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# Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously

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## I. Introduction

The European Union is an extremely active international actor in the area of trade, being widely involved in the negotiation and conclusion of bilateral free trade agreements ('FTAs') with partner countries. All new-generation free trade agreements include a sustainable development chapter, covering both environmental and labour standards. Among other things, the latter promote the ratification and implementation of Conventions of the International Labour Organisation. For instance most of the EU's FTAs contain provisions to protect the right to collective bargaining and freedom of association or to forbid discrimination at the place of work.[1] On 17 December 2018 for the first time in history, the European Commission sought formal consultations with a partner state, South Korea, for failure to respect a labour standard obligation in an EU FTA; and on 4 July 2019 escalated this dispute by requesting a panel.[2] This is a notable development. It comes more than seven

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[1] See Section II for an analysis of labour standards in the EU's FTAs.
[2] https://trade.ec.europa.eu/doclib/press/index.cfm?id=2044.

years after the entry into force of the agreement and the prolonged failure of the Asian EU partner to ratify and implement four of the eight fundamental ILO Conventions.

Private stakeholders[3] and academic observers[4] have long criticized weaknesses in the EU's enforcement record. Labour standards and environmental obligations are excluded for the time being from the set of rights which can be enforced via regular dispute settlement proceedings in these FTAs. No sanctions are envisaged in the event the EU's trading partners flout these standards. These enforcement weaknesses have undermined the confidence of civil society and other stakeholders in the ability of the EU to promote sustainable development through its FTAs and have thus weakened support for these trade liberalisation initiatives. The cognizance of such shortcomings has prompted legal scholars to rethink the rules of global trade in order to accommodate social and environmental concerns better.[5]

Stronger enforcement of labour obligations in EU FTAs has been gaining traction as well within the political debate. In fact, for several years now, the European Parliament has been calling for better enforcement of environmental and labour provisions in the EU's FTAs.[6] In his presidential election campaign in 2016 Emmanuel Macron proposed the creation of an "EU prosecutor" to police

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3 See ETUC submission on the Non-paper of the Commission services on Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs), 11 October 2017, available at: www.etuc.org/documents/etuc-submission-non-paper-commission-services-trade-and-sustainable-development-tsd#.WtRdzdNuaik

4 The scholarship on labour standards in the EU's FTAs is voluminous. See, e.g., H Gött, "Linkages of Trade, Investment and Labour in Preferential Trade Agreements: Between Untapped Potential and Structural Insufficiencies", in *2019 European Yearbook of International Economic Law (*Springer, 2018); H Gött (ed), *Labour Standards in International Economic Law (*Springer, 2018); B Melo Araujo, "Labour provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality" (2018) 67 *International & Comparative Law Quarterly* 233; L Bartels, "Human Rights, Labour Standards and Environmental Standards in CETA" in E Vranes, A Orator and D Fuhrer (eds), *Mega-Regional Agreements: TTIP, CETA, TiSA: New Orientations for EU External Economic Relations* (OUP, 2017); G Gruni, "Labour Standards in the EU-South Korea Free Trade Agreement" (2017) 5 *Korean Journal of International and Comparative Law* 100; G Gruni, "Law or Aspiration? The European Union Proposal for a Labour Standard Clause in the Transatlantic Trade and Investment Partnership" (2016) 43 *Legal Issues of Economic Integration* 399; L Bartels, "Social Issues: Labour, Environment and Human Rights" in S Lester, B Mercurio and L Bartels (eds), *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies* (CUP, 2015); L Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements" (2013) 40 *Legal Issues of Economic Integration* 297.

5 See G Shaffer, "Retooling Trade Agreements for Social Inclusion", (2019) 1 *University of Illinois Law Review* 1.

6 See Resolution on human rights and social and environmental standards in international trade agreements of 25 November 2010 (2009/2219(INI)) para 22(a); See Resolution on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility of 5 July 2016 (2015/2038(INI)) paras 22(c) and (d).

sustainability obligations.[7] Similarly, in the run up to the May 2019 elections for the European Parliament, the Socialists and Democrats Group of the European Parliament urged making sustainability obligations (including labour standards) fully enforceable.[8]

In response to these growing pressures, the European Commission issued two non-papers in 2017 and 2018.[9] The Commission contemplated several improvements in the implementation of FTA sustainability chapters. Some of its proposals are worthwhile indeed.[10] For example, the Commission emphasised the need for more transparency of its enforcement actions. Most attention, though, was devoted to the question of whether infringements of the sustainability chapters in the FTAs should be subject to trade sanctions. Ultimately, the Commission maintained its view that this is not desirable.

Unfortunately, the Commission disregarded financial penalties or more targeted sanctions, being alternatives to trade restrictions. Furthermore, these Commission papers paid no attention to the rather more pressing issue, in our view, of an effective private complaints procedure. Rather than an absence of sanctions at the end of an investigation, a key problem in the enforcement of the EU's sustainability chapters has been a lack of timely opening and pursuit of formalized investigations. Moreover, the Commission omitted to examine the internal consistency, clarity and enforceability of the labour standards which the EU has been including in its FTAs during the past decade or so. There is room for improvement here as well.

Following the May 2019 elections, environmental concerns gained broad support in the European Parliament. Commission President-elect Ursula von der Leyen acknowledged this political

[7] En Marche, Official Program on Industry, available at: <en-marche.fr/emmanuel-macron/le-programme/industrie>.
[8] See "Ten Progressive S&D principles for a new era of trade agreements" available at < https://www.socialistsanddemocrats.eu/ten-progressive-sd-principles-new-era-trade-agreements>.
[9] See the two non-papers of the European Commission services, *Trade and sustainable development chapters in EU free trade agreements*, 11 July 2107, available at: <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf>; and *Feedback and way forward on improving the implementation and enforcement of trade and sustainable development chapters in EU free trade agreements,* 26 February 2018, available at: <http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf>.
[10] For an overall assessment see also J. Harrison et al. "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Agenda", (2018) *World Trade Review* (open access).

reality and promised to make a European Green Deal a centrepiece of her agenda.[11] Likewise, she expects the implementation of labour standards in trade agreements to be a priority for her Commissioner for Trade, working with the newly created Chief Enforcement Officer (an affirmative response to President Macron's proposal).[12] Accordingly, the time is ripe for a reconsideration of the EU's past policies.

In this article we concentrate on labour standards. We present a four-pronged proposal to strengthen their enforcement in the EU's FTAs: tightening up these standards, admitting private complaints about their violation under the EU's Enforcement Regulation, scrapping separate and weak procedures to settle disputes regarding these standards in the EU's FTAs, while adding appropriate sanctions when they are persistently violated. The structure of the article is as follows. Section two identifies the state of the art of labour standards in the EU's FTAs. Section three identifies the amendments necessary to accommodate a private complaint procedure to enforce labour standards within an existing instrument of EU trade policy: the EU's Trade Barriers Regulation,[13] which the new von der Leyen Commission intends to upgrade and rebaptize as the Enforcement Regulation.[14] Section four proposes modifications to improve the dispute settlement mechanism in the EU's FTAs, strengthening the system of third party adjudication and including various sanctions. Section V reflects on what our proposal might realistically achieve. Section VI concludes.

[11] See Mission Letter of Commission President-elect Ursula von der Leyen to Frans Timmermans, Executive Vice President-designate for the European Green Deal (10 September 2019): https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-frans-timmermans-2019_en.pdf.
[12] See Mission Letter of Commission President-elect Ursula von der Leyen to Phil Hogan, Commissioner-designate for Trade (10 September 2019): https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-phil-hogan-2019_en.pdf, at 5.
[13] Regulation (EU) 2015/1843 of the European Parliament and of the Council, OJ 2015 L 272/1 (hereafter: the 'TBR'). For an introduction to the TBR see M Bronckers and N McNelis, "The EU Trade Barriers Regulation Comes of Age" (2001) 35 *Journal of World Trade* 427.
[14] See Mission Letter of Commission President-elect Ursula von der Leyen to Phil Hogan, above n 12, at 5.

## II. Labour standard obligations in the EU's FTAs

For about a decade now the European Union has been negotiating labour standard obligations in its new generation FTAs with third countries. They have been packaged with environmental norms in so-called sustainability chapters. The first example appears in the EU's FTA with South Korea.[15] Various types of provisions recur;[16] though the wording can differ from one treaty to another, in meaningful ways.

Firstly, these EU FTAs encourage the parties to respect and implement *existing* international commitments.[17] Within this group one finds hard obligations such as the one in CETA for each party to ensure that its labour laws and practices "embody and provide protection" under listed ILO standards.[18] Such standards, in all new EU's FTAs, always include the four core ILO standards prohibiting forced labour and child labour, protecting against discrimination and upholding the freedom of association and the right to collective bargaining.[19] CETA and the EU-Mercosur Trade Agreement go a step further including also obligations on health and safety of workers,[20] labour inspections and discrimination against migrants.[21] All these standards are based on pre-existing ILO instruments as well.[22]

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[15] OJ 2011 L127/1. The agreement was provisonally applied since 2011, and formally ratified in 2015.

