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Labour Provisions in the US and EU FTAs: A Two-Level Games Perspective

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Abstract

This article examines labour protection in the US and EU FTAs. It shows that the US and the EU have different approaches to labour issues in FTAs, which can be measured in three main aspects: (i) scope of labour commitments; (ii) institutional arrangements for implementation and (iii) enforcement mechanisms. While the interests of state actors are different, social partners have the same preferences toward labour protection through trade in the US and the EU. However, this research finds that trade unions in the US have been more influential than those in the EU. The findings of this research show the different linkages, interactions, and influence of social partners on state actors when developing labour provisions in US and EU FTAs.

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1. Differences of labour provisions in the US & EU FTAs

By 2017, the US will have 14 on-going free trade agreements (FTAs) with 20 countries.² At the same time, the EU has concluded FTAs with more than 50 countries, and is negotiating many more.³ However, while the US and the EU have on-going FTAs with 11 partners,⁴ they have very different approaches to labour issues with them.

In the US FTA model framework, labour issues are subject to almost identical provisions, while in the EU FTA model labour issues are integrated into to a so-called “Trade and Sustainable Development Chapter”, which substantially differs from one trade agreement to the next. At the same time, the US FTA model pinpoints labour rights conditionality in a more concrete manner than the EU FTA model, where labour standards are not merely limited to the ILO Declaration, but also refer to much broader notions of human rights promotion in general.⁵ While the US considers labour an equal issue among other commercial issues, the EU sees it as an element of social development.

In terms of scope of labour commitments, since the adoption of the Declaration on Fundamental Principles and Rights at Work in 1998 by the International Labour Organisation (ILO), most of the US and EU FTAs refer to this Declaration. However, labour provisions in US FTAs generally cover the majority of labour rights provided by the ILO core labour standards: freedom of association, the right to form unions and bargain collectively, limitations on child labour, and the elimination of forced labour. In addition, some of US FTAs include cash standards on minimum wages, hours, and occupational health and safety. The EU FTAs refer to a wide source of labour provisions provided by not only the ILO 1998 Declaration but also ILO 2008 Declaration on Social Justice in Globalisation, ILO Decent Work Agenda, the UN Declaration on Full Employment and Decent Work 2006, the UN 2030 Agenda.

The rights and obligations in US FTAs have been strengthened over time. The obligations of each party in US FTAs have improved from “promote compliance and effective enforce domestic labour law and procedural guarantee”⁶ to “obligations to incorporate labour rights and principles in domestic law and non-derogation clause”⁷ and “maintain in law and practice fundamental labour rights”.⁸ Except for four FTAs (with Peru, Colombia, Panama, and Korea), all other US FTAs require parties to enforce their national laws.⁹ In some cases, the labour provisions in US FTAs are supplemented by labour side agreements, which interpret and provide guidelines and technical support for the implementation of labour provisions in

² United States Trade Representative (USTR). The US also signed the Trans-Pacific Partnership Agreement (TPP) with 11 countries on 4 February 2016 but then withdrew from it on 23 January 2017.

³ European Commission.

⁴ See Appendix.

⁵ EP Policy Department (2014) “A Comparative Study of EU and US Approaches to Human Rights in External Relations”. Available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534981/EXPO_STU\(2014\)534981_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534981/EXPO_STU(2014)534981_EN.pdf) (visited 6 November 2016).

⁶ NAFTA.

⁷ US FTA: Chile, Morocco, Singapore, Peru.

⁸ US FTA: Panama, Colombia, Korea, Vietnam.

⁹ See also Samira Salem and Faina Rozental, *Labour Standards and Trade: A Review of Recent Empirical Evidence*, Journal of International Commerce and Economic, 8 (2012)

the FTAs.¹⁰ Implementation of these provisions, in some cases, is not only required for ratification but also pre-ratification.¹¹

The EU FTAs do not specify the obligations of each party regarding labour rights but re-confirm their obligation as ILO member to respect, promote and implement fundamental labour rights provided by the ILO 1998 Declaration. The standards adopted by the ILO are the main point of reference for the promotion and the development of these labour rights. In addition, EU FTAs require parties to implement ratified ILO conventions, and call for ratifying updated ILO conventions.¹² Furthermore, the EU does not usually impose pre-ratification requirements (except in the case of the Colombia–Peru FTA, where the European Parliament issued a resolution on the trade agreement of 13 June 2012, calling for the submission of a Road Map, which required, among other things, labour law reforms on freedom of association and the right to collective bargaining¹³). However, in its most recent FTAs, the EU has moved to the US approach by requiring its FTA partners to ensure in laws and practices not only the fundamental principles and rights at work but also to ensure that labour law practices promote occupational safety and health, acceptable minimum employment standards.¹⁴

Although most of the US and EU FTAs refer to ILO fundamental rights at work, the institutions for implementation of these commitments are different. While institutions for implementation are set up in all US FTA, they are not compulsory in all the EU FTAs. Only 4 of 10 EU FTAs have institution arrangement. This may be explained by the reason that the EU approach is more of promotional and provide space for its trading partner to implement their commitments by themselves. This may also result from the different enforcement mechanism of labour rights in the US and EU FTAs.

The US and EU approaches toward labour in FTAs become more obvious by looking at the enforcement mechanisms. Labour provisions in US FTAs can be the object of more constraining dispute settlement mechanisms. Except for the North American Free Trade Agreement (NAFTA), where the labour side agreement has different enforcement procedures than does the main agreement, labour provisions in all other 9 US FTA has enforcement and dispute settlement mechanism equally with commercial provisions. Violation of labour provisions may result in “appropriate and commensurate measures”¹⁵ of monetary fines or trade sanctions.

On the contrary, the EU, however, does not pursue a trade sanctions based approach to social and labour standards. The EU has always rejected this approach to labour standards.¹⁶ The EU’s FTAs clearly show that as far as labour standard compliance is

¹⁰ US-Chile, US-Peru Labour Action Plan. In the TPP, the US has Labour Action Plans with Brunei, Malaysia and Vietnam.

¹¹ Labour law reforms requirements in Peru, Colombia, Panama and Vietnam.

¹² EU-Vietnam FTA.

¹³ European Parliament Resolution of 13 June 2012 on the EU trade agreement with Colombia and Peru (2012/2628(RSP)). Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef%4-//EP//TEXT%2A%2A%2A-P7-TA-2012-0249%2A%2A%2A-DOC%2A%2A%2A-V0//EN> (visited 6 November 2016).

¹⁴ EU-Canada FTA.

¹⁵ In the case of Jordan.

¹⁶ Speech of Peter Mandelson, “Trade policy and Decent Work Intervention”, at the EU Decent Work Conference, 5 December 2006.

concerned, the focus is on information exchange and technical assistance with the aim of improving domestic legislation, rather than on enforcement. The methods used for the promotion of labour standards are more in line with the soft governance approach used by the ILO. In EU FTAs, the proposed institutional mechanisms for enforcement do not contemplate measures beyond consultations and an expert report. It is expected that these will result in a mutually satisfactory resolution. However, there is no binding arbitration, and no penalty of any kind in the case of noncompliance, and no clear linkage is established between market access and compliance with labour standards.¹⁷ Even the very recent EU-Canada Comprehensive Economic and Trade Agreement (CETA) has no binding dispute settlement mechanism, and is arguably weaker on than the NAALC, into which Canada entered over 20 years ago.

US FTAs require explicit labour rights provisions, and labour rights are subject to a system of binding dispute settlement with monetary fines and trade sanctions. On the contrary, the EU FTAs cover labour rights, part of the broader human rights category, vaguely compared to the US and rely more on “goodwill” implementation through cooperation than explicit enforcement mechanism.

It has been argued that for large countries, like the US, the cost of no-agreement are generally lower for most domestic constituents than in smaller, more dependent countries.¹⁸ Trading partners need the US more than the US needs other trading partners, enabling the US to impose strong labour demands on them. However, for those same 11 trading partners,¹⁹ the US and the EU share many similarities. In terms of GDP, the two have roughly the same GDP, around \$18.5 trillion at the end of 2015. In terms of trade, in 2016, the EU was the largest trading block, with total trade of more than \$5 trillion; total US foreign trade was \$4.9 trillion.²⁰ Furthermore, the EU market size is bigger with a population of more than 510 million²¹ while the US population is about 325 million.²² While the size of the market and the volume of trade are similar, the cost of no agreement cannot contribute to explaining the different approaches to labour issues.

In this context, it is very important to understand why the US and EU have different approaches that result in different labour provisions and enforcement mechanisms in FTAs with the same trading partners.

This research aims at understanding how domestic politics in the US and the EU shape the different outcomes of labour provisions in their FTAs with the same trading partners. While the US see labour provisions as conditions for FTAs, and apply the “conditional strategy”, the

¹⁷ Jeffrey S. Vogt (2015), “*The Evolution of Labour Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership*”, *Journal of International Economic Law*, pp. 827–860.

¹⁸ Robert D. Putnam (1988), “*Diplomacy and Domestic Politics: The Logic of Two-Level Games*”, *International Organisation*, vol. 42, no. 3, pp. 427.

¹⁹ See Appendix.

²⁰ “U.S. Imports and Exports: Components and Statistics”. Available at <https://www.thebalance.com/u-s-imports-and-exports-components-and-statistics-3306270> (visited 6 November 2016).

²¹ “Population and population change statistics”. Available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Population_and_population_change_statistics (visited 6 November 2016).

²² “U.S. and World Population Clock”. Available at <https://www.census.gov/popclock/> (visited 6 November 2016).

EU regards FTAs as a mechanism to promote human rights with a “promotional strategy”. While labour provisions in US FTAs normally impose pre-ratification reforms, those of EU FTAs require post-ratification reforms. Additionally, labour provisions in US FTAs are enforced by a monetary fine, trade remedies, or sanctions. Those of EU FTAs are implemented through a “good will” mechanism of dialogue and technical cooperation.

