been largely following the same content and process since NAFTA. Research highlights that this impact is largely connected to (Van den Putte 2016, 103):

- The public submissions process.
- Regulatory change through pre-ratification conditionality.
- The dialogue forums, which allow labour issues to be on the agenda in intergovernmental meetings.
- Aid directed at targeted programmes.

There seems to be more coherence and policy coordination within the US approach compared to that of the EU, bringing together aid programmes, policy development, and a common institutional framework. For example, the 2004 Dominican Republic and Central American Free Trade Agreement (CAFTA-DR) targeted the gap between law and enforcement through strengthening the capacity of labour institutions with specific target goals before ratification. After ratification this was followed up with development cooperation, monitoring, dialogue and 170 million US dollars in capacity-building aid (International Labour Organization 2016, 94). Furthermore, pre-ratification conditionality has been frequently used since 2006 to push for changes in domestic labour law in trading partner states.[9] Increased coherence may be linked to the fact that all social chapters come under the United States Trade Representative Labor Office in conjunction with the Labor Department (USTR 2017). Procedurally, there is an office within the Labor Department or a Joint Committee set up to oversee the chapter and a clear procedural guarantee with obligations for coordination. Also, unlike the EU

approach, civil society groups can file public submissions when they believe violations have occurred, and there is the option for sanctions to be applied when all else fails (Anuradha and Dutta 2017, 21–2). Critically, and differing from the EU approach, labour norms are regarded as trade issues and the dispute settlement mechanism is often applicable to the whole agreement including the labour chapter (Van den Putte 2016, 78). US agreements remain conservative in content and rarely go beyond original ILO commitments or existing domestic labour legislation. Increasingly the 1998 ILO Declaration is referenced, although rarely specific conventions; furthermore, the ILO tends to be excluded from any monitoring or advisory role (Anuradha and Dutta 2017, 18). In the most recent generation of US agreements (US-Peru 2009 onwards), content has begun to go beyond already existing domestic labour law (Giumelli and van Roozendaal 2017, 41–2).

Although available, sanctions are largely theoretical and rarely applied (they are usually fines rather than trade sanctions with amicable dispute resolution such as dialogue, preferred) (Ebert and Posthuma 2011, 10–11). For example, the North American Agreement on Labor Cooperation (NAALC) chapter of NAFTA has had limited results, with many studies suggesting that this is because, although sanctions can be employed, there is a lack of political will to use them, thus the impact was episodic rather than systematic (Greven 2005). This suggests that the US 'conditional' approach is rarely fully employed, and instead, in practice both the EU and US tend to follow a soft approach, shying away from sanctions when they could be applied (Oehri 2015).

**South-South agreements**

Many of the South-South agreements, especially those negotiated between Asian countries, tend to include labour provisions in the form of side arrangements, and emphasize cooperation based on knowledge sharing and joint projects (see Chile-China 2006). They usually do not have any legal consequences if they are breached, whereas those that are included in the main body tend to include a mix of promotional and conditional provisions (see Chile-Colombia 2009) may be submitted to the regular dispute settlement mechanism, and could result in trade sanctions (Ebert and Posthuma 2011, 17). The most extensive South-South agreements regarding content and dispute settlement processes are the Chile-China (2006) agreement, Chile-Panama (2008) and Chile-Colombia (2009) agreements (International Labour Organization 2013, 71). Regional integration agreements (RIA) have also included quite specific labour-orientated policies and institutional frameworks (see MERCOSUR (1991) and the Treaty of the Economic Community of West African States) (ECOWAS 1993/2005)) (International Labour Organization 2013).

**Unilateral agreements**

The GSP is the dominant unilateral approach pursued by the EU and US in regard to ILS. The US GSP program was instituted in 1974, and currently 94 countries benefit from preferential trade arrangements (International Labour Organization 2016, 24). The EU has two unilateral programmes – the Everything but Arms scheme open to Least Developed Countries (LDCs) and GSP+ scheme (International Labour Organization 2016, 25). One of the main differences between the EU and US designs is that the EU labour provisions directly build on the International Labour Organization conventions, and the US defines a list of internationally recognized workers' rights separate from the International Labour Organization Declaration (International Labour Organization 2016, 30). The US has suspended its GSP programme on four occasions – Belarus, Myanmar, Bangladesh and Swaziland. Whereas the EU has suspended its scheme three times: Myanmar (1996-2012), Belarus (2006 – ongoing), and in 2010 they downgraded Sri Lanka from GSP+ to the regular GSP scheme (International Labour Organization 2016, 33–4).

The application of the GSP process has not been uniform across both the EU and US; instead it has been applied selectively and tends to reflect broader foreign policy objectives, again highlighting the conflicting role of the trade-labour linkage and frequent lack of political will in this area. For example, although Myanmar (then Burma) was removed by the EU, Colombia and Georgia - both states with very poor ILS records (especially during this period) - were given GSP+ status (Bakvis and McCoy 2008, 5). The recent case of Bangladesh within the EU GSP scheme is another case in point, in which the US has removed Bangladesh from the scheme, the EU commission has not taken sufficient action to hold the government to account or investigate reported violations (Burrow and Visentini 2017).

In regard to improving working conditions, studies have shown that several countries have ratified ILO conventions in order to comply with the EU GSP scheme, however, there have been no clear improvements in the actual enforcement of labour standards (Ebert and Posthuma 2011, 25). Although ratification of conventions has increased in GSP partner countries, so has criticism that 'ratification is cheap' and little real progress on the ground has been made (Orbie 2011, 171). The conditions that have increased the impact of the GSP scheme – especially in the US where civil society can make submissions – is the presence of strong domestic actors such as unions, who can add external pressure (as in the case of Burma). Yet, as Greven points out, the absence of strong domestic partners is often what has led to the violation in the first place (2005, 15). Furthermore, many are beginning to argue that the GSP system (especially in the US) is losing its relevance as tariffs are becoming so low, and there has been a proliferation of bilateral trade agreements with previous GSP recipients undermining the benefits of preferential treatment through the scheme (Greven 2005, 11). Furthermore, in regard to the more hard-line US approach, initial evidence suggests that after preferences are removed there is a scramble to show that improvements have been made, but whether they are long term – and sustainable – is up for debate (Brown 2007, 55). Critically, the mid-term review of the EU GSP+ regime has found that there is no consensus on how effective the GSP regime has been in promoting human and labour rights (Development Solutions 2017, 31).

## The trade-labour linkage: An uneasy partnership?

The inclusion of social chapters within trade agreements needs to be understood in the wider context – and debate – over the relationship between trade and development, and labour rights in particular. There is still no universal consensus that such a relationship should exist. There were failed attempts to cement the trade-labour linkage multilaterally in the World Trade Organization (WTO) framework in the 1996 and 1999 WTO meetings. Ever since, trade and labour rights have existed in separate bodies (ILO and WTO) and regulation has diverged, with only the WTO holding enforcement capabilities (Scherrer and Beck 2016, 9). Thus, as Ewing-Chow describes, the two regimes have developed 'in splendid isolation' from one another. Certainly, the WTO principles do not create legal frameworks for the promotion of domestic labour rights in compliance with international standards (Ewing-Chow 2007, 171-2).[10] The failure of the Doha round of negotiations, where these issues were once again on the agenda, meant that any deepening of the institutional connection between trade and labour at the multilateral level further stagnated (Scherrer and Beck 2016).