[16] The EU's common formulation approach has been criticized for not sufficiently taking into account the diversity of work-related concerns amongst its trading partners. See Harrison et al., above note 10, at 11.

[17] Finding that the FTA with Singapore did not create *new* labour or environmental standards (in para. 152) allowed the European Court to say (in para. 155) that the FTA's sustainability chapter did not raise concerns regarding the regulatory competence of the EU or the Member States. See *Opinion 2/15* [2017] ECLI:EU:C:2017:376.

[18] CETA Art 23.3.

[19] CETA Art. 23.3; EU-Japan Economic Partnership Agreement Art. 16.4; EU-Mercosur Trade Agreement TSD Art. 4.4; EU-South Korea FTA Art. 13.4; EU-Vietnam Trade Agreement Art. 13.4; EU-Singapore FTA Art. 12.3; EU-Colombia and Peru Art. 269.

[20] CETA Artt. 23.3(2), 23.3(3); EU-Mercosur FTA Art. 4.10.

[21] CETA Art. 23.5(1) ; EU-Mercosur FTA Art. 4.10.

[22] ILO Convention No. 155 Occupational Safety and Health Convention; ILO Convention No. 7 Migration for Employment Convention; ILO Convention No.143 Migrant Workers Convention; ILO Convention No. 81 Labour Inspection Convention; ILO Convention No. 129 Labour Inspection Convention (Agriculture); ILO Convention No.87 Freedom of Association and the Right to Organise Convention; ILO Convention No. 98 Right to Organise and Collective Bargaining Convention; ILO Convention No.29 Forced Labour Convention; ILO Convention No. 105 Abolition of Forced Labour Convention; ILO Convention No. 138 Minimum Age Convention; ILO Convention No. 182 Worst Forms of Child Labour Convention; ILO Convention No. 100 Equal Remuneration Convention; ILO Convention No. 111 Discrimination Convention.

Other obligations are less definite. Certain FTAs include an obligation for their signatories to make "continued and sustained efforts towards ratifying" fundamental or other ILO conventions.[23] Commentators have argued that the practical significance of the latter obligation is elusive.[24] Nevertheless, in its recent dispute settlement request, the Commission is taking the position that the failure of Korea to ratify core ILO Conventions more than seven years after the FTA's entry into force infringes this best efforts obligation.[25] If that is indeed the Commission's current view, and taking on board that an assessment of best efforts depends to some extent on the circumstances of a particular case, it would make sense to supplement this efforts obligation with a concrete deadline by which these ratifications should occur: for example, within five or ten years after the FTA's entry into force at the most.

Secondly, EU FTAs contain *qualified* obligations which are dependent on additional conditions. These make it more difficult to identify when the obligation has been violated. This is notably the case for obligations not to lower existing levels of protection, or not to fail to enforce domestic labour laws and regulations. Such obligations are present in most of the EU's FTAs. Sometimes they are accompanied by the condition "in a manner affecting trade".[26] In other words, these obligations are triggered when trade effects occur. At other times, the condition is formulated as "an encouragement to trade."[27] In that case, an intent to affect trade is necessary, but actual trade effects need not be shown.[28] Inexplicably, an FTA may also combine both conditions.[29] As we will discuss, whether or not the application of labour standards in FTAs should depend on trade effects is a major bone of contention.

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[23] EU-South Korea FTA Art. 13.4(3); CETA Art. 23.3.4; EU-Japan Economic Partnership Agreement Art. 16.3(3); EU-Mexico Trade and Sustainable Development Chapter, Art. 3.4 (political agreement, April 2018).

[24] See Gött (2019), above note 4, at his notes 45-47; Bartels (2017), above note 4, at 3.

[25] See above, note 2.

[26] See, for instance, EU-South Korea FTA, Art 13.7; EU-Singapore FTA Art. 13.12

[27] See, for instance, CETA Art. 23.4; EU-Japan Economic Partnership Agreement Art. 16.2 (2).

[28] R. Zandvliet, *Trade, Investment and Labour: Interactions in International Law* 215 (Leiden PhD, 2019) http://hdl.handle.net/1887/68881.

[29] The text of the EU-Vietnam FTA finalized in 2018 contains both conditions: "in a manner affecting trade" regarding the obligation not to derogate from labour laws (Art. 13.3(2)); and "as an encouragement to trade" in respect of failures to effectively enforce labour laws (Art. 13.3(3)). See COM(2018) 691 final (17.10.2018).

Thirdly, EU FTAs contain a plethora of *vaguer* obligations such as the one to "promote awareness" of labour obligations.[30] Other agreements, such as the EU-South Korea FTA, include mere declarations of intent where the parties, for instance, "reconfirm that trade should promote sustainable development."[31] Such declarations barely have any legal significance.[32] The Commission ostensibly has been trying to persuade reluctant FTA partners to accept more goals to improve labour protection, by couching them in fuzzier language (and excluding hard enforcement).[33] Regretfully, the Commission's reports on the implementation record of the EU's FTAs to date do not include a reflection on the impact, if any, of such standards.[34]

The concern with such vague standards is not just their lack of effect. It is also their lack of focus. There is no scarcity of labour standards. Over the years, the ILO in particular has been a prolific rule-maker. Rather than deflecting attention from these multilaterally agreed ILO rules by negotiating yet another set of bilateral ones, and thereby undercutting the ILO's work,[35] the EU would do better to focus on where FTAs can add value: better implementation and enforcement of existing, notably ILO-agreed rules,[36] at least among preferential trading partners. Part of the problem may be that the EU has coupled labour with environmental standards in the sustainability chapters of its FTAs. Yet a separation could be in order. Although environmental problems addressed in FTAs easily are global in scope, it might be useful to experiment with new bilateral commitments, as these problems and potential solutions are rapidly developing. In contrast, the issues in labour relations have been recognized for a longer time and have been addressed for many years within the ILO.

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[30] CETA Art 23.6.

[31] EU—South Korea FTA Art 13.6.

[32] Zandvliet, above note 28, at 241 posits that clauses, which do not set forth a hard obligation, could still be legally relevant: they could be used as a defense by a respondent state in investor-state arbitration. By way of example, he argues that it would be inconsistent for an investment tribunal to grant damages when a state raises the minimum wage while that state promised to improve its labour standards in an agreement with the claimant's home state.

[33] See below, text at note 148.

[34] E.g., European Commission, *Report on Implementation of EU Free Trade Agreements in 2017* (2018). See also the underlying Commission Staff Working Document SWD(2018) 454 final (31.10.2018).

[35] Gött (2019), at his notes 48-58.

[36] See D Peksen and R G Blanton, "The impact of ILO conventions on worker rights: Are empty promises worse than no promises?" (2017) 12 *The Review of International Organizations* 75.

Accordingly, it is time for the EU to take a hard look and reassess whether the best efforts and blurrier standards it has included in its existing FTAs have been meaningful enough to eliminate troublesome practices, and whether problematic additional conditions can be deleted. The lessons of this exercise could be applied to future FTAs as well.

## III. Modelling a Private Complaint Procedure

A recent study highlights that the side-lining of non-governmental actors in the enforcement of FTA labour standards has had a "traceable impact" on the underperformance of these standards.[37] Governments have taken no, slow, or ineffective actions in response to private complaints. This has blocked or delayed solutions, the Commission's long-awaited formal steps against Korea regarding its failure to ratify core ILO Conventions being just one prominent example. European civil society representatives (assembled in the so-called Domestic Advisory Group[38]), engaged with monitoring the implementation of the labour standards in this FTA, already requested the Commission to initiate formal consultations with Korea in January 2014. Yet the Commission in its unfettered discretion opted for resolving the issue through political dialogue.[39] This informal process dragged on fruitlessly until December 2018.[40]

All this has damaged the credibility of FTA labour standards. Granting private stakeholders certain procedural safeguards, ensuring that their meritorious complaints will be pursued in a timely fashion, is therefore overdue. To date, academic observers have made various suggestions as to how a private complaint procedure might look. Here is a brief overview that can help to situate our proposal.

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[37] Gött (2019), above note 4, text at his notes 98-99.
[38] See below, text at notes 61-63.
[39] See J Harrison, M Barbu, L Campling, B Richardson, A Smith, "Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters" (2019) 57 *Journal of Common Market Studies* 260, 269.
[40] See above, text at note 2.