This research tests the following hypotheses:

1. Preferences and interests of different actors toward labour rights protection through FTAs in the US are more demanding than in the EU.
2. Political institutions and ratification procedures in the US enable the US to impose stronger labour provisions than in the EU.

2. Preferences toward labour provisions in FTAs

2.1 State actors

The US is a dominant player in international trade. For many years, the US has recognized labour rights as a trade objective in its trade laws. Bilateral and regional trade agreements and the Generalized System of Preferences (GSP) are often used by the US as a preference to pursue its international trade policy rather than other mechanisms.²³ The McKinley Act of 1890 first linked trade to foreign labour conditions, restricting imports produced by prison labour. The Tariff Act of 1930 prohibited convict-made goods. Article XX(e) of the General Agreement on Tariffs and Trade (GATT) acknowledged the right of nations to restrict items produced by forced labour. Since then, labour standards have been incorporated into virtually every part of US trade law: the Tariff Act of 1930; the Trade Act of 1974; the Caribbean Basin Economic Recovery Act (CBERA) in 1983; the Andean Trade Preference Act (ATPA) in 1992.

The Trade Act of 1974 created fast-track authority for the President to negotiate trade agreements that Congress can approve or disapprove but cannot amend or filibuster. However, this act required recipient countries to comply with “US internationally recognized worker rights”, though this requirement was only applied to GSP. Because of this, the first two US FTAs with Israel, 1985, and Canada, 1988, did not include labour provisions.

This pattern began to change after 1990 when a number of factors came into play. First, the US began to undertake FTA negotiations with lesser-developed countries. Second, it became increasingly accepted that labour issues were related to trade and trade policy. Third, there was increasing consensus that globalization had both costs and benefits. The benefits tend to be broadly dispersed and include relatively higher economic growth and productivity and greater access to lower-priced goods. Finally, business groups have increasingly been willing to make concessions to labour groups in order to promote trade agreements and pave the way for greater trade with, and investment in, developing countries.²⁴

The US first included labour rights issues in a side agreement to the North American Free Trade Agreement (NAFTA), a trade agreement between the US, Canada and Mexico. NAFTA was initiated during the Presidency of George H.W. Bush (1988-1992) and completed and approved under President William J. Clinton (1993). The Canadian, Mexican and US governments signed the North American Agreement on Labour Cooperation (NAALC), on September 14, 1993, and it came into force along with its parent trade agreement, NAFTA, on January 1, 1994. NAFTA was the first US international trade agreement to actively include labour provisions. To attract investors, the NAALC required each party to maintain high levels of labour protection without lowering standards. Since

²³ Namely, the Generalized System of Preferences Renewal Act of 1984, the Overseas Private Investment Corporation Renewal Act of 1985; the Caribbean Basin Economic Recovery Act of 1986; the Omnibus Trade and Competitiveness Act of 1988; and the Trade Act of 2002.

²⁴ Mary Jane Bolle (2016) *Overview of Labour Enforcement Issues in Free Trade Agreements*, Congressional Research Service Report.

then, labour provisions and human rights have been conditional for all FTAs with the US, with varying degrees of enforceability, complementing NAFTA.²⁵

FTAs were given new impetus following the US Trade Act of 2002, which included “the authorization to promote trade”. This Act created a strong link between trade and workers’ rights. It stated details of 17 principles of negotiating objectives for FTAs to be signed under the fast track authority. In terms of labour issues, these objectives include: promote respect for worker rights, and the rights of children, consistent with core labour standards of the ILO; seek provisions in trade agreements under which parties strive to ensure that they do not weaken or reduce protections afforded in domestic labour laws as an encouragement for trade; and promote universal ratification and full compliance with ILO Convention No. 182 (Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour).²⁶ The strategy laid the foundation for US objectives in labour negotiations of later FTAs, including US-Chile, US-Singapore, US-Morocco, US-Central America.

On May 10, 2007, the bipartisan leadership in Congress and the Administration agreed to a Bipartisan Agreement on Trade Policy (May 10 Agreement), which was supposed to restore support for trade in Congress.²⁷ The most important advance was the abandonment of the ‘enforce your own laws’ approach of the earlier model. The May 10th Agreement requires each party to both “adopt and maintain in its statutes, regulations, and practices there under”, and requires, among other things, provisions in FTAs for a fully enforceable commitment to adopt and maintain the laws and practices of the ILO Declaration.²⁸ FTAs between US-Peru, US-Panama, US-Colombia, US-Korea incorporate a bipartisan agreement on labour enshrined in the May 10 Agreement. In contrast to earlier FTAs, the policy establishes a fully enforceable commitment requiring FTA countries to adopt, maintain, and enforces the ILO core labour standards; refrain from lowering standards; apply the same enforcement provisions for labour and commercial disputes; and refrain from defending their inability to enforce core labour standards on the basis of limited resources.²⁹

In 2012, the US released the model Bilateral Investment Treaty (BIT),³⁰ which included expanded labour obligations such as an obligation not to “waive or derogate” from domestic laws; an obligation to “effectively enforce” domestic laws; a provision whereby parties reaffirm their commitments under the ILO Declaration. Together with the May 10 Agreement, this requirement has become the template for the US in its FTAs.

²⁵ Ibid.

²⁶ Sec. 2102 of the Trade Act 2002.

²⁷ Cathleen Cimino-Isaacs (2016) *Labour Standards in the TPP in Trans-Pacific Partnership: An Assessment*, Peterson Institute for International Economics.

²⁸ These are (1) a fully enforceable commitment that Parties to free trade agreements would adopt and maintain in their laws and practices the *ILO Declaration*; (2) a fully enforceable commitment prohibiting FTA countries from lowering their labour standards; (3) new limitations on “prosecutorial” and “enforcement” discretion (i.e. countries cannot defend failure to enforce laws related to the five basic core labour standards on the basis of resource limitations or decisions to prioritize other enforcement issues); and (4) the same dispute settlement mechanisms or penalties available for other FTA obligations (such as commercial interests).

²⁹ Mary Jane Bolle (2016) *Overview of Labour Enforcement Issues in Free Trade Agreements*, Congressional Research Service Report.

³⁰ <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (visited 6 November 2016).

In the Trans-Pacific Partnership Agreement (TPP), the US did not only use existing trade policy tools to improve respect for fundamental workers' rights and working conditions with trading partners, but also developed stronger tools with even greater reach.³¹ The US sought enforceable rules that protect the rights of freedom of association and collective bargaining; discouraged trade in goods produced by forced labour, including forced child labour; and established mechanisms to monitor and address labour concerns. The US also set out 10 objectives of labour issue in TPP negotiation.³²

US Objectives on Labour Issues in the TPP

- Secure broad commitments that would require all TPP countries to adopt and maintain in their laws and practices the fundamental labour rights as recognized by the ILO.
- Secure additional commitments by TPP countries, to have laws governing minimum wages, acceptable hours of work, and occupational safety and health.
- Ensure that labour commitments are subject to the same dispute settlement mechanism, including potential trade sanctions, that applies to other chapters of the Agreement.
- Establish rules that will ensure that TPP countries do not waive or derogate from fundamental labour laws in a manner that affects trade or investment and that they take initiatives to discourage trade in goods produced by forced labour, regardless of whether the source country is a TPP country.
- Establish a means for the public to raise concerns directly with TPP governments if they believe a TPP country is not meeting its labour commitments and requirements that governments consider and respond to those concerns.
- Provide effective remedies for violations of TPP countries' labour laws.

In fact, the signed TPP Labour Chapter shows that the US achieved beyond its objectives. In addition to the main Labour Chapter, the US has three side agreements on labour with Brunei, Malaysia, and Vietnam. These three agreements are an integral part of the TPP and enforced by the same mechanism. Their success, among other things, shows the role of a clear strategy from the beginning in labour negotiation in FTAs.

While the US has a conditional approach to labour rights in its FTAs, the EU pursues an integrated approach to the protection of human rights in the context of its trade policy, including FTAs. The EU focuses more generally on social development objectives within a cooperative framework. The EU claims that its trade policy "is conceived not only as an end in itself but as a means to promote sustainable development."³³ According to EU Trade Commissioner Cecilia Malmström, "Trade is not only a tool to create new economic opportunities for consumers, workers and employers, but also a tool to help the world become a more responsible place. Trade is not just about our economic interests, but also

³¹ USTR & DOL (2015) "Standing Up for Workers: Promoting Labour Rights through Trade". Available at <https://ustr.gov/issue-areas/labour#> (visited 6 November 2016).

³² For details see <https://ustr.gov/sites/default/files/TPP-Detailed-Summary-of-US-Objectives.pdf>.

³³ Report by the European Communities No. WT/TPR/G/136, 8.

about values. Child labour, insufficient workers' rights or irresponsible corporate behaviour are global scourges that I want trade policy to help us deal with."³⁴

In the EU, the strategy of state actors in labour protection in FTAs is broader. The EU wants its trade policy to support economic growth, social development, and environmental protection. Coherence and mutual supportiveness among these three elements are the basis for achieving sustainable development. From the EU's perspective, trade policies and agreements can have wide-ranging effects on the economy, employment, labour standards, social cohesion, and the environment, including policy development and regulatory aspects. The EU wants to ensure that its trade actions are supporting sustainable development within the EU, in its partner countries, and globally, and that respect for fundamental workers' rights requirements is ensured within trade and economic expansion.