Underpinning this debate is the heated question of whether further liberalization is compatible with ILS or sustainable development. There is the neoclassical position that claims a direct link between increasing economic growth through liberalization and ILS (the dominant neoliberal paradigm), there is the position often linked to more Marxist economics that liberalization will always negatively impact ILS leading to a race to the bottom, and there is the somewhat more pragmatic position that trade exists, and therefore we must guard against the negative repercussions that are inherent to it (Stiglitz 2013).

Despite the ongoing debate, the inclusion of social chapters in bilateral FTAs has increased rapidly over recent years, suggesting a new global norm. The NAALC chapter of NAFTA was the first example within a US-led agreement (Cabin 2009, 1057–8). And by the early 2000s the EU also began to make reference to ILS in bilateral agreements.[11] Since 2008, it is estimated that over 80 per cent of FTAs have included some form of labour provision; this is also the case between South-South trading partners (for example, Chile-Panama 2006), agreements between smaller states (New Zealand-Thailand Agreement 2005) and regional blocks (MERCOSUR or ECOWAS).[12] The 1998 International Labour Organization Declaration on Fundamental Principles and Rights at Work is often used as the baseline for these provisions (Bakvis and McCoy 2008, 1; International Labour Organization 2016, 6).

**The new generation of free trade agreements**

The so-called new generation of trade agreements (in particular Transatlantic Trade and Investment Partnership (TTIP), Trans-Pacific Partnership (TPP), Comprehensive Economic and Trade Agreement (CETA) and Trade in Services Agreement (TISA)[13] raises new questions over the feasibility of the trade-labour linkage in FTAs. As tariffs have been reduced to record lows, these agreements focus on the reduction of non-tariff barriers (NTBs), as well as strengthening investor rights. Conversely, many of these agreements also contain relatively detailed and progressive social chapters, perhaps as an attempt to claw back lost trust from the general public and social partners (Schillinger 2016). NTBs may appear fairly innocuous but usually refer to domestic regulations established by governments in the national interest; these can include environment or Occupational Health and Safety (OHS) standards, and labour regulation.

This new generation of agreements also includes more protections for investors such as investor-state dispute settlement (ISDS) clauses.[14] These courts act outside the normal legal process and can decide whether new regulations such as worker protection, minimum wage laws, or environmental protection, for example, may harm projected investment returns.[15] This in effect puts investors on the same level as national governments, weakening local-level democracy, policy space, and eventually labour standards (Scherrer 2014, 3).[16] It undermines the ability for ILS to be enforced even if a separate labour chapter is included (Scherrer and Beck 2016, 32–3; Beck 2014, 11).

Although some have argued that ISDS or the EU-proposed Investment Court System could also be accessed by trade unions (i.e. in the CETA agreement), there is a lack of access. When we understand that

lawyer fees can cost up to 1 000 US dollars an hour[17] for those schooled in investor-state proceedings, and the lack of knowledge of how these proceedings work, it is a logical assumption that civil society groups would be monetarily excluded from participation in these forums even if they were opened up to include more than investor rights (Eberhardt 2014, 107). This undermines any case for ISDS clauses to be seen as useful for the social interest. The new generation of agreements are thus incoherent in relation to ILS; there is an increased inclusion of often non-binding social chapters and increased investor rights through ISDS clauses and reductions in NTBs (ETUC n.d, 3).

**Why are existing labour rights provisions in FTAs not being enforced?**

The increasing inclusion of ILS in trade agreements is a step in the right direction. However, what is written in the agreement is either rarely enforced or there is no effective enforcement process outlined. When social chapters do have sanctioning potential (as is the case with most US agreements) it is rarely utilized, suggesting a lack of political will or capacity to do so. We suggest this comes down to numerous factors at the macro and micro level including legislation, institutions, culture, politics and so on that impact upon how, and what, enforcement entails (International Labour Organization 2016, 72).

The areas where FTAs may have the most potential for impact are around pre-ratification conditionality including specific institutional and legal reforms, and technical cooperation and capacity building, during the monitoring and implementation stages (International Labour Organization 2016, 73). In these cases such as CARIFORUM, some labour institutions were strengthened through the social chapter and capacity-building aid that was stipulated (Schmieg 2015). Yet, FTAs, as legal documents, can do no more than develop legal frameworks and institutional foundations (i.e. pushing for ratification of standards or on-paper reforms); it comes down to states to actually push forward the reforms and attitudinal shift necessary for enforcement (Schmieg 2015, 28).

Where some improvements in labour standards have occurred through the implementation of FTAs, it tends to be in very case-specific contexts that are dependent upon 'the interplay between a variety of political, social and economic factors' (Ebert and Posthuma 2011, 29). Somewhat reflecting these claims, Sengenberger in his 2005 study (2005, 100), proposed that the necessary conditions for ILS to be respected include:

- Understanding and respect for ILS in the political and institutional setting.
- Regulatory and policy coherence (national and international level).
- Government and institutional capacity.
- Teamed with effective regulation and legal frameworks.
- Political will on both sides.
- Strong labour institutions.
- Strong domestic civil society and social partners, in particular independent trade unions.
- Strong economic performance.

The repetition of these necessary criteria informs the conditions that are necessary for the enforcement of ILS through FTAs outlined in this study: Regulatory reform, political will on both sides, and the capacity and presence of strong social partners – especially independent trade unions.

Enforcement should be thought of as having two sides, the ratification of standards and their successful implementation. As a first step, enforcement requires the implementation of certain standards into national law. The second side of enforcement is the response of the government/s when a violation occurs. Thus, the effective enforcement of social chapters, particularly around ILS, requires certain conditions that could foster labour rights but also the political will of both actors to uphold what they have agreed to.[18] Central to questions of political will is the power and role of civil society, especially independent trade unions, to force their respective governments to take this seriously – to both implement and enforce the chapters that they have signed up to. As such, a lack of enforcement is directly related to trade union capacity: Sheer membership but also specifically their knowledge of, and access to, remedy mechanisms including social chapters. As such, strong domestic social partners – particularly independent trade unions – are central to any ILS scheme and the enforcement of ILS in social chapters. They can push for political will and act as monitoring institutions. They

also, if correctly engaged, can add much needed social legitimacy to FTAs, legitimacy that has rightly been questioned through the growing secrecy and unequal power balance that FTAs tend to institutionalize.

Problematically, due to the perceived lack of enforcement of existing social chapters and the lengthy and inefficient process when enforcement has occurred, trade unions and other civil society organizations can be put off from accessing this enforcement route as it is seen as time consuming, costly, and impossibly stacked against them. This can be exacerbated by the 'spaghetti bowl' of regulation and the lack of coherence between the multiple ILS regimes, as well as access (both monetary and knowledge) issues. Related specifically back to FTAs, what this then requires is that there is an effective and accessible enforcement mechanism or dispute settlement process in the agreement that states and civil society groups can utilize. As a recent International Labour Organization report points out, the successful implementation of labour provisions crucially relies upon the extent that social partners are involved in the process of both negotiating, and implementing, the trade agreement (International Labour Organization 2016, 7–8).

# Analysis of chapter design and enforcement

As stated previously there is little conclusive evidence that social chapters in trade agreements have had any substantive impact on the enforcement of labour rights. Despite this, the specific design of social chapters – both promotional and conditional – in regard to content, institutional and social partner involvement, dispute settlement mechanisms, the use of sanctions, and monitoring, could contribute to the potential for these chapters to be enforced and will now be analysed in more detail.