Some observers have reflected that the model of Investor-State Dispute Settlement (ISDS) might be extended to cover labour standards in FTAs.[41] With ISDS, private investors can directly submit their complaints to an international arbitral tribunal. By the same token, so these observers argue, individuals (e.g., workers) or private groups (e.g., trade unions) [42] should also be given the right to bring complaints directly to an international tribunal.[43] This seems to us a bridge too far. For the time being it is not even accepted by the EU that the sustainability chapters (including labour standards) in FTAs can be the subject of regular, intergovernmental dispute settlement.[44] Moreover, it is highly unlikely that the enforcement of labour standards included in FTAs can leapfrog the long-standing resistance to the creation of international supervisory mechanisms admitting private complaints in the trade area. None of the EU FTAs affords industries private access to an FTA tribunal to complain about violations of the classic trade obligations. At the multilateral level as well, private access to WTO tribunals has been a political no-go for decades.[45] Instead of proposing such far-reaching private access to FTA tribunals regarding labour standards, we opt for a different solution. Social partners and selected other civil society representatives should be able to trigger an investigation at EU level, where the European Commission remains in charge of any further dispute settlement proceedings brought under the FTA.

Against this background, we side with those[46] who have taken inspiration from the EU's Trade Barriers Regulation (TBR).[47] This mechanism allows EU industries to bring formal complaints to the

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[41] On the 'enforcement disparity' between investors' rights and labour standards in FTAs see H Gött, "An Individual Labour Complaint Procedure for Workers, Trade Unions, Employers and NGOs in Future Free Trade Agreements" in H Gött (ed) *Labour Standards in International Economic Law* (Springer, 2018) 185.

[42] P-T Stoll, H Gött and P Abel, *Model Labour Chapter for EU Trade Agreements*, 28 June 2017, 39, available at: <www.fes-asia.org/fileadmin/user_upload/documents/2017-06-Model_Labour_Chapter_DRAFT.pdf>.

[43] See Art. X.37 of their proposal.

[44] See below, text at n 106-110.

[45] See M Bronckers, "Private Appeals to WTO Law: An Update" (2008) 42 *Journal of World Trade* 245, 247-253; G T Schuyler, "Power to the people: allowing private parties to raise claims before the WTO Dispute Resolution System" (1997) 65 *Fordham Law Review* 2275.

[46] L Ankersmit, *A Formal Complaint Procedure for a More Assertive Approach Towards TSD Commitments* (Client Earth, 27 October 2017), available at < https://www.documents.clientearth.org/wp-content/uploads/library/2017-10-27-a-formal-complaint-procedure-for-a-more-assertive-approach-towards-tsd-commitments-version-1.1-ce-en.pdf>; L Bartels, *A Model Human Rights Clause for the EU's International Trade Agreements*, February 2014, available at: www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf.

[47] See above, note 13.

European Commission about violations by the EU's trading partners of multilateral or bilateral trade agreements.[48] The Commission is required to rapidly assess the admissibility of such complaints. If the complaint has merit, the Commission must conduct an in-depth investigation, including a verification in the third country concerned, a hearing of interested parties, and government-to-government consultations. Again, time limits apply. Should consultations fail, international dispute settlement and perhaps sanctions by the EU might follow. Of course, the point of a TBR case for private complainants is to obtain a positive solution, notably a settlement of their grievances, rather than obtaining trade sanctions from the EU against the third country. In all of this, while involving private stakeholders, the TBR preserves the state-to-state character of dispute settlement between governments.

What we propose is a modification of the TBR so that it can be used as well by other private stakeholders, notably trade unions and civil society, to complain about violations of labour standards. We will also propose changes to the international dispute settlement mechanism regarding labour rules in the EU's FTAs.

### *A. Admissibility of a Private Complaint*

It is important to design appropriate admissibility thresholds since the Commission has limited resources and cannot be expected to investigate thoroughly and in a time-limited fashion each and every complaint it receives. Furthermore, engaging with a third country on the grounds that it may have violated its international obligations towards the EU also taxes diplomatic relations. Thus, complaints without sufficient merit should be filtered out. According to the TBR, the Commission has 45 days to decide on the admissibility of a complaint.[49]

1. Representativeness

[48] TBR Art 1.
[49] TBR, Art. 5.4.

The TBR has been used in the EU since 1994[50] when it replaced the New Commercial Policy Instrument, but presently only industrial stakeholders are allowed to bring a private complaint.[51] We propose including additional categories of private complainants with regard to the enforcement of labour standards: representative EU social partners (trade unions and employers' organisations), as well as representatives of civil society appointed to monitor the implementation of an FTA's labour standards.

a. Social partners

Industry has long been admitted as a petitioner under EU trade instruments. It is of interest that labour unions are now also beginning to find their place. Thus, with the reform of the Trade Defence Instruments (TDI)[52] in 2018 trade unions have been given the right to lodge an application for the initiation of an anti-dumping or anti-subsidy investigation, even if only jointly with a Union industry.[53] With regard to TDI proceedings there is in fact case law requiring that a potential party to the investigation should demonstrate an objective link between the product concerned and its activities.[54] This is because the intervening organisation (Union industry or trade union) should be able to show that the outcome of the TDI investigation affects them. Accordingly, in the TDI interested trade unions would be trade unions representing employees of companies producing the product subject to investigation or that are suppliers of producers of the product subject to investigation.[55]

The difference between our proposal and the model being introduced in the TDI is that in our proposal trade unions would have a right to file a complaint independently, without other social or

[50] See M Bronckers and N McNelis, above note 13.
[51] TBR Arts 3 and 4.
[52] Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union, OJ 2016 L176/21; Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ 2016 L176/55.
[53] Regulation 2016/1036 Art 5 and Regulation 2016/1037 Art 10.
[54] Case T-256/97 *Bureau Europeen des Unions de Consommateurs (BEUC)* [2000] ECLI:EU:T:2000:21.
[55] See W Muller, "The EU's new trade defence laws – a two steps approach", *(2018) European Yearbook of International Economic Law* 45.

industrial partners. In our view, trade unions have their own interests in bringing a complaint with regard to labour standards violations and are in a position to autonomously provide sufficient evidence to initiate proceedings. Another reason to allow trade unions to act independently is that in a modified TBR procedure, accommodating labour standards, the interests justifying the complaint of a labour union can differ from the interests of labour unions in TDI proceedings. In TDI proceedings trade unions would intervene mainly to protect employment and avoid job losses within the EU. In contrast, with regard to labour standards included in the EU's FTAs they have a broader interest, also in the protection of shared values and fundamental rights abroad. International solidarity between workers is in fact the very *raison d'etre* of international trade union confederations.[56]

In view of these broader interests, one need not necessarily limit the admissibility of a labour union complaint to situations where its members manufacture the same products as the ones involved in the alleged violation of the labour right in the third country. We propose that the European Commission would accept complaints from social partners that are considered representative on the basis of the recognition procedure of TFEU Article 154. This Article provides that whenever the Commission is proposing EU legislation in the social policy field, management and labour unions shall be consulted. Such consultation can also lead to the conclusion of agreements between social partners and EU institutions.[57] To put this procedure into operation the European Commission had to identify the social partners to be consulted whenever required by EU law. This led to the creation of a list[58] on the basis of studies that the EU Foundation for the Improvement of Living and Working

[56] This is reflected in the Preamble of the Constitution of the European Trade Union Confederation (ETUC), which provides that ETUC cooperates with the International Trade Union Confederation (ITUC) to advance its objectives worldwide. The ITUC includes within the main aims of its Constitution to "strive for universal respect of fundamental rights at work". This has led to widespread cooperation and international networks between trade unions to support workers' rights across borders. See S Koch-Baumgarten and M Kryat, "Trade Unions and collective bargaining power in global labor governance" in A Marx, J Wouters, G Rayp and L Beke, *Global Governance of Labour Rights* (Edward Elgar, 2015); S "Sciarra, Notions of Solidarity in Times of Economic Uncertainty" (2010) 39 *Industrial Law Journal* 39.

[57] TFEU Art 155. See C Barnard, *EU Employment Law* (OUP, 2012) 47.

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

Conditions (Eurofund)[59] conducts to recognize social partners that are organised at EU level and capable of being consulted and negotiating agreements.

We submit that the same employer organisations and trade unions that are selected to take part in such procedures and have extensive institutional experience in dealing with labour issues at EU level, are also in a position to demand action regarding the violation of one of the labour standards protected under EU FTAs. There is in fact already an institutional infrastructure in place allowing the European Commission to interact with these social partners.[60] The use of this list of social partners would reduce drastically the number of persons allowed to bring an action under the proposed procedure.

b. Domestic Advisory Groups

Could other civil society groups also be admitted as TBR-petitioners? Domestic Advisory Groups (DAGs) have been created to assist in the implementation of sustainable development chapters in the EU's FTAs.[61] DAGs in the EU are composed of representatives of the European Economic and Social Committee (EESC), labour unions, employer federations and other European civil society organisations, such as human rights organizations.[62] DAGs can issue opinions and recommendations on the implementation of the trade and sustainable development chapter either upon request of other institutions or on their own initiative. When consensus is unattainable and it comes to a vote, EU DAGs can take such decisions by simple majority.[63]

[59] Eurofund, Representativeness of the social partners in the European cross-industry social dialogue (2013), available at: <www.eurofound.europa.eu/sites/default/files/ef_files/docs/eiro/tn1302018s/tn1302018s.pdf>.
[60] European Union, Consulting European Social Partners: Understanding How it Works (2011) available at: < https://publications.europa.eu/en/publication-detail/-/publication/5208f68c-3db1-405e-9b4a-51316aeacc03/language-en>

[61] E.g., see EU-South Korea FTA, Art. 13.12(4) and (5).
[62] See for the composition of the EU's DAG established under the EU- South Korea FTA https://www.eesc.europa.eu/en/organisation.
[63] On the operation of DAGs see for instance, the Rules of procedure of the EU Domestic Advisory Group created pursuant to Chapter 13 (Article 13.12) of the EU-Korea Free Trade Agreement available at < https://www.eesc.europa.eu/en/sections-other-bodies/other/eu-korea-domestic-advisory-group>.