The EU mandate is to use FTAs as long-standing policy instruments for promoting European integration on democratic, rights-based support for citizens.³⁵ Since 1995, the EU has included a human rights clause in all its trade, cooperation, partnership, and association agreements, except the WTO agreements.³⁶ The clause defines respect for fundamental human rights, including core labour rights, as an "essential element" of the agreement.³⁷ The EU makes it a priority to see that our trading partners implement provisions on core labour standards like the abolition of child labour, the rights of workers to organise, and non-discrimination at work.³⁸

EU policymakers want their counterparts to recognize that if they promote human rights and develop the habits of good governance, they will gradually attract long-term investment, stimulate trade, and achieve sustainable development.³⁹ However, in the EU's case, the enforcement of human rights provisions tends to be rather weak⁴⁰ while a great deal of persuasion and negotiation is used to accomplish the protection of labour rights and sustainable development.⁴¹ The EU does not pursue a trade sanctions based approach to social and labour standards. Instead, it offers additional tariff preferences to countries, which

³⁴ European Commission (2014) *Trade for All: Towards a More Responsible Trade and Investment Policy*. Available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (visited 6 November 2016).

³⁵ Petersmann, Ernst-Ulrich (2016) 'The European Union's 'Cosmopolitan Foreign Policy Constitution' and Its Disregard in Transatlantic Free Trade Agreements'. *European Foreign Affairs Review* 21, no. 4, pp. 449–468.

³⁶ European Commission, "The European Union's Role," 9.

³⁷ European Commission, Communication from the European Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, Document No. 5/23/1995, COM(95)216, 8.

³⁸ European Commission (2014) *Trade for All: Towards a More Responsible Trade and Investment Policy*.

³⁹ European Parliament, Council, Commission, Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: "The European Consensus," 2/24/2006, Official Journal of the European Union, C46/2. European Commission, Communication from the Commission to the Council and the European Parliament—The European Community's Development Policy, 4/26/2000, Document No. COM(2000)212 final, Brussels, 27.

⁴⁰ European Parliament (2014) "A Comparative Study of EU and US Approaches to Human Rights in External Relations" – Document No. EXPO/B/DROI/2014/27.

⁴¹ Wolfgang Plasa (2015) "Reconciling International Trade and Labor Protection: Why We Need to Bridge the Gap between ILO Standards and WTO Rules", Lexington Books: London, p137.

have signed and are effectively implementing the core UN/ILO human/labour rights international conventions (GSP system and GSP+). The most strict enforcement measures to combat labour rights violations are withdrawn development funds, or take “appropriate measures” such as suspending the agreement in full or in part if an offending partner country (mostly following a consultation procedure) fails to bring satisfactory change in its human rights records.⁴² It has been argued that the EU’s preference for a ‘soft’ and cooperative approach is rooted in a belief within EU institutions that trade sanctions are neither desirable nor effective, and that labour rights should be promoted through different instruments.⁴³

In practice, while the US had clear objectives based on the May 10 Template in the TPP labour negotiations, the EU-Vietnam FTA was conducted in accordance with the original negotiating directives of 2007. This Directive calls for “any agreement to incorporate binding social and environmental clauses, committing the parties to ratifying the ILO conventions and ensuring their effective implementation, particularly as regards child and forced labour, the eradication of which is a crucial challenge for the ILO”.⁴⁴

Labour objectives of the EU in CETA were set out by the Recommendation from the Commission to the Council. Accordingly, this recommendation requires a broad approach to labour issues as an integral part of sustainable development, and provide no sanction for the enforcement of labour commitments in CETA.⁴⁵

EU Labour Objectives in CETA

The Agreement will include commitments by both sides in terms of the social and environmental aspects of trade and sustainable development. The Agreement will include provisions to promote adherence to and effective implementation of internationally agreed standards and agreements in the social and environmental domain as a necessary condition for sustainable development. The Agreement will also include mechanisms to support the promotion of decent work through the effective domestic implementation of ILO core labour standards, as defined in the 1998 ILO Declaration of Fundamental Principles and Rights at Work as well as enhancing cooperation on trade-related aspects of sustainable development. It will also include provisions in support of internationally recognised standards of corporate social responsibility.

⁴² Other “appropriate measures” under the human rights clause include: alteration of the contents of cooperation programmes or the channels used, reduction of cultural, scientific and technical cooperation programs, postponement of a Joint Committee meeting, suspension of high-level bilateral contacts, postponement of new projects, refusal to follow up partner’s initiatives, and suspension of cooperation. See European Commission, Communication from the European Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, Document No. COM(95)216, 5/23/1995, 3.

⁴³ European Parliament (2016) TTIP and Labour Standards. Available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578992/IPOL_STU\(2016\)578992_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578992/IPOL_STU(2016)578992_EN.pdf) (visited 6 November 2016).

⁴⁴ European Parliament Resolution of 8 May 2008 on trade and economic relations with the Association of South East Asian Nations (ASEAN), Document No. 2007/2265(INI).

⁴⁵ Recommendation from the Commission to the Council in order to authorize the Commission to open negotiations for an Economic Integration Agreement with Canada, Document Nno. 9036/09 WTO 80 SERVICES 21 CDN 13 RESTREINT UE

The Agreement will foresee the monitoring of the implementation of the commitments and of the social and environmental impacts of the Agreement through inter alia public review, public scrutiny and mechanisms to address disputes as well as instruments of encouragement and trade related cooperation activities, including with relevant international fora.

In the US, Congress adopted trade policy with a clear mandate and template for labour negotiations that requires specific labour right provisions enforced by sanction mechanisms. In contrast, EU's strategies for negotiating FTAs are provided for by directives on a case-by-case basis depending the trading partners that require broader social labour protection enforced by non-sanction mechanism.⁴⁶

Different groups are likely to have quite different preferences on labour issues in FTAs. The group with the greatest interests in a specific issue is to hold the most extreme position. It has been argued that policy makers, who have the right to veto, or use human rights in FTAs to compete for influence, use regulations help them to solve other political problems or to win the supports of interest groups.⁴⁷ In terms of labour, trade unions and employers (business) are the most interested groups. In this context, it is important to understand how social partners influence the US and EU state actors' preferences toward labour protection in FTAs. Are trade unions in the US more demanding and stronger than those in the EU? Are employers in the US less powerful than employers in the EU?

2.2 Social partners

Trade Unions

In general, the literature suggests that the effect of US labour provisions on the situation of workers depends largely on the presence of strong domestic social partners.⁴⁸ It has been argued that the reason why the US started to link trade and labour standards in its trade laws was the demand from domestic industries and trade unions for stronger protection against imports of goods produced abroad under sub-standards labour condition.⁴⁹ American unions and, in particular, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) argued for extended labour standards to be included in trade agreements. Because it has strong demand on protecting labour rights through trade, AFL-CIO requires that enforcement mechanism be conditional in US FTAs.

According to AFL-CIO, successful trade policies must promote the fundamental labour rights included in the ILO core conventions; the preservation and expansion of public services; the creation of high-wage, high benefit jobs; the protection of democracy and allow public policies that regulate in the public interest. Global corporations are working to create a

⁴⁶ Overview of FTA and Other Trade Negotiations, available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (visited 6 November 2016).

⁴⁷ Emilie M. Hafner-Burton (2009) *Forced to Be Good*, Cornell University Press: London.

⁴⁸ Franz C. Ebert & Anne Posthuma (2011) *Labour provisions in trade arrangements: current trends and perspectives*, ILO: Geneva.

⁴⁹ Wolfgang Plasa (2015) *Reconciling International Trade and Labour Protection: Why We Need to Bridge the Gap between ILO Standards and WTO Rules*, Lexinton Books: London, p123.

trading system, which takes the power to regulate their behaviour away from voters and national governments and puts it at the international level, where there are no voters. This market fundamentalist approach does not, and cannot, work for workers. Successful trade policies must have at their core not simply “open markets” but improved lives for workers.⁵⁰ The AFL-CIO acknowledges that US FTAs have made measured (though incomplete) progress toward higher standards but notes that enforcement “has been slow and cumbersome, and relies totally on the political will of governments”. AFL-CIO President denied that enforcing labour standards has a protectionist impact. According to him, the ILO standards were designed to protect the interests of workers in low-income, as well as high-income, countries, and extending the same protections to workers' rights could not be protectionist.⁵¹

For example, trade unions play an important role in including labour issues in NAFTA. NAFTA, as initially conceived and negotiated, included no provisions for labour rights. In 1991, President George Bush told the US Congress: “Mexico’s labour standards are comparable to those in the US, Europe and other industrialized countries. The Mexican Constitution of 1917, as implemented through various pieces of legislation, provides a comprehensive set of rights and standards for workers in all sectors of Mexico. What have been lacking are budgetary resources to permit effective enforcement of the Constitution and legislative measures”.⁵² President Bush signed NAFTA in December 1992, but sending it to the Senate for ratification was up to the next president. Many unions campaigned against the passage of NAFTA, fearing that it would undercut jobs of union workers and weaken the ability of unions to negotiate favourable contracts with employers.⁵³ They pressured presidential candidate Bill Clinton to renounce NAFTA. They argued that the trade pact was a giveaway to multinational corporations and investors that would destroy jobs, drive down wages, harm the environment, and undermine human rights. Facing stiff questions from labour unions - a core Democratic Party constituency - Clinton declared that he would support NAFTA, stating: “This agreement does nothing to reaffirm our right to insist that the Mexicans follow their own labour standards, now frequently violated - this is a very important issue - and not aggravating the wage differentials which already exist.”⁵⁴ However, Clinton was heavily dependent on campaign support from business interests, especially from high-tech industries and Wall Street investment specialists, who supported NAFTA. The result was a compromise. Clinton promised to support NAFTA, but only if “side agreements” addressing labour and environmental issues were added to the trade arrangement.⁵⁵

⁵⁰ AFL-CIO, *The Trans-Pacific Partnership: Four Countries That Don't Comply With U.S. Trade Law*. Available at <http://www.aflcio.org/content/download/150491/3811471/file/TPPreport-NO+BUG.pdf> (visited 16 November 2016).