**Content**

Most agreements (both the US and EU) do not go beyond existing national regulation or norms, thus pushing for the acceptance of already existing regulation, which can be considered conservative. Notably, the recent side letters of the TPP do go much further than this as do some parts of the TTIP draft agreement (Vietnam Government and USTR 2015; European Commission and US 2017). Previously, the US had shied away from referencing the ILO, however, there is a growing convergence between the EU and US agreements around content, with most now referencing the 1998 ILO Declaration, and at times, specific ILO conventions.

This is a good shift for two key reasons. Firstly, increasing international policy coherence will make the requirements more streamlined and easier for states to understand, follow up, and potentially enforce, what they have agreed to (Ebert and Posthuma 2011, 30). Secondly, the deepening of commitments shows that there is a growing discursive shift towards recognizing the trade-labour linkage and importance of ILS. However, as Cabin (2009, 1081) asserts, the ILO declaration is necessarily ambiguous and flexible, which can readily allow the trade-labour linkage to be sidestepped in practice. Within the EU agreements, the EU-CARIFORUM EPA (2008) has been the most explicit in having an overarching goal of sustainable development; it was not just an "additional" social chapter but stipulated aid, capacity building, and an explicit goal of fighting poverty (Schmieg 2015, 21–3). Tensions over content and language can be seen in the EU-South Korea agreement where it was agreed by the parties that South Korea should move towards commitment to, and continuous improvement of, labour standards, but there are no repercussions for non-improvement, or specification on what "improvement" actually entails (FES Korea 2016).

Another key element of the content of social chapters that feeds into enforcement is whether they are promotional or conditional. Those that are more promotional tend also to be more ambiguous, or less prescriptive in both content, and on how enforcement is to occur (as there is less to directly enforce). Whereas conditional chapters have more detail regarding processes, dispute settlement mechanisms, commitments and monitoring. Interestingly, social chapters in bilateral agreements tend to be more aspirational, whereas unilateral programmes (i.e. GSP scheme) are much more explicit in what they demand (Polaski 2003).

US chapters tend to favour pre-ratification conditionality (ex-ante) with the last six out of seven agreements following this model (Bahrain 2006, Colombia 2012, Morocco 2006, Oman 2009, Panama 2012, and Peru 2009) (International Labour Organization 2013, 36). Ex-ante conditionality aims at changing the law before ratification, whereas post-ratification (ex-post) aims more at the enforcement of existing law. Thus, if the goal is to force a country to ratify new conventions, pre-ratification would be more applicable, and if it was more about the enforcement of existing laws vice versa. There is some evidence to show that significant regulatory changes have occurred through ex-ante conditionality in the US-Bahrain (2006) and US-Oman (2009) agreements, although the actual enforcement of these newly agreed-to regulations is debatable (Giumelli and van Roozendaal 2017, 45).[19] The TPP-Vietnam side letter was one recent example of ex-ante demands pushing for increased ILS, rather than the normal conservative commitment to uphold what already existed in domestic legislation (Vietnam Government and USTR 2015).

**Institutional design and monitoring**

The agreements that are more likely to be enforced seem to have either an ongoing and permanent institutional framework such as the Labour Department in the US, or have the ILO as some sort of advisory or monitoring body. Following on from the issues of ambiguity and

interpretation, the ILO can have a neutralizing or de-politicizing role necessary to counter the at times competing political, economic or diplomatic interests. Across the board, the enforcement of social chapters seems to be dependent on the political constellation at the time, for example, in the case of the South Korea-US FTA (KORUS) the vague wording of the clause means that they can interpret it as they will (Van Den Putte 2015, 227).

Research suggests that monitoring mechanisms that apply across multiple agreements tend to be more permanent and consistently enforced than those only applicable to single agreements. The US appears to be the leader in this with the most established and permanent advisory committees, however, representation tends to be skewed towards the private sector (International Labour Organization 2016, 134). What is critical in the US approach is that monitoring is almost always housed within the United States Trade Representative Labor Office in conjunction with the Labour Department (USTR 2017). NAFTA included a National Administrative Office that was solely responsible for managing complaints on labour issues (International Labour Organization 2013). This allows for more consistency across agreements, but also the creation of more permanent institutional frameworks, specific knowledge about labour issues, and coordination between other programmes within the Labour Department such as aid and capacity building.

The EU does not have this consistency across each agreement; instead, it tends to specify different monitoring or institutional frameworks depending on the trading partner. Becoming more common is some form of Domestic Advisory Group (DAG) to monitor the implementation of the agreement (since CARIFORUM 2008). The DAGs are more formalized than previous consultation forums, but so far only the EU-South Korea DAG meets regularly, and there is no complaint mechanism attached to the DAGs (International Labour Organization 2016, 136).[20] The EU-CARIFORUM EPA (2008) provided a somewhat novel mechanism for monitoring[21] that allowed for modifications of the agreement to occur if issues arose in the implementation process, and an annual meeting between the relevant authorities and consultative committee including civil society. However, the infrequent meetings (annually), and inadequate funding for these meetings seem to counter their effectiveness (Schmieg 2015, 26).

This suggests that there may be a need for an outside monitoring institution, preferably the ILO, to remove part of this political will dependency. However, the necessary pre-requisites for social dialogue (independent and relatively strong social partners and accountable institutions) is a big obstacle, as it is far from reality or feasible in some regions and sectors. The lack of enforceability beyond the soft approach within the ILO is also a limitation (Sengenberger 2005, 101). Linking back to the use of social chapters in pushing for the ratification of new conventions, an interesting point is that following ratification the ILO supervisory mechanism can be applied to those states under those conventions, indirectly increasing the monitoring role of the ILO (Doumbia-Henry and Gravel 2006, 198).

Studies have also shown that the inclusion of the ILO as some sort of advisory body can be useful as it can provide technical assistance, monitoring, and coherence through the development of cooperation programmes (International Labour Organization 2016, 9). However, within the US-Cambodia Textile Agreement (1999-2005) and the subsequent Better Work Programme, the centrality of the ILO at the expense of local NGOs and trade unions has come under some criticism for increasing dependence, and possibly hindering the development of such groups (Berik and Rodgers 2010, 25).

**Dispute settlement mechanism**

A key difference between the US and EU is whether labour provisions come under the regular dispute settlement mechanism and how it is designed. Most US labour chapters, due to the explicit relationship between trade and labour, extend the regular dispute settlement mechanism to the labour chapters (although before US-Peru this had some conditions attached). Firstly, findings of the dispute settlement procedure are binding, but if the recommendations are not implemented a monetary fine, then sanctions can be applied. However, what was covered by NAALC is very narrow, limited to child labour, OHS and minimum wage standards and to date no case has reached the point of sanctions (International Labour Organization 2016, 44).[22]

Since the US-Peru (2009) agreement the regular dispute settlement mechanism (with no conditions) has been applicable to the labour chapters. Previous to this a labour-specific dispute settlement mechanism

linked to sanctions had been employed (International Labour Organization 2013). Interestingly, the US-Peru (2009) agreement was the first example where through the inclusion of specific ILO conventions in the labour chapter, and the extension of the dispute settlement mechanism to the labour provisions, there was 'an enforceable obligation to adopt and maintain the principles recognized in the ILO declaration within domestic law,' (Cabin 2009, 1073).