DAGs have received a number of criticisms because of the lack of clarity on their mandate and the vague scope of their meetings. In addition, DAGs have been accused of inertia, and the attention given to them by Governments and the European Commission has been considered very limited.[64] Yet it should be recalled that it was the DAG established under the EU-Korea FTA that already in January 2014 called on the Commission to initiate formal action against Korea regarding the latter's failure to ratify core ILO Conventions.[65] Furthermore, DAGs, being composed of social partners as well as selected civil society organisations interested in the implementation of a particular FTA, are in an ideal position to perform the initial fact finding on the alleged violations necessary to start an action under the TBR. The European Parliament has urged the European Commission to respond systemically to concerns raised by DAGs.[66] Giving EU DAGs a private petition right under the TBR would be a good way of doing so.

On the other hand, we would not be in favour of granting civil society groups not represented in EU DAGs a right to complain under the TBR about labour standards violations by third countries. If social partners recognized under Art. 154 TFEU and EU DAGs see a reason for the EU not to pursue a complaint against the labour practices in a third country, their reticence should be given due weight. The same consideration also pleads against giving DAGs and other civil society representatives from the EU's FTA partner the right to petition the Commission under the TBR to investigate labour standard violations in their country. This is both a matter of policy as well prioritizing the use of the Commission's limited resources. Yet the Commission should not hesitate to hear their views once it has decided to open a TBR-investigation.[67]

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[64] For a critical assessment of DAGs see M Westlake, Asymmetrical institutional responses to civil society clauses in EU international agreements: pragmatic flexibility or inadvertent inconsistency?, *Bruges Political Research Papers 66//2017*; J Orbie, D Martens and L van den Putte, Civil Society Meetings in European Union Trade Agreements: Features, Purposes, and Evaluation, *CLEER Papers* 2016/3. Civil society organisations and trade unions have been skeptical that the present mechanisms to involve civil society in EU FTAs have any impact on the improvement of labour standards. See Harrison et al., above n 39.

[65] See text above, at note 40.

[66] See Resolution on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility of 5 July 2016 (2015/2038(INI)), para 22(b) http://www.europarl.europa.eu/doceo/document/TA-8-2016-0298_EN.html

[67] See below, text at n 94.

2. Merits

When the European Commission receives a complaint from a representative social partner, it needs to conduct another check to assess whether the complaint appears to have sufficient merit. In order to decide on admissibility, it is sufficient for the Commission to conduct a preliminary analysis, which in the present TBR is based on sufficient evidence to initiate a procedure.

The TBR requires a petitioner to show that the FTA obligation establishes a right of action for the EU; a requirement that would not need to be adapted in our proposal. In fact, according to the TBR, such a right of action exists when the relevant international rules 'either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question.'[68] This flexible formula captures violations of various types of labour standards currently found in FTAs: not just 'hard' obligations, but also 'softer' yet still meaningful standards.

A crucial point, however, is that the private complaint procedure should not require the demonstration of any particular effects on trade patterns. Presently, petitioners under the TBR do have to demonstrate some sort of trade effect.[69] Already in respect of violations of trade agreements curtailing EU exports, the trade effects requirement is not to be interpreted stringently though.[70] This requirement would in any event be misplaced in respect of complaints concerning labour rights violations in the EU's preferred trading partners with which it has concluded FTAs.

The EU insists on the inclusion of labour standards in FTAs for different reasons. In part these standards are motivated by economic considerations: without contesting the trading partner's comparative advantage,[71] the EU does want to reduce major disparities between the costs of producing goods and services in each of the signatories.[72] Experience has shown though that it is very

[68] See TBR Art 2(1)(a).
[69] See TBR Art 3.
[70] Bronckers and McNelis, (above n 13), 441-42.
[71] E.g. EU-South Korea FTA, Art. 13.2: 'The Parties note that their comparative advantage should in no way be called into question [by environmental and labour standards].'
[72] This was highlighted by the European Court of Justice in *Opinion 2/15* [2017] ECLI:EU:C:2017:376, para 159. The Court probably emphasised these trade effects because it was considering divisions of competence between the EU and

difficult to demonstrate the trade impact of labour right violations. This is illustrated by the case brought by the United States under the CAFTA-DR trade agreement against Guatemala, the only case fully litigated so far under a labour standard in an FTA. There, in the presence of a demonstrated violation of labour obligations by Guatemala, the US claim was not successful because of the impossibility of demonstrating that the lack of enforcement had happened ¨in a manner affecting trade¨, an additional condition in CAFTA.[73] This case demonstrates that maintaining a trade effects requirement in the TBR could impose a formidable obstacle to private complaints about labour standards.

Yet we oppose a trade effects requirement not only for practical reasons. There is also a normative side to our objections. Contrary to the United States, the EU has emphasized more the importance of fundamental rights, of shared values when establishing closer relations with its FTA partners.[74] As the Commission pointed out in its non-paper of July 2017, labour standards in FTAs are not only, or even primarily, driven by economic concerns.[75] One way of bringing these shared values to the fore is by allowing European trade unions through a TBR complaint to express their solidarity[76] with workers in a preferred EU trading partner who suffer when the FTA's labour standards are being violated in their country.

This value-based approach of EU trade policy overall was underlined by the Commission in a 2015 strategy paper,[77] and was reconfirmed by EU institutions and Member States in 2017.[78] One might question though whether the trade effects requirement in the TBR can be loosened. Would this

its Member States. Linking sustainability provisions (including labour standards) to trade helped to construe exclusive competence for the EU regarding these provisions under TFEU Art 207.

[73] See *Guatemala – Issues Relating to the Obligations Under Art 16.2.1(a) of the CAFTA-DR*, 14 July 2017, available at: bit.ly/2tiQos4; S Polaski, 'Twenty Years of Progress at Risk Labor and Environmental Protections in Trade Agreements' GEGI Policy Brief 004 (2017).

[74] The contrast between the US and EU approaches towards the inclusion of labour standards in FTAs is explained in Melo Araujo, above note 4, at 239-242.

[75] See European Commission services, *Trade and sustainable development chapters in EU free trade agreements*, 11 July 2017, 8.

[76] See above, text at n 56.

[77] European Commission, *Trade for All: towards a more responsible trade and investment policy* (2015).

[78] *The New European Consensus on Development: Our World, Our Dignity, Our Future* (2017). On the importance of labour standards see paras. 49 and 54.

not put into doubt the legal basis of Commission action under the TBR, which is after all a commercial policy instrument? The short answer is no. There are several ways to connect a complaint about labour standard violations, without an additional showing of specific trade effects, to the EU's common commercial policy.[79] First, there is necessarily a link with trade when a complaint about labour standards is brought under an FTA. The EU and its FTA partner have conditioned preferential trade relations on shared goals of labour protection, amongst other things.[80] Second, it is fully accepted in a trade regime that a country can take action against trade which offends its moral convictions, without there being any question of trade distortions.[81] Third, in a different context the EU legislature has already found that violations of labour standards, such as the non-ratification of ILO standards, do cause (unspecified) trade distortions. [82]

In sum, private complaints about labour standard violations in third countries should not only be admitted by the Commission in order to challenge undue cost disparities. Such trade distortions are difficult to prove, and they are not the only or primary concern of the EU when establishing preferential relations with a third country. Consequently, within the framework of a value-based trade policy, private complainants should not be required to show a link between the infringement of a labour standard and specific trade effects (as discussed above, in certain of the EU's FTAs trade effects could still be relevant in respect of obligations not to weaken or to effectively enforce domestic labour laws; we believe the EU needs to reassess this[83]). Sufficient evidence of the existence of the labour standard violation ought to be enough to trigger an in-depth investigation without the need to prove its trade impact.

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[79] As the European Court of Justice observed, the objective of sustainable development (including social and environmental protection) forms an integral part of the common commercial policy. See *Opinion 2/15,* above note 17, at paras. 142-147.

[80] See *Opinion 2/15, id.,* at para. 166.

[81] See Article XX(a) GATT; Article XIV(a) GATS.

[82] See Regulation 2017/2321, amending the EU's basic antidumping and countervailing duty regulations, OJ 2017 L 338/1, recitals 4 and 6. The non-ratification of ILO Conventions by countries such as China can lead to adjustments in the calculation of dumping margins. For an example see Commission Regulation 2019/1379, OJ 2019 L225/1, establishing a definitive antidumping duty on imports of bicycles from China, at paras. 100-102.