⁵¹ Gary Burtless (2001) *Workers' Rights: Labour Standards and Global Trade*. Available at <https://www.brookings.edu/articles/workers-rights-labour-standards-and-global-trade/> (visited 16 November 2016).

⁵² Cited in Jeremey Levinson, “*Unrequited Toil: Denial of Labour Rights in Mexico and Implications for NAFTA*”, World Policy Institute, April 1993, p. 2.

⁵³ LABOUR UNIONS. Available at <http://www.referenceforbusiness.com/small/Inc-Mail/Labour-Unions.html#ixzz4bV84OLYG> (visited 16 November 2016).

⁵⁴ *Expanding Trade and Creating American Jobs*, Remarks by Governor Bill Clinton, North Carolina State University, Raleigh, NC October 4, 1992

⁵⁵ Lance Compa (1999) “NAFTA's Labour Side Agreement Five Years On: Progress and Prospects for the NAALC” 7 *Canadian Lab. & Emp. L.J.* 1.

Negotiations for the labour side agreement began soon after Clinton took office, and the NAFTA labour side agreement was signed in 1993.

Some US labour and human rights advocates did not like this approach to trade and labour rights. They didn't see NAFTA advancing labour rights because it required parties to enforce their own laws (which were often lower than internationally accepted core labour standards). In addition, NAFTA's labour provisions were in side agreements, rather than in the body of the trade agreement. They wanted Congress to press the Administration to take a more comprehensive, enforceable and binding approach that built on internationally accepted standards. The AFL-CIO commented: "Free trade agreements like the NAFTA and the agreements of the World Trade Organization (WTO) are hurting US workers. These agreements allow imports made under inhumane conditions to flood our markets, undercutting US jobs and wages. They encourage US companies to scour the world looking for the lowest wages, the weakest labour laws and the most vulnerable workers".⁵⁶

Not only NAFTA, but later the CAFTA labour chapter, was harshly criticized by trade unions and human and labour rights organizations for doing little to improve labour laws and law enforcement or to curb future abuses.⁵⁷ One of the central criticisms of CAFTA was that it did not require a party's labour laws to comply with the rights established in the ILO's fundamental conventions. Instead, the parties were merely required to 'strive to ensure' compliance with these rights, and similarly to strive not to weaken them to attract trade or investment. A party's breach of these commitments could not be challenged in a dispute settlement. Indeed, only one of the chapter's commitments – to enforce one's own labour laws – could be subject to dispute settlement in the case of a breach.

In 2011, the AFL-CIO joined with labour federations of seven countries (Australia, Canada, Malaysia, Japan, Mexico, New Zealand, Peru) to draft and submit a comprehensive labour chapter for the TPP addressing their concerns.⁵⁸ However, the vast majority of those proposals were not reflected in the final TPP text. According to trade unions, while acknowledging minor reforms, the TPP labour chapter did not prove to be an effective mechanism to guarantee the full enjoyment of fundamental labour rights and workplace standards. The labour chapter still maintains a state-state dispute mechanism, which relies entirely on the discretion of TPP governments to prosecute claims against one another; this stands in stark contrast to the investor-state mechanisms available to corporations.⁵⁹

⁵⁶ Cited by Robert Rogowski & Eric Chin (2008) "US Trade Law & FTAs: A Survey of Labour Requirements", *Journal of International Commerce & Economics*, Vol 1, pp113-136.

⁵⁷ For criticism of the CAFTA Labour Chapter, see e.g. Report of the Labour Advisory Committee for Trade Negotiations and Trade Policy (LAC), *The US–Central America Free Trade Agreement*, March 2004. Available at <https://ustr.gov/sites/default/files/uploads/agreements/morocco/pdfs/LAC%20Report%20for%20CAFTA.pdf> (visited 26 November 2015)

⁵⁸ ITUC, "The Trans-Pacific Partnership Agreement: Model Labour & Dispute Resolution Chapter". Available at <https://www.ituc-csi.org/the-union-proposal-for-the-labour> (visited 26 November 2016).

⁵⁹ ITUC, "TPP Labour Chapter Scorecard Fundamental Issues Remain Unaddressed". Available at <https://tpplegal.files.wordpress.com/2015/12/ituc-labour-chapter-analysis.pdf> (visited 26 November 2016).

Though the TPP has the strongest labour commitments of FTAs so far,⁶⁰ the AFL-CIO has expressed opposition to it, citing the lack of enforceable labour provisions,⁶¹ without incentives mechanisms to make labour provisions to protect worker rights.⁶² When the TPP was opposed by trade unions, both of the presidential candidates opposed this agreement during their campaigns.⁶³ President Donald Trump decided to withdraw from the TPP on taking office. This shows the importance of trade unions in US politics, and their influence in US FTAs, not only in negotiation but also in the ratification process.

In the EU, the social partner organisations represent the interests of European workers and employers. The main cross-industry organisations representing social partners at EU level are: the European Trade Union Confederation (ETUC); the Union of Industrial and Employers' Confederations of Europe (BUSINESSEUROPE); the European Association of Craft, Small and Medium-sized Enterprises (UEAPME); and the European Centre of Enterprises with Public Participation (CEEP). Alongside these cross-industry organisations are many other socio-professional groups representing specific or sectoral interests.⁶⁴

While trade unions in the US have strong, clear strategy, and demands for labour provisions in FTAs, the positioning of European trade unions over the EU's free trade agenda has been characterised by ambivalence. In their official pronouncements, trade union confederations have been highly critical of the orientation of EU trade policy toward the interests of capital at the expense of a social agenda. While ready to voice criticism of its shortcomings, however, very few European trade union confederations have actively opposed the EU's free trade strategy.⁶⁵

In the EU, trade unions offer support to the EU's FTAs on the understanding that they should include social chapters dealing with workers' rights, especially the core labour standards enshrined in the conventions of the ILO. Compared with the AFL-CIO position, that of the ETUC has more to do with general principles and a desire for cooperation. While trade unions in the US require a separate chapter on labour issues with internationally recognised labour rights, trade unions in the EU regard labour rights as a component of social element of sustainable development. Instead of referring to specific labour rights, the ETUC requires "parties to the agreement will ratify the ILO standards concerned".⁶⁶ In fact, labour provisions

⁶⁰ "TPP Protecting Workers". Available at <https://ustr.gov/sites/default/files/TPP-Protecting-Workers-Fact-Sheet.pdf> (visited 26 November 2016).

⁶¹ AFL-CIO Blog, 'The Hardworking Families of the AFL-CIO Will Join with Our Allies to Defeat the TPP, says Trumka'. Available at <http://www.aflcio.org/Blog/Political-The-Hardworking-Families-of-the-The-Hardworking-Families-of-the-AFL-CIO-Will-Join-with-Our-Allies-to-Defeat-the-TPP-says-Trumka> (visited 26 November 2016).

⁶² Interview with a senior official of AFL-CIO.

⁶³ Candidate potions on the TPP. Available at https://ballotpedia.org/2016_presidential_candidates_on_the_Trans-Pacific_Partnership_trade_deal (visited 26 November 2016).

⁶⁴ EU-Lex, "Social partners". Available at http://eur-lex.europa.eu/summary/glossary/social_partners.html (visited 26 November 2016).

⁶⁵ John Hilary, "European trade unions and free trade: between international solidarity and perceived self-interest". Available at <http://www.andreasbieler.net/wp-content/workshop/Hilary.pdf> (visited 26 November 2016).

⁶⁶ ETUC/ITUC (2007) ETUC/ITUC statement of trade union demands relating to key social elements of "sustainable development" chapters in European Union negotiations on free trade agreements (FTAs)". Available at <http://www.tuc.org.uk/international/tuc-13518-f0.cfm> (visited 26 November 2016).

in EU FTAs, as examined above, mostly refer to ILO conventions, and do not refer to specific labour rights.

In terms of dispute settlements, trade unions in the EU also demand as strong enforcement as trade unions in the US. The ETUC requires that the Sustainable Development chapter fall under the same standard provisions as everything else in the FTAs, hence its stipulations are subject to the same dispute settlement treatment as all other chapters in FTAs. In addition, ETUC requires that FTAs should provide for fines and the fines must be high enough to be sufficiently disincentivizing. The proceeds from such fines should be directed toward improving social standards and working conditions in the sectors giving rise to the problems concerned.⁶⁷

ETUC has been fighting hard for its labour objectives in FTAs. In 2010, the ETUC issued a joint statement together with the ITUC and the Trade Union Confederation of the Americas (TUC), calling for the EU's FTAs with Central America, Peru, and Colombia not to be signed.⁶⁸ In 2012, ETUC joined CSA/TUCA, the Global Union, and ITUC in issuing a statement, once again, calling for members of EU Parliament to vote against the EU-Colombia-Peru FTA. According to ETUC, the appalling human rights record in Colombia and continued labour violations in Peru would damage the EU's reputation as a leading force in the promotion of human rights and basic freedoms. Unfortunately, ETUC has not been successful and these FTAs have been ratified.

In 2016, the TUC wrote to the Secretary of State for International Trade Liam Fox calling for him to oppose the CETA. The TUC opposed CETA due to the negative impact the deal would have on workers' rights, public services, and sovereignty. According to ETUC, "While CETA commits the EU and Canada to uphold core ILO standards, there are no effective sanctions if labour rights are violated. Instead, trade unions will only be able to raise concern through advisory groups. Clearly, this is unfair when compared to the multi-million legal claims foreign investors would be able to lodge through the ICS in CETA when they feel their rights have been infringed".⁶⁹ However, this opposition did not prevent the EU from signing the agreement.