Conversely, the EU approach has been more promotional, employing dialogue and cooperation when violations occur. Across most recent EU agreements (EU-South Korea 2011, Peru 2013, Colombia 2013, and the CARIFORUM 2008) when disputes arise the parties are required to submit these to an expert body, and from their findings recommendations are made. These processes can take the ILO's activities/recommendations into consideration. If all else fails, they can request that the Trade and Sustainable Development Sub-Committee be convened where recommendations will be made, and from which the parties need to then take adequate steps (Ebert and Posthuma 2011). Yet, there still remain no provisions for enforcement, meaning only soft pressure can be applied (Schmieg 2014, 6).

The EU-CARIFORUM and EU-South Korea agreements are seen as the most comprehensive in regard to how the dispute mechanism and civil society engagement should take place. Yet in both there is still no option for sanctions or suspension of trade benefits. The EU-CARIFORUM (2008) agreement was the first EU agreement where labour provisions were also covered by the regular trade dispute settlement mechanism (International Labour Organization 2013).

The EU-South Korea agreement has been plagued with its own problems. Under this agreement the European Commission must present annual implementation reports, alongside annual civil society forums (International Labour Organization 2013, 77). However, the current issues plaguing the EU-South Korea dispute process, where the South Korean government has been accused of hand-picking government-friendly participants, suggest that continued dialogue is not always enough (International Labour Organization 2016, 42). This may also be tied to the contradictory claims by South Korea and the EU over how much improvement has been made in reference to the ratification of ILO conventions (FES Korea 2016). The Colombia EU agreement has also come under fire, because, although it is quite good on content, the only enforcement avenues available are dialogue and cooperation (Orbie 2011, 175).

The inclusion of some form of public submissions process such as that in the US-Guatemala (2006) agreement,[23] which allows for civil society groups to participate and lodge complaints, tends to result in more enforcement as there is a designated role for social partners to push political will. This is directly connected to how the institutional and dispute settlement mechanisms are designed to allow for social partners to have an unambiguous role in proceedings. Critically, outside pressure can help enforce the political will of trading partners who may be unwilling to pursue these issues otherwise. However, such a submission process relies on strong domestic social partners, especially trade unions, being able to access these channels and having the necessary knowledge, capacity, and faith in the process to do so. In best practice examples, this has resulted in transnational linkages occurring between trading partner trade unions, strengthening solidarity, dialogue, and knowledge sharing (although this is not the norm!). For example, within the US-Guatemala agreement the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and Guatemalan trade unions lodged a shared complaint against Guatemala over its failure to comply with its labour rights obligations (International Labour Organization 2016, 45). This led to increased transnational advocacy networks throughout the process.

However, as most submissions continue to fail and are not adequately followed up, submissions can begin to tail off due to "submission fatigue" (Greven 2005, 35). As Greven concludes: "If unions and NGOs stop using it (submissions process) because it is too expensive and ineffective, cooperative activities may also end altogether" (Greven 2005, 38). There is hope that the proposed civil society forums in the new round of EU FTAs (EU-CARIFORUM 2008 and EU-South Korea 2011) may lead to increased respect for labour rights through knowledge transfer and indirect transnational linkages, as has occasionally occurred through the US public submissions process (Putte and Orbie 2015, 271).

**Engagement of social partners**

It is argued that the inclusion of civil society groups in both the development and implementation of social chapters will give much needed legitimacy to future agreements and trade-labour linkages (Van den Putte 2016, 36). As suggested above, there has been a steady increase in mechanisms that could lead to more involvement of civil society stakeholders in the design and implementation of FTAs across both EU and US agreements (International Labour Organization 2016, 127). However, these mechanisms have rarely been used in practice.[24] This is connected to the issues that affect enforceability in the first place, such as the accessibility of the mechanism, or the absence of independent trade unions or civil society groups making any mechanism somewhat redundant. However, inclusion must be meaningful, as social partners need to see value in participating, yet the interests involved in the negotiation of FTAs tend to mean that the cards are stacked against them (i.e. ISDS clauses and accessibility) (Scherrer and Beck 2016).

To date, no FTA has significantly involved civil society groups in the negotiation process. The way that social partners have been included in the social chapter after ratification differs slightly between the EU and US. The US public submissions process is an important channel not available in EU agreements (International Labour Organization 2016, 138–9). Another difference is that the EU stipulates regular meetings with civil society, whereas the US enters into dialogue only once a problem arises (Van den Putte 2016, 75–6). The EU-CARIFORUM EPA signalled a shift in European policy around civil society engagement (Schmieg 2015, 28). However, to date, civil society forums in European-led FTAs have only been fully implemented and meet regularly in the EU-South Korea agreement (some form of civil society meetings are meant to take place in EU-CARIFORUM, EU-Central America, EU-Peru/Colombia, EU-Georgia and EU-Moldova) (Orbie, Martens, and Van Den Putte 2016, 10). With every new agreement, a new EU-wide DAG is created. The EU's trading partners often do not do this, meaning that there can be a well-established EU-DAG but a malfunctioning or non-existent DAG representing the trading partner.[25] The failure of the governments or mechanisms to fully address civil society concerns in the EU-South Korea agreement may limit its ongoing efficacy, as civil society groups lose faith, or develop dialogue fatigue, and cannot see any tangible benefits in continuing the process.

The EU-Peru and EU-Colombia agreements have also had disputes over civil society participants, questioning the legitimacy of these dialogue forums as little policy space has actually been given to social partners, and the specificities of the issues are rarely addressed (Van den Putte 2016, 91).[26] The problems surrounding this obviously relate to a lack of political will within trading partners, but also the ambiguity in the wording of the clause that left these decisions somewhat up to interpretation. Furthermore, where trading partners either do not have a tradition of dialogue, or hold a different conception of what social dialogue is, the focus on such processes can lead to ineffectiveness (i.e. in South Korea) (FES Korea 2016). This highlights the constraints of such a model when strong social partners and independent trade unions, and not least, this tradition of cooperation, are not in place.[27] Ultimately, the effectiveness of these forums relies upon them meeting regularly, with key labour groups in attendance, government consultations where labour rights issues can be raised, and the capacity of transnational advocacy networks developing outside these forums (Putte and Orbie 2015, 272).

Because there have been few recognized benefits from participation in these forums (both in the EU and US), there is growing civil society fatigue (especially in regard to EU-South Korea and the NAALC process) (Lukas and Steinkellner 2010, 4). That the negotiation of agreements takes place behind closed doors, and trade unions and other civil society groups are often unable to participate in forums or implementation processes post-ratification due to limited access and capacity, further weakens any social footing that such agreements purport to hold (Lukas and Steinkellner 2010, 3). Studies suggest that those where the design is complex, hard to navigate, lengthy, and costly, dissuade social partners from participating, and thus limit their effectiveness (Ebert and Posthuma 2011, 24). Critically and poignantly, Van den Putte notes that none of the civil society groups perceive the EU's trade-labour linkage as 'providing them with a strong tool to improve their labour situation.' And very few civil society groups are even aware of the obligations their governments have agreed to, or the tools available to them in the agreements (Van den Putte 2016, 101).[28] In regard to EU agreements and the EU-South Korea, EU-Colombia and EU-Peru agreements in particular, dialogue fatigue has set in with little realized change.