[83] See above text at notes 26-29; 74-82.

It is of interest that the soft dispute settlement procedures regarding the sustainability chapters (including labour standards) included in recent EU FTAs such as CETA[84] or EU-Japan[85] do not impose trade impact as a threshold condition. The EU ought to maintain this approach when reforming the TBR to accommodate complaints about labour standards.

3. The Union interest

There is no need to modify the additional requirement present in the TBR that the investigation should be 'in the interest' of the European Union. This leaves some discretion to the European Commission in deciding whether to open an in-depth investigation. For instance, one could conceive of the Commission declining to open proceedings against an isolated instance of a labour standard violation, in the event this is not connected to a pattern of similar instances, and the country concerned does have a good track record in respect of the norm(s) at issue.[86]

Yet the impact of this discretionary element in the Commission's assessment should not be overstated, as experience in the trade area has shown.[87] Indeed, once a private petitioner has shown it is entitled to bring a complaint (i.e., it is duly representative), and has brought sufficient evidence that a third country is likely to violate its FTA labour standards obligations, it would be politically difficult for the Commission to decide that it is not in the interest of the Union to even investigate such a complaint and to make inquiries with the third country. It should be recalled here that the Commission is obliged to publish a reasoned decision in the Official Journal.[88]

Furthermore, such a negative Commission decision is subject to judicial review via the action for annulment.[89] Social partners having brought a complaint under the TBR are likely to have standing

[84] CETA Art 23.10.
[85] EU-Japan Economic Partnership Agreement, Art 17 Chapter 16.
[86] Note that certain labour standards themselves require a sustained or recurring course of action (notably, regarding the failure to enforce domestic labour laws). See for instance EU-South Korea FTA Art. 13.7 (1); CETA Art. 23.4 (2); EU-Japan FTA Art. 16.2 (3). In those cases, demonstrating a pattern of (in) actions then becomes part of showing the merits of its complaint for the private petitioner.
[87] Bronckers and McNelis, (above n 13) 449-51. 4
[88] TBR Art 13.4.
[89] See ECJ, Case 70/87 *Fediol IV* [1989] ECLI:EU:C:1989:254.

in such an action. This may be less clear for a DAG, although the Court has admitted applicants without legal personality.[90] A DAG petition is probably best co-signed by the members supporting it, so that they would also become addressees of any negative Commission decision.

*B. Internal investigation by the Commission*

The present TBR defines the procedural steps to be taken by the European Commission when investigating the violations alleged in a private complaint it has declared admissible.[91] Most of these provisions can be utilised in an investigation of labour standards violations.

The European Commission has the duty to inform the third country involved of the complaint. This announcement is bound to trigger intergovernmental consultations between the EU and the foreign government. The Commission also has the power, when necessary, to perform an investigation in the third country and speak with private stakeholders, unless the country concerned objects.[92] Furthermore, the European Commission has an obligation to hear the parties concerned if they have made a written request for a hearing.[93] In principle, this system allows the European Commission to hear social partners in the EU and in the third country so that they can contribute to the evidence collected in the case. The nature of labour rights obligations might require slight adaptations to ensure that the petitioners are heard by the Commission and to support the participation of the social partners and private persons affected by the violation in the third country. Thus, we could imagine an obligation on the European Commission to reach out and collect evidence from private stakeholders, even if they did not register their intention to take part in the investigation after the publication of the notice in the Official Journal. After all, in an FTA-based case the burden of proof rests on the EU to demonstrate that labour standards are being infringed in the third country.[94]

[90] See ECJ, Case 175/73 *Union Syndicale* [1974] ECLI:EU:C:1974:95. See also K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (OUP, 2014) 313.
[91] See notably TBR Art 9.
[92] TBR Art 9.2.
[93] TBR Art 9.5.
[94] This is a notable difference with the conditionality review under the EU's GSP plus regime, pursuant to which the EU may withdraw or suspend trade preferences it has granted to developing countries that have committed but fail to uphold

There are experiences in other countries where this advanced model of fact-finding concerning labour standards violations is already a reality. For example, in the context of the enforcement of the Canada-Colombia Agreement on Labour Cooperation (CCOALC), a side agreement to the Canada-Colombia FTA, Canadian authorities performed extensive investigations within Colombia.[95] When Canada concluded this investigation it raised serious concerns about the protection of key labour rights in Colombia. Both governments then agreed on a 3 year action plan to be undertaken by Colombia (2018-2021).[96] The US Department of Labour as well has formally investigated private complaints about labour conditions in seven countries so far. Several of these have led to governmental action plans.[97]

It also seems appropriate to stipulate explicitly that the Commission is to examine whether the ILO has made any relevant findings regarding the alleged labour standard violations. The ILO has shied away from third party adjudication on the compliance of Members with its norms.[98] But the ILO does have supervisory mechanisms, though in most cases these are ultimately consensus-driven – and consensus has become more difficult to find amongst social partners, especially after the 2012 stalemate on the right to strike.[99] Still, it would be useful for the Commission in its investigation to

labour standards. In this review, the burden of proof rests on the developing country to show that it is complying with these standards. See Art. 15.2 Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008. OJ 2012 L303/1. The need for the Commission to pro-actively collect evidence on the GSP-beneficiary's non-compliance with labour standards is reduced accordingly.

[95] Review of public communication CAN 2016-1 Report issued pursuant to the Canada-Colombia Agreement on Labour Cooperation, 2017, available at: www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/2016-1-review.html.

[96] Available at: <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/colombia-action-plan.html>.

[97] US Bureau of International Labour Affairs, *Submissions under Labor Provisions under Free Trade Agreements*, available at: <https://www.dol.gov/agencies/ilab/our-work/trade/fta-submissions>. For a recent evaluation see Congressional Research Service, *Labour Enforcement Issues in U.S. FTAs* (September 2018); P Abel, "Comparative conclusions on arbitral dispute settlement in trade-labour matters under US FTAs" in H Gött, *Labour Standards in International Economic Law* (Springer, 2018) 153; F Giumelli and G van Roozendaal, "Trade agreements and labour standards clauses: explaining labour standards developments through a qualitative comparative analysis of US free trade agreements" (2017) 17 *Global Social Policy* 38.

[98] See generally A Koroma and P van der Heijden, *Review of ILO Supervisory Mechanism* (ILO, 2015).

[99] P van der Heijden, "The ILO Stumbling towards Its Centenary Anniversary" (2018) 15 *International Organizations Law Review* 203, 212-215.

take on board any fact-finding or reflections in ILO reports (not limited to reports endorsed by the ILO's supervisory bodies) that could help to shed light on the alleged violations.

Regarding the type of evidence to be collected, the TBR would require some adaptations as well. Presently, the Commission is supposed to consider only trade-related factors (e.g., volume of imports or exports, prices, impact on the Union industry, effects on trade) to establish whether the complaining industry has shown that it is injured by the third country's violation of its international obligations.[100] These factors are not particularly relevant for an investigation into violations of labour standards. As explained above, such violations may not, or not primarily, cause economic injury within the EU, but rather disrupt shared values that underlie the FTA with the third country. Establishing the violation itself, as well as such factors as its gravity and/or frequency, should be sufficient for a finding that the EU has a right of action against the third country concerned.

After an investigation of five or seven months,[101] there are several possible outcomes under the TBR. First, the Commission can conclude that there was no violation of the labour standard included in the FTA and that no further action should be taken.[102] Second, without necessarily admitting to a violation, the third country might propose to take measures that would remove the need for the EU to take further action.[103] Third, the EU and the third country might find that the best way to resolve the dispute is to conclude a new agreement between them.[104] Finally, the Commission might find there is a violation attributable to the government, even though this is not accepted by the third country. In that case, the Commission would normally want to initiate international dispute settlement proceedings under the FTA before taking any further action.[105]

**IV. International Dispute Settlement**

[100] TBR Art 11.
[101] TBR Art 9.8.
[102] TBR Art 12.1.
[103] TBR Art 12.2.
[104] TBR Art 12.3.
[105] TBR Art 13.2.