While trade unions in the EU demand a strong enforcement mechanism, their influence is not great. In addition, while their demand is unified at EU level, this position is much divided among trade unions of EU member states. For example, trade unions in the UK have not got consensus on enforcement mechanism of labour provisions in FTAs. UNISON, one of the biggest trade unions in the UK, supports labour provisions but does not support sanctions.⁷⁰

Furthermore, involvement in EU trade policy making is not well institutionalized, while trade unions in the US influence trade policy through the main advisory committee to the US government on trade and labour issues, the Labour Advisory Committee (LAC) for Trade

⁶⁷ Ibid.

⁶⁸ ETUC/ITUC/TUCA (2010) Appeal to European Union, Latin American and Caribbean Heads of State and Government." Statement of the LAC-EU Trade Union Summit held in Madrid on 4-5 May 2010. http://www.etuc.org/IMG/pdf_LLamamiento_Cumbre_Madrid_-_EN_-_Final-ING.pdf (visited 26 November 2016).

⁶⁹ ETUC Letter to International Trade Secretary Liam Fox on 21/6/2016. Available at <https://www.tuc.org.uk/international-issues/trade/tuc-letter-international-trade-secretary-liam-fox-calling-him-oppose-ceta> (visited 1 May 2017).

⁷⁰ Interview with the Head of International Cooperation, UNISON, UK.

Negotiations and Trade Policy. The LAC, currently comprised of 26 labour union leaders and a few academics, is mandated to “provide reports on trade agreements to the President, the Congress, and the Office of the United States Trade Representative (USTR) at the conclusion of negotiations for each trade agreement”. Unlike the situation in the EU where trade unions are poised to meet when the situation calls for it, trade unions in the US meet on an institutionalized regular basis through the LAC. This mechanism contributes to enhancing the influence of US trade unions on labour issues in FTAs negotiation. In fact, the LAC has urged the Congress to reject every trade agreement negotiated since 2002⁷¹ and required stronger enforcement provisions in FTAs.⁷²

One of the reasons why trade unions in the US are more demanding is US workers have more fear of globalisation than EU workers, and contributes to the differences in positions toward free trade and thus labour protection in FTAs. In the US, globalisation has generated more wealth but also more income inequality and adjustment problems than in EU. In the EU, where welfare systems are more generous, globalisation generated less wealth but also less income inequality and labour adjustment.⁷³ Thus, workers in the US have more “globalisation fear”, and demand stronger labour provisions in FTAs than those in the EU.

In terms of enforcement, trade unions in both the US and the EU demand a sanction mechanism to enforce labour provisions in FTAs. However, trade unions in the EU have not been able to force the EU commission to include this mechanism in their FTAs. The weakness of EU social partners may be explained by, among other things, the less political power and linkages between trade unions and political parties. The closer interest groups are to the party in government, the more likely a government is to meet the demands voiced.⁷⁴

Employers

Employers and trade unions often take opposite sides on labour provisions in FTAs, the former opposing and the latter supporting. The unsuccessful attempt of EU trade unions in fighting for labour provisions in EU FTAs may also result from the fact that employers in the EU are more powerful than employers in the US.

While US trade unions strongly demand labour provisions in FTAs, the US Chamber of Commerce has denounced them. The Chamber favours FTAs, and it fears that most countries will resist including enforceable labour standards in any new agreement as many governments have declined to address labour rights within the WTO. Accordingly, the

⁷¹ Report of the Labour Advisory Committee for Trade Negotiations and Trade Policy, Chile, 2/28/2003, 16; Australia, 3/12/2004, 14; Central America, 3/19/2004, 15; Morocco, 4/6/2004, 9; Dominican Republic, 4/22/2004, 7; Bahrain, 7/14/2004, 8; Oman, Peru, 2/1/2006, 12. It is interesting to note that the membership of the LAC went from 58 in 2004 to 28 (twenty-six from unions and two from academia). These reports are all available at the www.ustr.gov/bilaterals.

⁷² Labour Advisory Committee for Trade Negotiations and Trade Policy, “The U.S.-Singapore Free Trade Agreement,” Document No. 2/28/2003, 6, 16.

⁷³ André Sapir, “Who’s Afraid of Globalisation? Domestic Adjustment in Europe and America”, in: R.B. PORTER, P. SAUVE, A. SUBRAMANIAN, A. BEVIGLIA ZAMPETTI (eds.), *Efficiency, Equity, Legitimacy. The Multilateral Trading System at the Millennium*, Washington DC, The Brookings Institution, 2001, pp. 179-204

⁷⁴ Eugenia da Conceicao-Heldt (2013) Two-level games and trade cooperation: What do we now know?, *International Politics* Vol. 50, 4, 579–599.

Chamber opposes the inclusion of labour provisions in FTAs. It maintains that the best means to achieve improvements in labour and environment conditions is to pursue these improvements in separate, albeit parallel efforts.⁷⁵ In 2010, the Chamber opposed a bill to provide duty-free treatment for some goods produced in parts of Afghanistan and Pakistan that meet requirements of labour rights compliance. It argued that this linkage is intrusive and impractical.⁷⁶

In the EU, BusinessEurope⁷⁷ (formerly known as UNICE – the Union of Industrial and Employers' Confederations of Europe) is recognised one of the main social partners. In the past, UNICE did not adopt any official position concerning the inclusion of labour-related provisions in bilateral trade treaties. The position adopted by UNICE at the Seattle Conference (1999) was modelled on the Singapore Declaration (1999). UNICE was convinced that an open, multilateral trade system was the best way to maximize the growth needed to secure worldwide improvement for living, working, and educational conditions. UNICE did not accept the rationale behind calls for the introduction a social clause, or the use of trade policy to achieve social policy objectives by the possible use of trade sanctions. In UNICE's view, such action would not be an appropriate or effective means to achieve the objectives pursued. It would have serious negative implications for the multilateral trade system, and consequently, damage the situation of the people it was trying to help. Nevertheless, UNICE supported further discussion on how to promote the universal implementation of basic labour standards more efficiently. UNICE believed that the discussion should focus on identifying abusive working conditions, such as the worst forms of child labour and forced labour.⁷⁸

This position has not changed. In BusinessEurope's opinion, trade liberalization furthers the objectives of sustainable development through job creation or the introduction of environmentally-friendly technologies. It has suggested that the central goal of FTAs is to promote the liberalization of trade and investments, one should be careful to strike the right balance between trade liberalization on the one hand, and social and environmental provisions contained in the FTAs Sustainability Chapters on the other hand.⁷⁹

For BusinessEurope, trade and investment agreements have been enhancing trade and investment as the main objective, ensuring that each party implements its labour and

⁷⁵ US Chamber of Commerce Press Release. Available at <http://www.uschamber.com/press/releases/2000/october/00-185.htm> (visited 1 May 2017).

⁷⁶ US Chamber of Commerce (2010) Statement on International Worker Rights, US Foreign Policy and the International Economy. Available at https://www.uschamber.com/sites/default/files/legacy/.../1003intl_worker_rights.pdf (visited 1 May 2017).

⁷⁷ BusinessEurope has 40 members from 34 countries, including the European Union countries, the European Economic Area countries, and some central Eastern European countries.

⁷⁸ European Commission (2008) The Use, Scope and Effectiveness of Labour and Social Provisions and Sustainable Development Aspects in I and Regional Free Trade Agreements. Available at www.ec.europa.eu/social/BlobServlet?docId=2112 (visited 1 May 2017).

⁷⁹ BusinessEurope (2015) "EU Commission Communication -Trade for All BUSINESSEUROPE Assessment". Available at https://www.businesseurope.eu/sites/buseur/files/media/position_papers/rex/trade_for_all-businesseurope_assessment_final.pdf (visited 1 May 2017).

environmental laws and policies, whilst committing to continuous improvement.⁸⁰ It proposes that FTAs should encourage effective domestic implementation of ILO conventions that have been ratified. The level of commitments should be limited to “not to weaken or reduce existing protection in order to attract investments”, and maintains their autonomy to regulate in the area of social affairs and the protection of the environment.⁸¹ Each member of an FTA should be free to define policies and measures adjusted to labour and environmental standards they deem appropriate.⁸² BusinessEurope does not support the inclusion of sanction mechanism for labour clauses in FTAs. From its point of view, the sanction is not a good instrument, not efficient as it is difficult to implement, and may be harmful to trade. BusinessEurope demands the EU attract more trading partners and encourage them to improve their labour rights instead of sanctioning trading partners.⁸³ It suggests that enforcement of the sustainability chapter should be efficient and pragmatic, based on soft pressure, consultation, transparency, and publicity.⁸⁴

In the EU, interest groups concentrate their lobbying effort on national governments, and push them to block trade agreements that run counter to their interests. The European Commission has an incentive to listen to economic interests, rather than having proposals rejected by the Council of EU. The resulting “symbiotic” relationship between the Commission and interest groups can lead to situations in which “companies and the Commission present the member states with a negotiating strategy ‘pre-approved’ by European industry”.⁸⁵ This helps explain why employers (like BusinessEurope) have been more influential in shaping the EU strategy to labour issues in FTAs.

Both main employer organisations in the US and the EU oppose the inclusion of strong labour provisions with the sanctioning mechanism in FTAs. However, their voices are heard and implemented differently.

⁸⁰ BusinessEurope (2017) “Trade and Sustainability”. Available at <https://www.businesseurope.eu/policies/trade/trade-technical-issues/trade-and-sustainability> (visited 1 May 2017).

⁸¹ BusinessEurope (2014) “Trade-Roadmap for the European Commission”. Available at <https://www.businesseurope.eu/sites/buseur/files/media/imported/2014-01000-E.pdf> (visited 1 May 2017).

⁸² BusinessEurope (2015) “TTIP: The Sustainable Chapter”. Available at <https://www.businesseurope.eu/sites/buseur/files/media/imported/2015-00382-E.pdf> (visited 1 May 2017).

⁸³ Interview with a senior official of BusinessEurope.