This is exacerbated by (Van den Putte 2016, 94–5):

- The ineffective DAG process.
- Little connection between the domestic and transnational bodies.
- Government oversight of these forums (for example, in Colombia civil society groups participated in forums where government bodies were present and thus had little real ability for open and transparent discussion).
- Selective choosing of civil society participants in the case of South Korea.
- Little trade union faith in the process.
- A lack of financing that has made them inaccessible to trade union and civil society groups. This is an access issue tied both to knowledge of how the processes work within base-level union membership, and what their rights are, but also the cost of participating in endless negotiations.

Furthermore, within European civil society organizations there is also a reluctance to take part in a mechanism that would oversee the implementation of a trade agreement that they do not agree with. There is a continuous insider-outsider dilemma for civil society groups with the possibility of giving legitimacy to agreements that are not in their interest. This can mean that those that do participate may not actually be representative. Exacerbating this is the limited access of stakeholders to texts under negotiation. Where some access has occurred, most still see this as lacking transparency, with many meetings such as the Civil Society Dialogue on Trade within the EU, acting more as an information session rather than real dialogue. The secrecy surrounding the negotiation of the recent TTIP agreement is a case in point (Scherrer 2014, 1). The inclusion of social partners in TTIP perhaps warrants a specific mention as it represents the new generation of regional/bilateral FTAs including CETA, TPP, and TISA and many have hailed its social chapter as progressive. Importantly, and as stated previously, in most of these analyses the social chapter is considered in isolation from the rest of the agreement that undermines the capacity of public institutions, and gives more power to capital at the expense of labour around issues of accessibility. Yet, when looking specifically at the social chapter, although perhaps more extensive content-wise than previous agreements, the proposals around monitoring and implementation are vague. Furthermore, the inclusion of civil society is limited to the right to be 'informed' and 'heard'; as such there is no explicit mention of influence, prescriptive dispute processes, or sanctions (Beck 2014, 20).

**Sanctions or incentives**

There is an ongoing debate over whether, and if so, what type of, sanctions should be used in regard to ILS in social chapters. The lack of sanctions within EU agreements has often been cited as the reason behind their lack of enforcement, but the reality is more complex (Giumelli and van Roozendaal 2017, 45). Although sanctions are never explicitly outlined in the EU chapters, there is one avenue open to sanctions being utilized. Because social rights can be included in the essential elements clause, this can also mean that once the non-enforceable dispute mechanism has been exhausted, this clause could be utilized possibly resulting in the suspension of trade benefits (Putte and Orbie 2015, 270). Nonetheless, this is unlikely to ever occur.

Some argue that sanctions are likely to do more harm than good to developing economies (Maskus, n.d., 1) and thus wind back ILS gains. Punitive trade restrictions for non-compliance or enforcement can lead to job losses in developing countries, hurting those that ILS are aiming to benefit (Singh and Zammit 2000, xv). Citing another extensive study on the effectiveness of sanctions, Michael Ewing-Chow states that in over 100 cases economic sanctions have only worked about a third of the time (although even this may be overstated), and that sanctions often impact citizens more than those in power (Ewing-Chow 2007, 153–4). A way around this would be to 'emphasize incentives for labour standards compliance,' rather than punitive action for violations (Berik and Rodgers 2010, 4). In Singh and Zammit's study (2000, xv) on the promotion of ILS in developing economies, they suggest that adherence is more likely to occur through the provision of technical and financial assistance, alongside cooperation with domestic and international civil society groups, rather than through punitive or sanction-based mechanisms. This is also backed up by Greven (2005), and Lukas and Steinkellner's (2010) reports, that show that the presence of sanctions is not as critical, but rather it is the capacity of local trade unions, labour inspectorates and programmes targeted at specific labour rights issues, which have the most impact for the enforcement of ILS.

Consistently, incentives rather than sanctions appear to be most effective, as instead of shaming countries into action, which can have political fallout (and thus limit political will to enforce) this could also be linked to capacity building and development aid around country-specific goals (Ebert and Posthuma 2011, 29).

The US approach has aid and institutional frameworks for capacity building around labour issues built into its social chapters to a much larger degree (content and monetary wise) than EU FTAs (Doumbia-Henry and Gravel 2006, 194). Thus, although sanctions are on offer, what is actually more utilized are the aid or capacity-building projects, which may be the most effective part of the agreements (Doumbia-Henry and Gravel 2006, 194). Labour-related cooperative activities in US agreements have ranged from 400 000 US dollars to improve communication between government and social partners (in both the US-Bahrain and US-Oman agreements) and 85.1 million US dollars to improve the implementation of labour law, increase labour departmental budgets and improve labour law compliance (in CAFTA-DR 2006) (International Labour Organization 2013, 83).

The US-Chile (2004) agreement falls somewhere in the middle, and has been cited as potential best practice. The US-Chile sanction/incentive process includes the payment of fines into a fund for improving the specific labour rights violations that occurred, alongside the removal of trade preferences as a last resort (Lukas and Steinkellner 2010, 7). The US-Cambodia textile agreement (1999-2005) is another fairly successful example of this; incentives in the form of increased quotas for Cambodian textile imports into the US were directly linked to the improvement of factory safety and labour rights in the sector (Scherrer and Beck 2016, 14). The small, positive steps seen in Cambodia in respect to labour rights in the garment industry, may be attributed to Better Factories Cambodia, which grew out of this project (Berik and Rodgers 2010, 3). The Memorandum of Understanding on Labour Cooperation attached to the TPP also included policy-related workshops and policy dialogue (International Labour Organization 2013, 87).

Sanctions, as a last resort, may have a role to play. Firstly, their presence can act as a deterrent (although this is hard to measure or prove) and they can do reputational damage to the country in question, providing political leverage beyond the economic scope of the agreement (Ebert and Posthuma 2011, 21). Any direct causality is hard to show, but this idea that they may act as a disincentive is commonly held (Anuradha and Dutta 2017, 26). Yet, even when sanctions have been available (i.e. in the US agreements), disputes have never reached this point, suggesting that in reality there is not much difference between the promotional and conditional approaches when it comes to enforcement through sanctions.

Furthermore, there is an inconsistent application of the sanctions process, undermining the perceived threat of their presence. The removal of trade preferences under the unilateral approach of both the EU and US GSP system has been employed much more than any FTA process (Ebert and Posthuma 2011, 21). There is some evidence that the use of sanctions under the GSP scheme did improve the political situation in the target states by weakening business support for the regimes (Giumelli and van Roozendaal 2017, 46).[29] However, until 2011 no US labour dispute within an FTA (where sanctions are available) had ever resulted in their use (Ebert and Posthuma 2011, 23–4). This highlights the necessary (and currently lacking) political will of trading partners to follow through on what they have agreed to, and potential lack of social partner capacity – or faith – in pursuing this process.

Reflecting the debate over dialogue versus pre-ratification conditionality, economic sanctions can have an effect in pushing forward legislative changes, but may have little impact on pushing through changes in attitudes, behaviours and beliefs. This backs up the claim that, although you can force ratification, this does not work in the case of enforcement, which is more complex. Whether or not sanctions do act as a deterrent, what does limit their effectiveness is their inconsistent application (both through the GSP and FTA approach). What is more important is that there are clear directives about what happens when violations occur, a well devised process, and consistent application, otherwise – as we see with the current US sanctions system that is rarely utilized – it becomes somewhat meaningless. If sanctions exist, they must be consistently and quickly applied to have an effect and act as a deterrent to others (Giumelli and van Roozendaal 2017, 45).