*A. State-to-State dispute settlement*

1. Institutional aspects

In case the third country does not remedy the violation of the FTA's labour standards found by the Commission, the next step would be international dispute settlement. To begin with, formal consultations are to be held, involving the FTA's trade and sustainable development committee.[106] If within a short period (say three months)[107] the consultations do not resolve the issue, the FTAs envisage proceedings before a panel of experts. This panel may issue a report setting out infringements of the labour standards; or is perhaps limited to suggesting more consensual ways forward.[108]

Compared to the general dispute settlement system of FTA, this procedure is more tentative and lacks sanctions. We submit that there is no need for such a separate, weaker enforcement mechanism dedicated to labour standards. Instead, disputes on labour standards obligations can and should be settled under the general dispute settlement mechanism of the EU's FTAs.[109] The only modification necessary would be the inclusion of labour law specialists in the roster of candidate panelists. This would not be the first time that the general dispute settlement mechanism of an FTA is utilised to enforce labour standards. In the recent Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), labour disputes are already settled via the general dispute settlement procedure. Whenever a dispute arises under the labour chapter, this agreement provides that "panelists other than the chair shall have expertise or experience in labour law or practice".[110] The CPTPP is an interesting model for the EU. This trade agreement includes a large number of

[106] See for instance CETA Art 23.9.
[107] See, for instance, CETA Art 23.10.
[108] See L Puccio and K Binder, *Trade and Sustainable Development in CETA,* European Parliament Research Service Briefing PE 595894 (January 2017) (the Panel of Experts is only supposed to find a 'shared solution').
[109] It should be noted though that this would seemingly remove one argument used by the European Court to find that the sustainability chapter (including labour standards) of the FTA with Singapore fell within the exclusive competence of the EU, and did not raise issues regarding the division of competence between the Union and the Member States. See *Opinion 2/15,* above n 17, at para. 154. Then again, even if the FTA's general dispute settlement procedure would apply to its labour standards, the interpretation, mediation and dispute settlement mechanisms set forth in the international (notably ILO) treaties from which the FTA's labour standards originate would remain in force.
[110] CPTPP Article 28.8 (5).

countries with which the EU already has FTAs in place (Canada, Chile, Japan, Peru, Singapore), or is still negotiating or finalizing FTAs (Australia, Mexico, New Zealand, Vietnam).

Taking enforcement of FTA labour standards more seriously is not just a matter of shoring up dispute settlement procedures though. As discussed above, it also requires taking a hard look at the patchwork of labour standards that have so far been included in the EU's FTAs.[111]

2. The relationship with the ILO

Some see the inclusion of a fully-fledged dispute settlement procedure to enforce core labour standards in the EU's FTAs as a threat to the ILO and its supervisory procedures. Admittedly, when other institutions become involved with enforcing ILO standards, the ILO to some extent loses ownership. If such 'outsourcing' is not done sensibly, the ILO's governance model may suffer.[112] Yet 'outsourcing' has been occurring, and can also reinforce ILO norms. One notable example, outside of the trade area, happened when the European Court of Human Rights relied on ILO instruments to read the right to strike into Art. 11 of the European Convention of Human Rights.[113] Those involved with labour standards in EU FTAs need to be cognizant that trade action is no substitute for the work done by the ILO, but rather a supplement. Accordingly, as we proposed above, rather than adding new and seemingly meaningless bilateral standards in FTAs, the EU should focus on better implementation and enforcement of existing ILO-standards.[114] Furthermore, in administering the TBR the Commission should take on board all ILO findings regarding the labour standard violations it is asked to investigate.[115]

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[111] See Section II above.

[112] Gött (2019), at his notes 48-58, cautions that selecting or adapting ILO instruments in bilateral trade agreements may relativize and delegitimize the ILO's work.

[113] ECtHR, *Demir and Baykara v. Turkey* (Application no. 34503/97), judgment of 12 November 2008 (Grand Chamber); *Enerji Yapi-Yol Sen v. Turkey* (Application no. 68959/01), judgment of 21 April 2009. See F C Ebert and M Oelz, *Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts* (ILO DP/212/2012), at 9-12.

[114] See text above, at note 35.

[115] See text above, at notes 98-99.

To illustrate that the trade system can co-exist, and productively co-operate with more specialized institutions, the WTO offers a useful example. The WTO complements other institutions such as the World Intellectual Property Organization (WIPO). Thus, the TRIPS Agreement of the WTO incorporates parts of the WIPO-administered Conventions, such as the Paris Convention on Industrial Property[116] and the Berne Convention on Copyright.[117] It is noteworthy that the WTO has received jurisdiction to adjudicate disputes in the area of intellectual property, and involving these Conventions, without it being necessary to show a link with trade[118] (Only later on in the WTO proceedings might trade effects become relevant, if and when the respondent country would fail to comply with a ruling to bring its disputed intellectual property measure into compliance with the WTO ruling, and the complaining country seeks to induce compliance through retaliatory trade restrictions[119]).

When the inclusion of intellectual property rules was first proposed at the time the WTO was created, many in the intellectual property community were uncomfortable. Would trade tribunals really be competent to judge the intricacies of intellectual property law? And would they give proper weight to intellectual property concerns, looking through the lens of a liberal trade regime? The fact was that GATT panels had engaged with intellectual property in the past.[120] The fact was too that WIPO did not offer an effective mechanism to enforce the classic intellectual property conventions.[121] The case law developed on intellectual property disputes since then by WTO panels and the WTO Appellate Body has not provoked fundamental opposition. The fact that the WTO and WIPO in

[116] TRIPS Art 2.1.
[117] TRIPS Art 9.1.
[118] TRIPS Art 64. The TRIPS Agreement, supposedly covering only trade related intellectual property rights, sets out straightforward intellectual property norms.
[119] DSU, Art. 22.4.
[120] See notably GATT panel, *US-Section 337*, 36S/345 (1989).
[121] Ultimately, the International Court of Justice would be the forum to adjudicate such disputes, yet no intellectual property dispute has ever been brought before the ICJ. E.g., Paris Convention on Industrial Property, Art. 28.

various ways cooperate with each other has helped to avoid conflicts and contradictions between the two organizations.[122]

Establishing preferential relations with other countries, while segregating trade from non-trade values, has become politically untenable for the EU. It should be noted as well that in human rights and international labour law the issue of enforcement remains very much a work in progress, with the ILO[123] lacking the enforcement procedures which are today common in international trade law. Accordingly, providing labour standards with a more effective enforcement mechanism established in the EU's comprehensive trade agreements, does fill a gap. Furthermore, as most of these labour standards are not linked to trade effects,[124] their enforcement by FTA tribunals should not be conditioned on a showing of trade effects either.

In sum, there is no good reason to think that the enforcement of labour standards by these FTA tribunals poses a threat to the ILO. It does behove FTA tribunals to verify whether ILO bodies have reported on the issues being litigated before them,[125] while keeping in mind the limitations inherent in the ILO's consensus-based supervisory mechanisms.[126] It would be advisable too if the political Committee on Trade and Sustainable Development supervising the implementation of the FTA's commitments, including its labour standards, would engage with the ILO's work too.[127]

*B. Sanctions*

It has been an article of faith for the EU to avoid hard enforcement mechanisms and resist sanctions in its FTAs with respect to violations of their sustainability chapters. One intriguing hypothesis is that the EU has been concerned about its own labour and environment protection standards being

[122] Early on the WTO and WIPO concluded a cooperation agreement, which entered into force in 1996: https://www.wto.org/english/tratop_e/trips_e/wtowip_e.htm.
[123] D Peksen and R G Blanton, above n 36.
[124] See Chapter II above.
[125] See CETA Art 23.10 (9).
[126] See text above at n 99.
[127] See for instance EU-South Korea FTA Art. 13.12.

challenged by its trading partners.[128] However that may be, it does not mean that the EU at present could not impose sanctions in case its trading partner violated an FTA's labour standards.

1. The current situation

First, there is the 'nuclear option' under public international law: the EU can terminate or suspend the liberalization provided by the FTA in case its treaty partner does not comply with any of its provisions, including the labour standards. This possibility was highlighted by the European Court when it analysed the sustainability provisions of the EU's FTA with Singapore.[129] Yet this possibility does seem rather remote.

Second, at least some of the FTAs' labour-related obligations (notably, those embodying the ILO's core labour standards) could be deemed to reflect human rights.[130] Respect for human rights constitutes an 'essential element' of the relationship between the EU and its preferential trading partners since the early 1990s.[131] In the case of human rights violations by its partners, FTAs or their accompanying framework agreements make provision for appropriate countermeasures, including the suspension, or conceivably even the termination of the FTA.[132] The EU has enforced the human rights clause, and suspended FTA benefits, in response to breaches of democracy, notably coup d'Etats and election irregularities.[133] However, non-compliance with (core) labour norms by a treaty partner has never led the EU to invoke the human rights clause. For instance, when the EU in December 2018 and July 2019 initiated formal dispute settlement proceedings with Korea on labour standard violations, it made no reference to human rights or the 'essential elements' clause in the

[128] See Melo Araujo, above note 4, at 242 and 253.
[129] ECJ, *Opinion 2/15* [2017] ECLI:EU:C:2017:376, para. 161 (referring to Art. 60(1) of the Vienna Convention). See Bartels (2013), above at note 4, who emphasizes that this is only a default position, in the absence of a *specific* treaty provision regulating the consequences of a breach of its norms.
[130] *Handbook on Assessment of Labour Provisions in Trade and Investment Agreements* 20 (ILO, 2017).
[131] E.g., 2010 Framework Agreement between the EU and Korea, Art. 1(1).
[132] See 2010 Framework Agreement between the EU and Korea, Art. 45(3) and (4) (envisaging the right of a party to take appropriate measures unilaterally in cases of "special urgency"). In a Joint Interpretative Statement covering this provision, the EU and South Korea agreed that a "particularly serious and substantial violation" of human rights, being an "essential element" would constitute a case of "special urgency".
[133] Saltnes, "The EU's Human Rights Policy: Unpacking the literature on the EU's implementation of aid conditionality", *ARENA Working Paper No. 2* (March 2013).