⁸⁴ BusinessEurope (2015) “A Trade Policy for the 21st Century”. Available at <https://www.businesseurope.eu/sites/buseur/files/media/imported/2015-00591-E.pdf> (visited 1 May 2017).

⁸⁵ Cowles, Maria Green (2001) ‘The Transatlantic Business Dialogue and Domestic Business-Government Relations’, in Maria Green Cowles, James Caporaso and Thomas Risse (eds.) *Transforming Europe: Europeanization and Domestic Political Change* (Ithaca: Cornell University Press), 159-79.

3. Institutions & procedure

3.1 Institutions

In the US, trade policy making is very much a political process, to a great extent because authority is shared between Congress and the Executive Branch. The US Constitution assigns the authority to “regulate commerce with foreign nations”⁸⁶ to its legislative branch, Congress. The Congress sets the objectives for trade policy making and maintains tight control over Executive Branch discretion. As a result, the US approach to linking trade agreements and labour rights is constantly evolving, reflecting both conditions of a particular trade partner and the interaction of Democrats and Republicans in Congress.⁸⁷

Under the US Constitution,⁸⁸ the President has sole authority to negotiate and conclude trade agreements. Legally, the President can act on behalf of Congress in certain cases, by way of receiving ‘Trade Promotion Authority’ from Congress.⁸⁹ As part of the Executive Branch, the Office of the US Trade Representative (USTR) has the ‘principal responsibility for administering US trade agreements’. There are inter-agency working groups through which the Labour Department, the State Department, the Treasury Department, the Agency for International Development (USAID) and the USTR come together and discuss potential labour rights related implications of US international trade policies. Numerous Executive Branch entities interact with one another and with interest groups in the formation and implementation of trade policy, providing more opportunities for social partners, particularly trade unions, to have a voice and influence labour protection in FTA negotiations.

Through its trade law, US Congress has clearly defined the objectives and created a strong template for labour rights protection in the US FTAs. In negotiation, the position of US labour negotiators are constrained by laws passed by Congress, which is also the ratification authority. This has made the win-sets of the US in FTA negotiation very small. While win-set size can create opportunity⁹⁰ as a smaller win-set can be a negotiating advantage: “I would like to accept your proposal, but I could never get it accepted at home...”.⁹¹ This tactic was successfully used by the US in the TPP labour negotiation.⁹² Demands set out by the US Congress have also been an advantage of the US in labour negotiation, contributing to the success of US in imposing its labour objectives on other negotiating partners.

In the EU, trade policy is an exclusive power of the EU. This means that the EU, and not individual member states, negotiates international trade agreements. The European Commission negotiates with the trading partner on behalf of the whole EU but does so in

⁸⁶ Sec. 8 Article I.

⁸⁷ Susan Aaronson (2010) Reality Bites The Myth of Labour Rights as a Non-trade Issue. Available at https://www2.gwu.edu/~iiep/assets/docs/papers/Aaronson_IIEPWP2010-29.pdf (visited 1 May 2017).

⁸⁸ Article II.

⁸⁹ Cooper, W., ‘Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy’, Congressional Research Service, CRS Report for Congress, 13.1.2014

⁹⁰ Shivan Sarin (2015), “Strategizing the Two-level Negotiation: How a Level I Negotiator Deals with a Level II Agitator”, *Harvard Negotiation Law Review*, vol. 21, pp. 143.

⁹¹ Putnam (1988), See also Fredrick W. Mayer (1992), “Managing Domestic Differences in International Negotiations: The Strategic Use of Internal Side-Payments”, 46 INT’L ORG. 793, 796 (1992).

⁹² Personal experience as a member of the TPP Labour Team of Vietnam.

close cooperation with the Council and European Parliament who ultimately approve the overall agreement. Member states have delegated policymaking authority to the supranational level, and the Council delegates negotiating authority to the Commission, which speaks with a single voice and defends a common position on behalf of the whole EU.⁹³

The Commission, the Council of the EU, and the European Parliament are in regular contact about trade policy including plans to negotiate a trade deals. In the early stages of a discussion about launching trade negotiations, the Commission holds a public consultation on the content and options for any FTA, and conducts an assessment of the impact of a deal on the EU and the potential partner country. The Commission requests formal authorization from the Council to open negotiations known as “negotiating directives”. These set out the general objectives to be achieved. The Commission’s request is also shared with the European Parliament. After internal discussion, the Council adopts the negotiating directives and authorises the Commission to negotiate on behalf of the EU. The Directorate-General for Trade in the European Commission helps to develop and implement the EU trade and investment policy. As the EU’s executive actor, the Commission and its Directorate-General for Trade, in particular, have the sole right to negotiate the trading partners on behalf of the EU.⁹⁴

The separation of power in the making of US trade policy provides an enormous source of bargaining strength for the US,⁹⁵ which also makes Congress more powerful and puts it in a stronger position during trade negotiations than the EU Parliament. It has been argued that the EU’s failure to use sanctions to protect human rights stems not from a lack of will but rather from the collective decision-making process at the EU level.⁹⁶ While in the US, the president/USTR can negotiate FTAs based on mandates provided by Congress through its trade laws, the single EU negotiates from a position agreed upon prior to the actual negotiation. In terms of labour issues in FTAs, while the US has clear mandate with a strong enforcement mechanism, positions of Members States in the EU are very different. For example, while France and Belgium favour a binding and enforceable social clause, most Member States and the European Commission advanced that this issue should be addressed in a soft and cooperative way.⁹⁷

Furthermore, while the US president has an electoral base, members of the European Commission are nominated by the Council of the EU and approved by the EU Parliament. The direct electoral mechanism in the US gives social partners (voters) more power in

⁹³ See European Commission, “Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, Document No. COM (95) 216 final, 23 May 1995.

⁹⁴ Gstöhl, S., ‘The European Union’s Trade Policy’, *Ritsumeikan International Affairs*, Vol. 11, 2013, p. 1-22.

⁹⁵ Maxwell Cameron & Brian Tomlin (2000) *The Making of NAFTA: How The Deal Was Done*, Cornell University Press: London at 229.

⁹⁶ Hadewych Hazelzet, “Carrots or Sticks? EU and U.S. Reactions to Human Rights Violations in the Nineties and Beyond”. Available at http://www.democracyagenda.org/papers/3.2_Hazelzet.doc (visited 1 May 2017).

⁹⁷ European Parliament (2016) *TTIP and Labour Standards*. Available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578992/IPOL_STU\(2016\)578992_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578992/IPOL_STU(2016)578992_EN.pdf) (visited 1 May 2017).

influencing trade objectives of the president, including labour objectives, than those in the EU. Because trade union members outnumber employers (in terms of votes), they are arguably more powerful than business in imposing their positions on labour issues.

3.2 Ratification procedure & veto players

Ratification procedures clearly affect the size of the win-set.⁹⁸ In the US, the President negotiates FTAs with foreign countries and submits to Congress legislation that would implement the agreements by making “necessary or appropriate” changes to US law. US FTAs have historically been approved as congressional-executive agreements by a majority vote of each house of Congress rather than as treaties ratified by the President after having received the “advice and consent” of a two-thirds majority vote of the Senate.⁹⁹

Under the trade promotion authority (TPA), established by the Trade Act of 1974 and renewed by the Trade Act of 2002, Congress authorizes the President to negotiate FTAs if both houses approve them, and if other statutory conditions are met. Congress can approve or disapprove these FTAs but cannot amend or filibuster.¹⁰⁰ However, this authority had expired (except for agreements already under negotiation) in 2007. In early 2012, the Obama administration indicated that a requirement for the conclusion of TPP negotiations was the renewal of TPA. This required the US Congress to introduce, and vote on, an administration-authored bill for implementing the TPP with minimal debate and no amendments, with the entire process taking no more than 90 days. The Bipartisan Congressional Trade Priorities and Accountability Act of 2015, which is commonly known as TPA Fast-track legislation was then passed by US Congress. Through this TPA, the President could continue to “submit trade deals to Congress for an expedited vote without amendments”.

EU ratification process involves not only EU level but also member state level, which creates a three-level negotiation. The negotiating positions of different EU member states are translated to the European level and affect the EU negotiating a position. In the EU, after both sides sign an FTA, the Council transmits the agreement together with the draft decision to conclude to the European Parliament for consent. Once it receives the texts, Parliament gives its consent after the necessary preparation at the committee level. Formally, the power is limited to saying ‘yes’ or ‘no’ to the agreement by votes in plenary session. Where the agreement contains provisions that fall under Member State responsibility (this is known as a “mixed agreement”), individual Member States also have to ratify the agreement alongside the EU according to their national ratification procedures. After consent of Parliament and ratification by Member States, the Council adopts a final decision to implement the FTA.¹⁰¹

In the US, all FTAs must be voted by Congress, which is the sole veto player. In the EU, the institutional complexity is high with, a relatively large number of veto players in the trade policy-making system. Not only the European Parliament but also national parliaments of 28

⁹⁸ Robert D. Putnam (1988), pp. 427

⁹⁹ Brandon J. Murrill (2016) “ U.S. Withdrawal from Free Trade Agreements: Frequently Asked Legal Questions”, Congressional Research Service.

¹⁰⁰ Bipartisan Congressional Trade Priorities and Accountability Act of 2015, P.L. 114-26, §103 (June 29, 2015) (codified at 19 U.S.C. §4202).

¹⁰¹ European Commission (2013) “Trade Negotiation Step by Step. Available at http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf (visited 1 May 2017).

EU Member States, and regional parliaments of member states are veto players. Therefore, if any one of these parliaments does not agree, it can block the ratification of an FTA.

The Wallonia case

The Belgian federal government, which has always backed the CETA, was barred from giving its consent because of opposition from a regional parliament. Under the Belgian federal system, there are five regional and language-based parliaments, all of which have a say in the country's foreign affairs.