# Recommendations

In suggesting possible future designs of EU social chapters, what is critical to keep in mind is that the enforcement of ILS is complex, and there is not one simple solution. The lack of enforcement of the existing social chapters can be explained by external conditions and problems of chapter design.

Firstly, enforcement comes down to political will, attitudinal change and the presence of strong independent trade unions; it is more complex than whether or not sanctions are included. While there may be no 'one size fits all' policy prescription, strong coherence and standard design are needed within EU agreements. The specific conditions of trading partners can be considered in time-bound implementation steps until full compliance.

Additionally, each condition (political will, capacity, regulation, independent social partners…) is dependent on the other, meaning that for successful policy each must be addressed rather than seen as isolated or independent variables. Isolating and directing impact towards only one issue will most likely open up a Pandora's box of other limitations. For example, an effective labour chapter needs a clear dispute resolution system beyond mere dialogue, yet even dialogue requires the participation of civil society groups such as trade unions. However trade unions may well be unlikely to want to participate and give legitimacy to firstly, an agreement that undermines key rights and issues in the public good (i.e. new generation of FTAs tackling NTBs). Furthermore, dialogue fatigue will set in if their concerns are not addressed, or the processes outlined for participation are seen as rubber stamping, or lacking bite. Starting from this, some recommendations can be made around the design of any future social chapter:

*The design, monitoring and implementation of the chapter must be accessible to social partners; this includes meaningful engagement, and consideration of capacity constraints.*

The pressure to push for political will can occur through civil society, which requires civil society groups to, firstly, have knowledge of the agreement, and secondly, the capacity to exert such pressure. Pressure can be external in the form of campaigns or lobbying or internal through the dispute mechanism or consultation processes. As such, certain knowledge of these mechanisms, time and faith in such processes are necessary pre-conditions. Issues of access plague most agreements, raising broader questions around what types of resources (knowledge or monetary) are required to access the dispute or monitoring processes. Is it prohibitive to workers and their organizations? And do the necessary social partners firstly exist, and secondly, have the capacity to use these tools?

The cost and time of dispute procedures must also be taken into account as being normally prohibitive to under-resourced and time-poor trade unions that do not have the capacity to pursue such avenues when there is at least historically little evidence of success. The further ingraining of these mechanisms into ISDS clauses and the language of investment rights rather than human rights, further excludes such groups from the necessary background knowledge required to comprehend and make use of these tools.

To address this, certain policies could be implemented:

- Funding to finance participation and allow for diverse and representative participation in the civil society forums.
- Pre-ratification training with social partners around the mechanisms and content of agreements. This could also facilitate transnational solidarity networks between trade unions.
- A public submissions process such as in the US teamed with strict monitoring and timely procedures i.e. that disputes must be addressed within 90 days of submission.
- Strengthening the Civil Society Dialogue and extending their power beyond having the right to be heard and consulted to concrete and enforceable rights. The US approach of holding one meeting for discussion with civil society groups regarding all trade agreements rather than requiring civil society to participate in separate and frequent meetings on all agreements seems to counter this.[30]

*Social chapters need to be coherent across and within agreements.*

Coherence is another other key issue that severely limits the enforcement of ILS. Currently, there is a lack of coherence between the social chapter and the motivations of the rest of the agreement. There is also a lack of consistent application of the existing procedures. Finally, and specifically in relation to the EU, there is also a lack of coherence across EU institutions and policy ownership. For example, does the procedure relate to one or more agreement? Or are civil society groups and government bodies required to understand the nuances of each social chapter within each FTA? If it is a case-by-case basis, this increases the workload of civil society groups and thus probably decreases their ability to participate, as well as the capacity of governments to monitor commitments. The EU's move towards subsuming ILS into much broader and less defined sustainable development chapters further facilitates the lack of ownership of these issues across departments, taking them further away from a core human rights agenda. Critically, on a more macro level there is also a lack of coherence between the US and EU, muddling the field for trading partners over what is demanded of them, returning to this idea of a spaghetti bowl of regulation straining the already limited capacity of labour and trade departments and civil society groups, such as trade unions.

To address this, possible policy options could include:

- Strengthening the link between labour rights as human rights possibly outside the sustainable development framework and chapter.
- Transnational cooperation could be improved through collaboration between governments when trade agreements are being negotiated at the same time.[31]
- Regular Human Rights Impact Assessments to be carried out in consultation with civil society groups and social partners.
- A standard social chapter design that still retains space for domestic peculiarities.
- More coherence and cooperation across relevant EU departments and a consistent contact point across all agreements.

*The 1998 ILO Declaration and key conventions should form the basis of what is included in social chapters. The ILO could also act in a consultative capacity or in a third-party monitoring role.*

The move towards the inclusion of ILO standards is a good step towards increased coherence and convergence of the multiple ILS regimes and should be encouraged. Although there are obvious weaknesses of the ILO (due mostly to lack of enforcement), the ILO as an independent body also offers an important monitoring opportunity countering to some degree the politics of enforcement.[32] This in turn will require that ILO reports be credible, timely and transparent.

To address this, possible policy options could include:

- Explicitly linking the ILO conventions as well as the 1998 Declaration to mechanisms in the agreement.
- Utilizing the ILO as a monitoring or third-party chair in the dispute mechanism.

*Pre-ratification conditions should be employed to push for regulatory changes beyond existing ILS commitments*

Where social chapters may have the most tangible and to some extent more pragmatic impact may be in pushing for regulative change through pre-ratification conditionality. The pressure that FTAs can exert on countries during negotiations has been shown in the recent side letter of the TPP between Vietnam and the US. This extra pressure from the trade negotiations, alongside lengthy dialogue and pressure campaigns may result in Vietnam ratifying some new ILO conventions, and altering its domestic legislation to allow for increased freedom of association. Critically, these shifts cannot be put down solely to the TPP, as it formed one tool in the diplomatic toolbox of the US, and added extra pressure to negotiations with the EU during recent years, but it does show that when working in partnership with other policies, social chapters in FTAs may facilitate regulative change. Pre-ratification commitments have also been shown to be useful in pushing regulative changes in the US-Oman, and US-Bahrain agreements.

Pre-ratification conditions are most likely to be enforced (or carried out) as they provide a clear prescription for what is demanded, when, and how. They are measurable, allowing them to sidestep some of the issues plaguing

other areas of enforcement. As such they should be fully embraced and extended to as many regulatory areas as is feasible.

To address this, possible policy options could include:

- The signing of new ILO conventions and necessary domestic legislation (for example, Freedom of Association) to be included as ex-ante conditions.
- Extend ex-ante conditionality to the building up of labour inspectorates or capacity-building programmes to assist trading partners to meet these demands.
- Partner ex-ante demands with ex-post capacity-building improvements. This could also be linked to aid and training programmes between trading partner institutions or trade unions.
- This could also be extended to the promotion of a living wage or even a regional living wage such as the Asian Floor Wage campaign.