2010 Framework Agreement.[134] The EU based itself on the FTA's labour standards.[135] Moreover, in its more recent Strategic Partnership Agreement with Canada, the EU seems to have excluded the possibility that a violation of labour rights could ever be considered a violation of the human rights clause that might lead to a suspension or termination of CETA.[136] This is considered to be a major shift in the EU's treaty practice.[137] As a result, the notion of enforcing labour rights through human rights provisions by now appears rather theoretical.

This trend would seem to exclude a thought-provoking proposal for targeted sanctions. [138] Consider a situation where the labour standard (e.g., an ILO Convention) has been ratified and incorporated into domestic law; and where primary responsibility for the violation rests with the private sector. This situation could perhaps amount to a violation by the government of its obligation to enforce its labour laws effectively.[139] Yet rather than pursuing the foreign government, the Commission might propose to the European Council imposing sanctions on the responsible individuals or companies. The distinct advantage over trade restrictions would be that these sanctions are targeted on those implicated in the violation, and do not impose any further costs on the offending country or on the EU.

This proposal took inspiration from the sanctions that have been imposed against individuals, involved in human rights abuses, under the EU's Common Foreign and Security Policy. In one example under the CFSP, in 2015 the EU froze the assets and restricted the admission of four individuals from Burundi "involved in planning, directing, or committing acts that violate international human rights law or international humanitarian law."[140] The proposal for targeted

[134] See above, note 131.
[135] In its consultation and panel requests, above note 2, the EU referred to EU-South Korea FTA Art. 13.4 (3).
[136] See notably Art. 28(3) and (7) of the 2016 Strategic Partnership Agreement between the EU and Canada.
[137] Bartels (2017), above note 4.
[138] C. Portela, *'Enforcing Respect for Labour Standards with Targeted Sanctions'*, Core Labour Standards Plus project, Friedrich-Ebert-Stiftung 2018: https://www.fes-asia.org/news/enforcing-respect-for-labour-standards-with-targeted-sanctions/
[139] See above, text at n 26-28.
[140] European Council Decision (CFSP) 2015/1763, OJ 2015 L 257/37, cited in Portela, *id.*, at 9.

sanctions was predicated on the idea that certain violations of labour standards represent human rights abuses, and can infringe the 'essential elements' clause of an FTA.[141] However, the recent developments just discussed seem to foreclose this avenue for the EU at present.

One might add that the European Commission has shown great reluctance elsewhere as well to take trade action in the event of labour standard violations.[142] For instance in the Generalised System of Preferences Plus selected developing countries have received additional tariff preferences upon ratification of a set of international conventions on human rights, labour standards and the environment. In that context the EU can suspend preferences in case a beneficiary country does not uphold the labours standards it has ratified.[143] Yet for a long time the European Commission did not take any action in this respect. In fact, the Commission presently is subject to an investigation by the European Ombudsman for maladministration for its alleged failure to investigate the status of Bangladesh under the GSP after numerous violations of labour standards.[144] (Exceptionally though, on 11 February 2019 the Commission launched proceedings to suspend temporarily tariff preferences granted to Cambodia because of, amongst others, serious and systemic violations of labour rights.[145])

Against this background, it was significant that the Commission in its first non-paper of 2017 raised the possibility that the EU might discard its aversion to sanctions in response to labour standard infringements. The Commission suggested that sanctions might be introduced in FTAs after all. Yet upon further reflection, the Commission dismissed this option in its second non-paper of 2018.[146] To deny labour standards in FTAs the one feature (sanctions in case of non-compliance) that is missing

[141] Portela, above note 138, at 13.
[142] See V Depaigne, "Protecting fundamental rights in trade agreements between the EU and third countries" (2017) 42 *European Law Review* 562; J Vogt, "A little less conversation: the EU and the (non) application of labour conditionality in the Generalized System of Preferences" (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 285.
[143] See above, n 94.
[144] Complaint by the International Trade Union Confederation to the European Ombudsman, available at < https://www.ituc-csi.org/IMG/pdf/bangladesh_ombudsman_complaint_final_2018_06_06_clean.pdf >.
[145] OJ 2019 C55/11.
[146] See above, n 9.

in the ILO's regime[147] calls for a compelling justification. In our view the Commission's paper does not provide one.

The Commission notes that when other countries coupled sustainability obligations (including labour standards) with sanctions in their FTAs, these obligations were narrower in scope than the norms that the EU managed to include in its FTAs.[148] Yet the Commission makes no attempt to analyse whether its broader provisions on environmental protection or labour rights have actually been able to achieve more. There is no evidence to support this.[149] As discussed above, some of these provisions are so weak that they would seem to be virtually meaningless.

The other thing noted by the Commission is that trade sanctions do not guarantee that the non-complying country will change its offending practices.[150] Of course, the absence of sanctions does not guarantee this either. In fact, sanctions would only come into play if other means to induce compliance have failed. But then, the Commission argues, it is difficult to calculate the level of trade sanctions, or economic compensation, in response to a breach of social or environmental standards.[151] This is the nub of the problem. As the Commission itself recognised in its first non-paper, these sustainability (including labour) standards have not, or not primarily, been included for economic reasons.[152] Accordingly, it is indeed problematic to design compensatory sanctions. In fact, trade sanctions are in many ways counterproductive, even if the economic damage resulting from violations of trade-related obligations could be estimated more accurately. As analysed elsewhere, trade sanctions create unpredictability in the trading system, hit 'innocent bystanders' not being implicated in the violation in the offending country, and impose costs as well on the sanctioning country.[153] In

[147] Melo Arujo, above note 4, at 236; see also discussion above, at notes 98-99, and 123.
[148] See Commission services, Feedback and way forward on improving the implementation and enforcement of trade and sustainable development chapters in EU free trade agreements 26 February 2018, 3.
[149] See text above, at note 34.
[150] Ibid.
[151] Ibid.
[152] See text above, at note 75.
[153] See M Bronckers and F Baetens, "Financial Payments as a Remedy in WTO Dispute Settlement Proceedings. An Update" in J Bourgeois, M Bronckers and R Quick (eds) *WTO Dispute Settlement: Time to Take Stock* (College of Europe Studies, Peter Lang, 2017) 67-98. An earlier version of this analysis was published in (2014) 16 *Journal of International Economic Law* 281-311.

its re-assessment in 2018 the Commission therefore should not have confined itself to trade measures when considering sanctions.

2. Proposed sanctions

We endorse the proposal of the European Parliament that an FTA panel should have the means to oblige a non-complying country to make financial payments as a temporary inducement until the date it brings itself into compliance with the labour standard it has been found to violate.[154] This is not unprecedented. As the Commission itself noted, albeit only in its first non-paper of 2017,[155] Canada for example foresees fines in the event of infringements of the sustainability chapters in its FTAs (other than CETA, notably because of resistance by the EU!). Furthermore, the EU itself has useful experiences too with financial penalties in the event of EU law infringements by Member States. These can be demanded by the Commission and imposed by the European Court. The amount of the penalties depends on factors such as the severity of the infringement, its duration, and the ability to pay of the offending country (i.e., its GDP).[156] Such penalties have proved to be a successful tool to assure compliance especially when coupled with other strategies such as shaming via the media and discursive action.[157]

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

[154] See Resolution (above n 6) para 22(d).
[155] European Commission services, *Trade and sustainable development chapters in EU free trade agreements*, 11 July 2107, 3.
[156] For the Commission's Communications on this topic see: http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/financial-sanctions/index_en.htm . The Commission published an update of its calculus of lump sums and penalty payments in 2019. See its Communication published in OJ 2019 C70/1.
[157] G Falkner, "Fines against Member States: an effective new tool in EU infringement proceedings?" (2016) 14 (1) Comparative European Politics 36.