On October 14th 2016, Wallonia, a French-speaking area in southern Belgium, voted against CETA. Paul Magnette, Wallonia's minister-president, who had been leading the opposition to the agreement, had wanted to reopen talks with Canada, but the EU institutions insisted that was impossible. Wallonia had been nervous about exposing its agricultural sector to competition from Canadian farmers. Magnette also raised objections to a proposed court system for settling disputes between foreign investors and governments.

Belgian law requires the backing of all seven regional, federal and linguistic entities for the deal to be accepted by the national government. Thus, the veto of Wallonia resulted in the veto of Belgium and blocking of CETA.

It has been suggested that when the number of veto players increases the probability of forming a preferential trade agreement decline.¹⁰² The institution system in the EU provides more constraint for ratification than in the US. While the 28 EU Members have different preferences toward labour protection influenced by their domestic actors, it will be very difficult to achieve a strategy for strong labour provisions in EU FTAs.

¹⁰² Mansfield, E.D., Milner, H.V. and Pevehouse, J.C. (2007) "Vetoing Cooperation: The Impact of Veto Players on International Trade Agreements". *British Journal of Political Science*, Vol 37(5): 403–432.

4. Concluding remarks

This research shows that the US and the EU have different approaches to labour issues in FTAs, which can be measured in three main aspects: (i) scope of labour commitments; (ii) institution arrangements for implementation and (iii) enforcement mechanism. While the US considers labour as an equal issue compared to other commercial issues, the EU sees it as an element of social development. While institutions for implementation are set up in all US FTAs, they are not compulsory in all EU FTAs. While labour provisions in US FTAs are enforced by monetary fines or trade sanctions, the EU does not pursue these approaches to labour standards in its FTAs.

The different approaches are decided by varying preferences of state actors toward labour rights protection through FTAs. US state actor's preferences toward labour rights protection in FTAs are more demanding, and have been transformed into mandates and objectives for labour negotiations approved by the Congress and applied to all trading partners. In contrast, the EU strategies for negotiating FTAs are provided for by directives on a case-by-case basis depending on each trading partner. This has made the win-sets of the US in FTA labour negotiations smaller than those of the EU. Smaller win-sets in the US have been a negotiating advantage, contributing the statement that win-sets can create opportunity and bargaining power.¹⁰³

While the interests of state actors are different, social partners have the same preferences toward labour provisions in US and EU FTAs. However, this research finds that trade unions in the US have been more influential than those in the EU; and that conversely, employer organizations in the US have less power than those in the EU. It has been argued that the closer interest groups are to the government, the more likely a government is to meet demands voiced by interest groups on trade liberalization.¹⁰⁴ The findings of this research show how different links and influence of social partners on state actors impact the formation of labour provisions in FTAs.

Political institutions and ratification procedures in the US have enabled them to have stronger labour objectives than in the EU. In the US, Congress is the sole veto player. In the EU, not only the European Parliament but also the parliaments of 28 EU Member States and their regional parliaments are veto players. With so many levels of development and preferences about labour protection, it is difficult to achieve strong labour provisions. This contributes to the argument that when the number of veto players increases the probability of forming a preferential trade agreement declines.¹⁰⁵

Because internationalization affects the choices of actors,¹⁰⁶ and can lead to the change in actors' policy preferences,¹⁰⁷ further research is needed to investigate the impacts of

¹⁰³ Shivan Sarin (2015), "Strategizing the Two-level Negotiation: How a Level I Negotiator Deals with a Level II Agitator", *Harvard Negotiation Law Review*, vol. 21, pp. 143.

¹⁰⁴ Euge'nia da Conceic,a~o-Heldt (2013) "Two-level games and trade cooperation: What do we now know?", *International Politics*, Vol. 50, 4, 579–599

¹⁰⁵ Mansfield, E.D., Milner, H.V. and Pevehouse, J.C. (2007).

¹⁰⁶ Keohane, R.O. and Milner, H.V. (eds.) (1996) *Internationalization and Domestic Politics*. Cambridge: Cambridge University Press.

internationalization on the preferences of domestic actors in labour issues in US and EU FTAs. Further study is also needed to measure which approach is more efficient in enhancing labour rights for trading partners: the conditional approach of the US, or the promotional approach of the EU.

¹⁰⁷ Frieden, J.A. and Rogowski, R. (1996) "The impact of the international economy on national policies: An analytical overview" In: R.O. Keohane and H.V. Milner (eds.) *Internationalization and Domestic Politics*. Cambridge: Cambridge University Press, pp. 25–47.

Appendix: Labour Provisions in the US & EU FTAs

MEXICO		US- MEXICO: NAFTA 1994	EU - Mexico Economic Partnership, Political Coordination and Cooperation Agreement 2000
	Scope	<ul style="list-style-type: none"> Labour provisions are included in the <i>North American Agreement on Labour Cooperation (NAALC)</i>, Not refer to the ILO Declaration but to 11 labour rights principles. 	<ul style="list-style-type: none"> Refer to fundamental human rights. Cooperation on human rights and democracy (A 39). No mention of labour rights.
	Institution	<ul style="list-style-type: none"> Trade ministerial meeting. National Administrative Office. Evaluation Committee of Experts. Arbitral Panel. 	<ul style="list-style-type: none"> No institution.
	Enforcement	<ul style="list-style-type: none"> The labour side agreement has different/ separate enforcement procedures than does the main agreement. Arbitral panel (labour exclusive) limited to 3 labour rights and principles: child labour, minimum wages, and OSH. Monetary assessment to be directed towards enforcement. Fines up to US\$ 20million/0.07 of total trade volume (goods) Trade sanctions of an amount no greater than the monetary assessment. 	<ul style="list-style-type: none"> No enforcement mechanism.

		US - Canada: NAFTA 1994	EU – Canada (CETA) 2016
CANADA	Scope	<ul style="list-style-type: none"> Labour provisions are included in the <i>North American Agreement on Labour Cooperation (NAALC)</i>, Not refer to the ILO Declaration but to 11 labour principles. 	<ul style="list-style-type: none"> Chapter 23 on trade and labour Refer to ILO Declaration 1998; ILO Decent work Agenda Ensure in law and practice. Non-lowering labour standards.
	Institution	<ul style="list-style-type: none"> Trade ministerial meeting. National Administrative Office. Evaluation Committee of Experts. Arbitral Panel. 	<ul style="list-style-type: none"> Contact point; Committee on Trade and Sustainable Development. A panel of Experts.
	Enforcement	<ul style="list-style-type: none"> The labour side agreement has different/ separate enforcement procedures than does the main agreement. Arbitral panel (labour exclusive) limited to 3 labour rights and principles: child labour, minimum wages, and OSH. Monetary assessment to be directed towards enforcement. Fines up to US\$ 20million/0.07 of total trade volume (goods) Trade sanctions of an amount no greater than the monetary assessment. 	<ul style="list-style-type: none"> The labour chapter has different/ separate enforcement procedures than does the main agreement. Consultation No remedies No sanction.
		US- Jordan FTA 2001	EU-Mediterranean Agreement Jordan 1997
JORDAN	Scope	<ul style="list-style-type: none"> ILO Declaration and its Follow-up. Acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health Not fail to effectively enforce its labour laws in a manner affecting trade. 	<ul style="list-style-type: none"> No labour provision except for Art 42 regarding the right of each party in applying laws and regulations on entry and stay, work, labour condition and establishment of natural persons and supply of services.
	Institution	<ul style="list-style-type: none"> Contact point 	<ul style="list-style-type: none"> No institution.

		<ul style="list-style-type: none"> • Joint Committee • Dispute Settlement Panel. 	
	Enforcement	<ul style="list-style-type: none"> • Labour provisions and commercial provisions are equally enforceable. If the dispute is not resolved under procedures specified, the affected Party shall be entitled to take “any appropriate and commensurate measure” (Article 17.2(b)). • Trade sanctions.¹⁰⁸ 	<ul style="list-style-type: none"> • No enforcement mechanism • No remedies • No sanction.
CHILE		US-Chile FTA 2003	EU-Chile Association Agreement 2002
	Scope	<ul style="list-style-type: none"> • Chapter 18 on Labour • ILO 1998 Declaration • Internationally recognized labour rights and acceptable work conditions (minimum wages, hours and OSH) • Ensure domestic labour law consistent with international labour standards • Not fail to effectively enforce its labour laws in a manner affecting trade between the Parties 	<ul style="list-style-type: none"> • Title V on Separate Section on Social Cooperation • Not refer to ILO • Respect for basic social rights • through the promotion of • cooperative activities related to international labour standards.
	Institution	<ul style="list-style-type: none"> • Labour Affairs Council; • Contact point; • Labour Roster. • Labour Cooperation Mechanism. 	<ul style="list-style-type: none"> • No institution.
	Enforcement	<ul style="list-style-type: none"> • Same dispute settlement with the main 	<ul style="list-style-type: none"> • No enforcement mechanism

¹⁰⁸ In an exchange of letters between the USTR Robert Zoellick and Jordanian Ambassador Marwan Muasher before Congress considered the implementing legislation in 2001, the governments reportedly agreed to resolve any potential disputes without resorting to trade sanctions. See Governments: “would not expect or intend to apply the Agreement’s dispute settlement enforcement procedures ... in a manner that results in blocking trade.” Jordan Free Trade Agreement Approved by Finance and Ways and Means, *Inside U.S. Trade*, July 27, 2001.