*The monitoring and institutional design of the chapter must be clearly defined. This should include regular and consistent department meetings and social partners and civil society groups must be meaningfully included in the process.*

Regarding the inclusion of civil society, Van den Putte suggests that this must be obligatory and specific – it cannot be left up to government discretion to consult civil society as the 'more precise the formulation, the higher the level of institutionalization' (Van Den Putte 2015, 225). However, these processes must be open and safe. The main purpose of civil society meetings or forums needs to be addressed on a case by case basis dependent on how much experience the trading partner has in regard to their experience of social dialogue procedures, as well as the maturity of the mechanism, or even how viable/safe dialogue between these groups may be (Van Den Putte, Orbie, and Bossuyt unpub.).

To address this, possible policy options could include:

- Use the current DAGs format as a starting point, teamed with public submissions and some formalized role for civil society in the dispute settlement process.
- There should be regular (more than annual), locked-in, and financed meetings with civil society groups.
- Have a consistent department that is responsible for the enforcement of the social chapter.
- There is also space for the ILO to play a role either as a last resort in disputes or in a consultative or chairing capacity.
- A panel of experts made up of a mix of the social partners from both trading partners could also be beneficial.

*The Dispute Settlement Mechanism must be timely, transparent, include social partner and be accessible. This same mechanism should apply across the whole agreement.*

Including the social chapter under the same mechanism as the rest of the agreement aids coherence as well as reinforces the trade-labour linkage, further integrating ILS into economic trade concerns. As stated previously, the success of the social chapter depends on social partners seeing that it is useful to them and enforced. The direct and meaningful involvement of social partners through public submissions or a seat at the table would help this, as would making the process more transparent and accountable.

To address this, possible policy options could include:

- Including stakeholders in some form of tripartite committee and the possibility of a third-party chairperson (i.e. maybe the ILO) to act if resolution is not possible.
- Dispute and consultation processes should have time stipulations on how quickly such problems or submissions should be addressed. In their draft social chapter, Lukas and Steinkellner suggest that submissions should be addressed within 90 days (2010, 20–22).
- Establishing a national contact point and a public submission process (Bartels 2014, 17).

*Sanctions should be available but should work alongside incentives, capacity-building programmes and aid.*

Sanctions should be considered as a last resort and act as some form of deterrent. If teamed with a prescriptive and non-negotiable dispute settlement mechanism, the application of sanctions may become more consistent. The US agreements that link aid programmes and capacity-building training to country-specific issues that arise through the negotiation and monitoring stages of the agreement seem to be best practice, and have

measurable impact. If these programmes could be developed in partnership with independent domestic trade unions, this would be especially beneficial and may also counter some of the pushback from such groups.

To address this, possible policy options could include:

- A three-step process in the application of sanctions: Firstly, consultation, secondly, a monetary fine if the violation is not resolved before, finally, resorting to the removal of trading preferences.
- Following the model of many Canadian FTAs i.e. Peru (2009) and Chile (2004), the monetary fine should go into a fund that would specifically target the labour violation under consideration (Lukas and Steinkellner 2010, 7).
- Working alongside these more punitive measures could be some form of incentive scheme with increasing market access or aid when certain ILS markers are reached (i.e. the Better Work Cambodia programme); a form of post-ratification conditionality.

# Conclusion

Ultimately, the enforcement of social clauses relies on smart design but also the more macro-level confluence between legal, political and development cooperation, and the need for legal resources to be combined with political pressure (International Labour Organization 2016, 128). Civil society and social partners play a crucial role in the functioning of labour provisions. For this reason, they must be involved from the early stages, allowing better implementation and increasing transparency of the procedures (International Labour Organization 2016, 128). As Greven describes, labour rights mechanisms will only work when there are domestic actors who can make use of them and where these processes can act as extra pressure points for transnational campaigns; they are not an end in themselves finishing at ratification (Greven 2005, 38).

The agreements need to be coherent on numerous levels – building on the ILO Core Labour Standards (CLS) would be a starting point. This could allow for both civil society groups and governments with limited resources to have some better understanding of what they need to implement; otherwise this could be a repetition of the numerous and largely ineffective Multi-Stakeholder Initiative (MSI) regimes. There must also be coherence among relevant EU agencies, as although the trade-labour linkage is accepted in a normative way, how this is to be actualized is not clear, and seems to differ across agencies. The US approach where one department (Labor) has responsibility and plays an active and, to some extent, coherent role should be replicated. This will also counter any lack of political will, by limiting opportunities for the buck to be passed. Linked to this, is the need for agreements and labour chapters to be clear on what is required throughout the dispute settlement procedures or the makeup of DAGs (i.e. see the issues that have plagued the EU-South Korea agreement).

Furthermore, timeframes and outcomes need to be prescribed in the agreement in the clearest and most direct language possible to avoid miscommunication or different interpretations (on both sides). Following this, sanctions do not seem to be the determining factor of enforcement; instead it is consistency across the procedures and use of incentives such as increased trade access, aid or capacity-building programmes that appear most effective. As such, some sort of mix of the three teamed with an unequivocal dispute procedure where the concerns of civil society groups, such as trade unions, are given real space may be most effective.

Critically, for any social clause to work or have impact there needs to be buy-in from civil society, which on a larger scale requires the re-building of trust in, and the legitimacy of, the power of trade agreements to benefit workers and not just the wealthy few. This will require a re-socialization of trade agreements, more transparent negotiation and opportunities for independent civil society to participate, and have power, in the negotiation, implementation, and enforcement of the agreement. It will also require more detailed and compulsory impact assessments including human rights, the environment, and labour (Schillinger 2016, 3).

The corporate agenda cannot be the driving force behind such agreements, rather they must allow for policy space for states to regulate in the public interest, irreversibility clauses must be blocked, compensation schemes outlined, and participation mechanisms and accessibility issues addressed (Schillinger 2016, 5). As Ebert and Posthuma summarize in their detailed study of social clauses, 'given that challenges in the promotion of labour standards often have multiple roots, an integrated and multi-faceted approach seems most promising,' (Ebert and Posthuma 2011, 29). Social chapters need to be understood as one part of a policy mix rather than a solution in themselves.

# Notes

1. Across agreements some refer to social clauses and some to chapters. There is some difference between the two (normally around how comprehensive they are), however, for this study the term social chapter will be used. Increasingly, these chapters are called sustainability chapters that include environmental standards, human rights, and labour rights. This study focuses specifically on labour rights; their inclusion in, and enforcement through, such chapters.

2. Although seemingly semantic, there is a subtle difference between labour rights - certain agreed-to and universal rights that belong the individual and linked to the broader human rights discourse, and labour standards, which are the agreed-to conventions (i.e. through the ILO) or provisions that aim to protect those individual rights.

3. The trade-labour linkage is a term suggesting that trade and labour standards can be linked and whether trade can be used to promote and enforce labour standards (Adriaensen and González-Garibay 2013, 545).

4. It is suggested that within trade agreements the US approach is seen to be more effective in promoting labour rights through trade whereas the EU is seen to have more legitimacy on this issue (Van Den Putte, Orbie, and Bossuyt unpub., 1).

5. This can be seen in the recent side letters of the TPP agreement, especially in Vietnam.

6. These were mostly limited to migrant worker rights.

7. Within the EU-South Korea agreement there is only mention of the intention to ratify conventions not the need to ratify, meaning that South Korea has made little move towards ratification. The South Korean government has signaled that it is considering ratifying conventions 95 and 118 and some changes may be made regarding the Trade Union and Labour Relations Adjustment Act, however, these actions, if they come to pass, cannot be solely attributed to the agreement as forming part of a larger policy framework (Van den Putte 2016, 88–9).