We also submit that the proposal[158] to introduce sanctions targeted at individuals and companies, responsible for egregious violations of labour standards, ought to be favourably considered. Clauses in FTAs, such as CETA, excluding the possibility that labour violations could amount to human rights violations, are to be avoided. It might be thought difficult to issue such sanctions on the same legal basis as the TBR. But nothing prevents the Commission, if it were to identify individuals with responsibility for wide-spread or grave labour standard violations during a TBR-investigation, from proposing sanctions to the European Council within the context of the CFSP. In other words, there is no reason to think that this shift in follow up would amount to an *abus de procédure.*[159]

Finally, in our proposal, trade sanctions are in principle not to be used to enforce labour standards. However, if the country violating the labour standard does not bring itself into compliance and refuses to make financial payments, the remedies in the general state-to-state dispute settlement could be extended to the sustainability chapter (including labour standards) as *extrema ratio*. The EU's FTA with Canada, for instance, includes several provisions to assure compliance with the final panel report concerning trade obligations. These include, after the expiration of a reasonable period for compliance, the right of the offended party to suspend obligations.[160] In the WTO system, retaliation must be equivalent to the level of nullification or impairment of benefits, which means that the retaliatory response may not go beyond the level of harm caused by the other party.[161] This idea of economic injury to calculate the amount of the retaliation can be adapted to sustainability obligations, so that the value of the retaliation could approximate the financial penalties that the offending country is refusing to pay. For instance, a financial penalty of €10 million could be replaced

[158] See above, text at note 138.
[159] Compare, for instance, the limitations imposed on the Commission from using facts discovered in a competition law investigation for a different purpose. See Regulation 1/2003, OJ 2003 L1/1, Art. 28.1. This procedural principle of EU competition law was enunciated before by the ECJ in Case 85/87, *Dow Benelux v Commission*, EU:C:1989:379, para. 17. No such limitation can be deduced in trade law from the TBR.
[160] CETA Art 29.
[161] WTO, Countermeasures by the prevailing Member, available at: www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm.

by tariff increases on imports from the offending country amounting to €10 million (or a multiple in case of sustained infringements).

So as to avoid any misunderstanding: we would expect any sanction mechanism to be reciprocal in nature. Accordingly, in the event an FTA partner would have reason to accuse the EU (or one of its Members) of infringing an agreed labour standard, and the EU were not to bring itself into compliance, the EU risks being confronted with similar sanctions. Now one must be mindful of the above-mentioned hypothesis that the EU has been resisting hard enforcement of labour standards out of concern that its own protection of labour might not always be compliant.[162] We would like to think, but cannot prove, that this hypothesis is mistaken. Perhaps the best way for the EU to remove any doubt is to accept sanctions.

## V. Managing expectations

Including labour standards in trade agreements is, of course, no panacea to improve the protection of labour. Trade agreements do not replace existing methods and fora to achieve better labour protection, to begin with the ILO. At best, the trade system can offer a supplementary means, notably by offering an enforcement tool – the lack of sanctions in case of non-compliance being a notable weakness of the ILO regime.[163] At the same time, one should guard against the risks that the linkage of labour standards and trade is used for protectionist purposes. Traditionally this has been the concern notably of developing countries when opposing any such linkage, notably in the WTO.[164]

Because of the underperformance of the labour standards in the EU's FTAs, so far neither the advantages nor the risks of linking them with trade preferences have crystallized. Being attentive to the risks, it certainly seems possible to achieve better labour protection without slipping into

[162] See above, text at note 128.
[163] Melo Arujo, above note 4, at 236; see also discussion above, at notes 98-99, and 123.
[164] The failed Seattle Ministerial Meeting in 1999 made this abundantly clear, and the linkage has remained anathema since then in the WTO. See generally K Addo, "The Global Debate: The Linkage Between Labour Standards and International Trade" in K Addo (ed), *Core Labour Standards and International Trade* (Springer, 2015).

protectionism. Thus, our proposal only envisages trade sanctions as a means of last resort, if all other attempts at settlement or remedies have failed. This makes bringing a TBR case about a labour standard violation a very cumbersome, if not plainly unsuitable proposition for a private petitioner primarily seeking trade restrictions against an FTA partner of the EU.

Having proposed including private complaints about labour standard violations in the TBR, as well as adaptations to the dispute settlement mechanism applicable to such labour standards in the EU's FTAs, we should caution against exaggerated expectations. Even if the regular dispute settlement system in the EU's FTAs, involving third-party adjudication, would come to apply to the FTA's labour standards, this does not mean that we can expect to see a flurry of cases soon – let alone multiple sanctions against FTA partners not properly upholding labour standards. Generally speaking, there is very little litigation under FTAs, even under their trade provisions. One recent study found only one example over the period 2006-2017;[165] only three dispute settlement cases were ever initiated under an FTA concluded by the EU, and this only very recently.[166] Furthermore, the one case fully litigated under an FTA's labour standards, by the United States against Guatemala,[167] was unsuccessful.

One plausible hypothesis for this dearth of activity is that in a bilateral context successful claimants lack the support of (many) other countries to press the losing country for compliance, support that they do have in a multilateral forum like the WTO. This may be an important explanation why smaller or less powerful countries are reluctant to take on big FTA partners like the EU. But it does not explain why the EU itself seems loath to initiate dispute settlement proceedings under its

[165] See G Vidigal, "Why is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement" (2017) 20 *Journal of International Economic Law* 927 (citing *Costa Rica v. El Salvador*, decided in 2014 under CAFTA).

[166] In addition to the complaint formally raised against Korea about the latter's failure to ratify core ILO conventions (see above, note 2), the EU in January 2019 formally requested consultations with Ukraine about the latter's wood export ban: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1968, and in June 2019 with the South African Customs Union regarding the latter's safeguard measure on frozen chicken cuts imports from the EU http://trade.ec.europa.eu/doclib/press/index.cfm?id=2031.

[167] *Guatemala – Issues Relating to the Obligations Under Art 16.2.1(a) of the CAFTA-DR* (above n 73).

many FTAs. Another conjecture has been that when it is in an asymmetrical power relation with smaller FTA partners, the EU might have felt that it had other ways to express its displeasure and obtain relief.[168] Yet others have pointed out that enforcement of its rights, either in the WTO or under FTAs, does not seem to have been a priority for the EU in recent years.[169] It would seem that the EU has become averse to litigation and has built up a preference for negotiation (with the risk of having to pay twice or more for the same concession). Whatever the reasons for this shifting attitude, a probable side effect has been that the TBR has fallen into disuse as well in recent years.[170]

Having said all this, we do believe it is worthwhile for the EU to endow well-supported private complaints about third-country violations of labour standards with procedural safeguards. In part this requires an adaptation of an already existing legal instrument, the TBR. This will also require a different mind-set amongst EU authorities, and notably the Commission, that more effective enforcement of international treaty obligations *can* make a difference. Additionally, as has been observed before, more resources need to be made available to fully monitor, implement and enforce the labour component of FTAs.[171]

## VI. Conclusions

Better enforcement of the labour standards included in the EU's FTAs is achievable. First, the labour standards in the EU's FTAs ought to be brought up to date, based on the experiences of the past decade or so: weeding out standards that are open-ended or fuzzy, as well as problematic conditions (notably, trade effects). New bilateral standards that undercut the work of the ILO must be avoided.

[168] For an early, revealing analysis see Broude, *From Pax Mercatoria to Pax Europea: How Trade Dispute Procedures Serve the EC's Regional Hegemony* (October 2004) available at: dx.doi.org/10.2139/ssrn.724641.
[169] See M Cremona, *A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon,* Swedish Institute for European Policy Studies 56 (Report No. 2, 2017); SJ Evenett, *Paper Tiger? EU Trade Enforcement as if Binding Pacts Mattered* (New Direction, 2016).
[170] The summer of 2017 saw the opening of a rare, new investigation by the Commission into a complaint brought by the European paper industry against a Turkish import licensing scheme. OJ 2017 C218/20. Following Turkey's revocation of the disputed scheme, the Commission suspended its investigation. OJ 2018 L62/36.
[171] Melo Araujo, above note 4, at 244-245.

Second, the incoming von der Leyen Commission intends to upgrade an existing private complaint procedure (the TBR) in the trade area, which is to become known as the EU's Enforcement Regulation. This Regulation ought to be adapted to admit complaints about labour standard violations by social partners, and by civil society groups already involved with the implementation of these standards (the so-called DAGs). In its investigation, the Commission should take on board all relevant findings already made by the ILO. Third, the tentative dispute settlement provisions specific to labour rights chapters in the EU's FTAs ought to be struck, and complaints about labour standard violations ought to be handled through an FTA's regular dispute settlement procedure. This would represent a move towards binding adjudication before a panel of independent experts. Fourth, rather than trade sanctions in the event of non-compliance with a panel ruling, the EU should favour financial penalties on the government or sanctions targeted on the individuals and companies responsible for the labour standard violations. Trade sanctions ought to become a last resort.

Finally, those who favour more rigorous enforcement by the EU of labour standards included in the EU's FTAs will have to engage more broadly with the EU's lacklustre enforcement of its rights under international trade agreements generally. The creation of a Chief Trade Enforcement Officer by the von der Leyen Commission seems a positive step. Perhaps the growing interest from civil society and political groups in more robust implementation of the labour rights obligations in the EU's FTAs could help to reinvigorate the enforcement of other parts of these agreements as well.

Labour standards, which are based on shared values and do not only seek to level the economic playing field, are the perfect example of an area of treaty-making which, if effectively enforced, would contribute to restoring trust in EU trade agreements. The recent dispute settlement proceedings brought by the Commission under the labour chapter of its FTA with South Korea could be the first signal of a change of attitude in this area. Our proposal provides for a more solid enforcement mechanism, allowing the EU to have a greater impact in a field which is increasingly at the centre of legal and societal debates.