8. Including labour rights in a broad sustainability chapter means that many departments could be responsible, for example, for environmental concerns DG Environment would be most appropriate, issues of development of aid and capacity programmes, Directorate-General for International Cooperation and Development (DG DEVCO), for specifically labour issues, DG employment and so on. DG Trade, however, is responsible for the whole FTA, creating possible confusion over responsibility, expertise and interpretation.

9. This was the case in US-Morocco (2006), US-Bahrain (2006), US-Oman (2009), US-Peru (2009), US-Colombia (2012) and US-Panama (2013) (International Labour Organization 2013, 37).

10. The centrality of 'like products' as the category for WTO formulations and claims (where trade concerns are the leading argument), rather than a process and production model, is problematic for the provision and enforcement of labour rights through trade. The 'like product' model compares products in their completed state; a smartphone produced in China and one produced in Germany would be considered comparable products and then subject to the Article I (most favored nation) principle so that no restrictions could be placed on the import of Chinese smartphones even if they had been produced under exploitative working conditions. This is in contrast to the process and production model (that was ruled against in the Tuna/Dolphin case) that argued that products were not comparable if they had been produced under different conditions; the process and method of production are central to the end product. Although this argument was not accepted in the WTO, it could have opened the door to both environmental (as in the Tuna/Dolphin case) and labour rights being considered as grounds for differential treatment within the WTO (Ewing-Chow 2007, 162). The potential General Agreement on Tariffs and Trade (GATT) legal frameworks that could help protect ILS are limited to the Anti-Dumping GATT Article VI (limited to price not social dumping), Countervailing Duties (Article XVI), and the Nullification and Impairment Provisions (Article XXII),

however, none of these can be explicitly linked to ILS and would require a more creative interpretation (Scherrer and Beck 2016, 9–10). Notably, the GATT 1994 does allow for legitimate government policies that may be contrary to the GATT agreement if they aim to protect 'public morals, health or the environment' but notably this does not mention labour rights (Marceau 2009, 545). Yet, public morals is a subjective term and with a growing discursive agreement around labour standards, and there is some potential in the argument that public morals could extend to labour standards (Ewing-Chow 2007, 162).

11. The CARIFORUM Economic Partnership Agreement (EPA) was the first EU agreement to contain an explicit chapter that included ILS alongside conditional provisions. Previous (and many following) agreements did not include such a concrete linkage, rather they made reference to the need for general improvement in ILS (EU-South Korea), linked ILS to certain cooperation provisions (EU-Mediterranean), or a broad claim to respect ILO standards through cooperation with little prescription on how this was to occur (EU-Chile, EU-South Africa) (Adriaensen and González-Garibay 2013, 544).

12. There has been huge growth in the number of FTAs including some form of labour provision from four in 1995 to 58 by June 2013 (International Labour Organization 2013, 5).

13. These agreements are much more extensive than previous and some concurrent agreements and form part of the "deep trade" agenda. For this reason, they warrant a specific mention. We acknowledge that it looks like TTIP and TPP may no longer be ratified by the US and thus may not survive, however, we suggest that they signify the dominant and probably ongoing shifts within FTAs, so are worth analyzing for this reason.

14. In the TTIP negotiations the EU proposed a new form of ISDS in an Investment Court System. This system aims to tackle some of the issues raised by ISDS proceedings by opening up an appeals process, locking in judges and a specific system that is more transparent (European Commission 2015). This has been further developed in CETA, however, it is still unclear and questionable how this new court system would tackle the problems of accessibility or the counter increased rights given to investors.

15. For a detailed discussion of cases where this has already occurred see Eberhardt (2014).

16. An example of this was the case that Veolia, a French utility company, brought against Egypt in response to Alexandria raising the minimum wage (Ebert and Posthuma 2011, 28).

17. Notably the case between Germany and Vattenfall (against the phase-out of nuclear energy) has cost the country 6.5 million euros to date just in legal costs (Eberhardt 2014).

18. Political will can be linked to capacity issues within developing states regarding labour legislation, labour courts, inspections, weak trade unions, and sometimes the overlapping and conflicting interests between government and business. Within developed states/regions political will can be lacking because of competing economic or political concerns, or issues around their own legitimacy on such issues (i.e. the US has not ratified certain ILO conventions) to name a few.

19. The major change that can be linked to the pre-ratification conditionality in Oman was the right for workers to form and join trade unions (International Labour Organization 2013, 29).

20. DAGs are comprised of independent representatives of civil society balanced between business, labour and the environment (European Economic and Social Committee 2017). Notably, the responsibility of the EU-South Korea DAG falls under the responsibility of the European Economic and Social Committee.

21. What is monitored through these mechanisms goes beyond labour rights including human rights and the environment through a broad sustainable development agenda.

22. Yet despite being more prescriptive than EU agreements, the US enforcement process is not judicial but rather political, meaning the process is inconsistently applied. For example, the labour office came under increased pressure to close under the Bush administration, showing that the power – and interpretation – of labour chapters are vulnerable to the politics of those in power (Greven 2005, 35–6).

23. This was part of the Dominican Republic-Central America – United States Free Trade Agreement (CAFT-DR) 2006 (US Government 2017).

24. The US-Guatemala case mentioned previously is one of the few times this has been followed through; the NAALC forums being very limited in scope have also begun to be less often implemented. The EU has approached Civil society forums differently across agreements, for example, EU-South Korea created two formal DAGs and a wider Civil Society Forum. In the EU-Central America and EU-Peru/Colombia agreements the creation of new DAGs is not formally stipulated and in EU-CARIFORUM this is a closed meeting of civil society groups alongside the governmental bodies (Orbie, Martens, and Van Den Putte 2016, 15).

25. See the case of EU-Peru and EU-Colombia, and the lack of Central American DAG meetings. This in effect stops any possibility of having an inter-DAG meeting between the trading partners (Orbie, Martens, and Van Den Putte 2016, 16).

26. The CARIFORUM Civil society forum has also not taken place for many years because of an ongoing dispute over who should participate.

27. This is also reflected in the EU-Peru and EU-Colombia agreements where dialogue has not been effective because the necessary pre-conditions (strong social partners and experience with social dialogue) were not in place, creating an ineffective policy design for the context-specific conditions of those countries, as well as forums where trade unionists felt threatened by the presence of government bodies who had been instrumental in their persecution (Van den Putte 2016, 94).

28. Notably EU-based trade unions are an exception to this, highlighting the uneven power dynamics across trade unions within trading partners.

29. For example, in Myanmar (Giumelli and van Roozendaal 2017).

30. However, the US approach is not without complaint, where criticism has been leveled at the meeting structure that certain agreements are not discussed or examples of labour rights violations being "ranked," meaning those considered of less importance are not discussed due to time constraints (For example, the focus was on Colombia rather than South Korea) (Van Den Putte 2015, 230).

31. Increased cooperation may be hard to facilitate through agreements that have increased competition at their heart – highlighting the conflicting nature of trade (competition) and labour (cooperation).

32. It must be noted that the ILO is not at all free from politics. As we have seen in the recent protracted stalemate over the right to strike, the tripartite body is often highly political, yet what is meant here is that it removes the domestic (and potentially competing) economic or diplomatic concerns from overriding violations of ILS; the ILO can act as the mediator or watchdog.

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