		<p>agreement.</p> <ul style="list-style-type: none"> • Monetary assessment. Fines up to US\$ 15 million. • Trade sanction. 	<ul style="list-style-type: none"> • No remedies • No sanction.
SINGAPORE		US-Singapore FTA 2003	EU-Singapore FTA 2014 (not signed)
	Scope	<ul style="list-style-type: none"> • Chapter 17 on Labour • ILO 1998 Declaration • Internationally recognized labour rights and acceptable work conditions (minimum wages, hours and OSH) • Ensure domestic labour law consistent with international labour standards • Not fail to effectively enforce its labour laws in a manner affecting trade between the Parties. 	<ul style="list-style-type: none"> • Chapter 13 on Trade and Sustainable Development • Refer to ILO 1998 Declaration, ILO 2008 Declaration, ILO Decent Work Agenda; Ministerial Declaration of the UN Economic and Social Council on Generating Full and Productive Employment and Decent Work for All of 2006.
	Institution	<ul style="list-style-type: none"> • Labour Cooperation Mechanism; • Contact point; • Subcommittee on Labour Affairs. 	<ul style="list-style-type: none"> • Board on Trade and Sustainable Development.
	Enforcement	<ul style="list-style-type: none"> • Same dispute settlement with the main agreement. • Monetary assessment with a fine up to \$15 million per violation per annum. • Trade sanction. 	<ul style="list-style-type: none"> • Different/ separate enforcement procedures than does the main agreement. • Consultation & Panel of Experts • No remedies • No sanction.

		US-Central America FTA 2005	EU-Central America Association Agreement 2012
CENTRAL AMERICA	Scope	<ul style="list-style-type: none"> • Chapter 16 on Labour • Refer to ILO Declaration • Strive to ensure that its laws provide for labour standards consistent with the internationally recognized labour rights • Ensure domestic labour law consistent with international labour standards • Not fail to effectively enforce its labour laws in a manner affecting trade between the Parties. 	<ul style="list-style-type: none"> • Title 3 on Social development and Social cohesion • Refer to Millennium Development Goals; ILO 1998 Declaration; ILO Decent Work Agenda; UN Declaration on Full Employment and Decent Work. • Specific variations (e.g. migrants, indigenous populations).
	Institution	<ul style="list-style-type: none"> • Labour Affairs Council • Contact point • Labour Cooperation • Capacity Building 	<ul style="list-style-type: none"> • No institution.
	Enforcement	<ul style="list-style-type: none"> • Same dispute settlement with the main agreement. • Monetary assessment: Fines up to US\$ 15 million. • Trade sanctions. 	<ul style="list-style-type: none"> • No enforcement mechanism • No remedies • No trade sanction.

		US – Morocco FTA 2004	EU - Mediterranean Agreement Morocco 1997
		MOROCCO	Scope
Institution	<ul style="list-style-type: none"> • National Labour Advisory Committee • Labour Cooperation Mechanism. • Joint Committee 		<ul style="list-style-type: none"> • No institution.
Enforcement	<ul style="list-style-type: none"> • Same dispute settlement with the main agreement. • Monetary assessment with a fine up to \$15 million per violation per annum. • Trade sanction. 		<ul style="list-style-type: none"> • No enforcement mechanism.
PERU		US – Peru FTA 2007	EU – Peru – Colombia FTA 2012
		Scope	<ul style="list-style-type: none"> • Chapter 17 on Labour • Reference to ILO 1998 Declaration and ILO Convention 182 • Obligations to incorporate labour rights and principles in domestic law • Commitment prohibiting FTA countries from

		<p>lowering their labour standards</p> <ul style="list-style-type: none"> • Limitations on “prosecutorial” and “enforcement” discretion. 	<p>point; Subcommittee on Trade and Sustainable Development.</p>
	Institution	<ul style="list-style-type: none"> • Labour Affair Council • Labour Cooperation • Capacity Building Mechanism. 	<ul style="list-style-type: none"> • Contact point • Subcommittee on Trade and Sustainable Development.
	Enforcement	<ul style="list-style-type: none"> • Same dispute settlement with the main agreement. • Monetary assessment with fine up 50 percent of the level of the benefits the panel has determined or if the panel has not determined the level, 50 percent of the level that the complaining Party has proposed to suspend. • Trade sanctions. 	<ul style="list-style-type: none"> • Different/ separate enforcement procedures than does the main agreement. • Consultations; independent review (Group of Experts); recommendations. • No remedies. • No trade sanction.
PANAMA		US – Panama FTA 2012	EU – Panama (EU – Central America)
	Scope	<ul style="list-style-type: none"> • Chapter 16 on Labour • Reference to 1998 Declaration and ILO Convention 182 • Obligations to incorporate labour rights and principles in domestic law and non-derogation clause. • Commitment prohibiting FTA countries from lowering their labour standards • Limitations on “prosecutorial” and “enforcement”. 	<ul style="list-style-type: none"> • Title 3 on Social development and Social cohesion • Refer to 1998 Declaration; DWA; fundamental ILO Conventions; UN Declaration on Full Employment and Decent Work. • Commits to the promotion and effective implementation of its laws and practice and in its whole territory of internationally recognised core labour standards.
	Institution	<ul style="list-style-type: none"> • Labour Affairs Council • Labour Cooperation, Capacity Building Mechanism 	<ul style="list-style-type: none"> • No institution.

		<ul style="list-style-type: none"> • Labour Rosters 	
	Enforcement	<ul style="list-style-type: none"> • Same dispute settlement with the main agreement. • Monetary assessment with fine up 50 percent of the level of the benefits the panel has determined or if the panel has not determined the level, 50 percent of the level that the complaining Party has proposed to suspend. • Trade sanctions. 	<ul style="list-style-type: none"> • Consultations; third party; independent review; recommendations. • No trade sanction.
COLOMBIA		US – Colombia FTA 2012	EU – Colombia FTA 2013
	Scope	<ul style="list-style-type: none"> • Chapter 17 on Labour • Reference to 1998 Declaration (as obligation to ensure rights from this generation onwards) • Obligations to maintain in law and practice fundamental labour rights • Obligations to incorporate labour rights and principles in domestic law and • Commitment prohibiting FTA countries from lowering their labour standards • Limitations on “prosecutorial” and “enforcement” discretion. 	<ul style="list-style-type: none"> • Title IX on Trade and Sustainable Development • Refer to 1998 Declaration; Decent Work Agenda; Fundamental ILO Conventions; UN Declaration on Full Employment and Decent Work.
	Institution	<ul style="list-style-type: none"> • Labour Affairs Council • Labour Cooperation • Capacity Building 	<ul style="list-style-type: none"> • Contact point • Subcommittee on Trade and Sustainable Development. <p>○</p>

	Enforcement	<ul style="list-style-type: none"> • Same dispute settlement with the main agreement. • Monetary assessment with fine up 50 percent of the level of the benefits the panel has determined or, if the panel has not determined the level, 50 percent of the level that the complaining Party has proposed to suspend. • Trade sanctions. 	<ul style="list-style-type: none"> • Different/ separate enforcement procedures than does the main agreement. • Consultations; independent review (Group of Experts); recommendations. • No remedies. • No trade sanction.
KOREA		US – Korea FTA 2012	EU – Korea FTA 2011
	Scope	<ul style="list-style-type: none"> • Chapter 19 on Labour • Reference to 1998 Declaration (as obligation to ensure rights from this generation onwards) • Obligations to maintain in law and practice fundamental labour rights • Obligations to incorporate labour rights and principles in domestic law and non-derogation clause. • Commitment prohibiting FTA countries from lowering their labour standards • Limitations on “prosecutorial” and “enforcement” discretion (i.e., countries cannot defend failure to enforce laws related to the five basic core labour standards on the basis of resource limitations or decisions to prioritize other enforcement issues). 	<ul style="list-style-type: none"> • ILO Declaration 1998 • UN Declaration on Full Employment and Decent Work 2006 • Respecting, promoting and realising, in their laws and practices. • Non-lowering labour standards.
	Institution	<ul style="list-style-type: none"> • Labour Affairs Council • Labour Cooperation Mechanism. 	<ul style="list-style-type: none"> • Contact point • Committee on Trade and Sustainable

			<p>Development</p> <ul style="list-style-type: none"> • Domestic Advisory Group • Civil dialogue mechanism
	Enforcement	<ul style="list-style-type: none"> • Same dispute settlement with the main agreement. • Monetary assessment with fine up 50 percent of the level of the benefits the panel has determined or if the panel has not determined the level, 50 percent of the level that the complaining Party has proposed to suspend. • Trade sanction: suspension of benefits until the non-conformity is eliminated 	<ul style="list-style-type: none"> • Separate dispute settlement through Consultation; Panel of Experts. • No trade remedies. • No sanctions.
VIETNAM		US – VN FTA 2016 (TPP)	EU – VN FTA 2016 (not signed)
	Scope	<ul style="list-style-type: none"> • Chapter 19 on Labour and Labour Side Agreements¹⁰⁹ • Refer to ILO Declaration • Obligation to maintain in its statutes and regulations, and practices the rights as stated in the ILO Declaration • Have laws governing minimum wages, hours of work, and occupational safety and health • Vietnam has to undertake several legal, institutional and procedural reforms before the TPP takes effect. 	<ul style="list-style-type: none"> • Refer to the ILO 1998 Declaration and ILO 2008 Declaration; ILO Decent Work Agenda; UN Declaration on Full Employment and Decent Work 2006; 2030 Agenda • Call for ratification of ILO up to date conventions • Implementation of ratified ILO conventions.
	Institution	<ul style="list-style-type: none"> • Labour Council 	<ul style="list-style-type: none"> • Contact point.

¹⁰⁹ In the TPP negotiation, the United States requested, tabled, and signed labour side agreements with three other TPP members: Brunei, Malaysia and Vietnam.

		<ul style="list-style-type: none"> • Labour Cooperation • Labour Dialogue • Independent Committee of Expert (Labour Side Agreement) • Government review (Labour Side Agreement) • ILO assistance (Labour Side Agreement) 	<ul style="list-style-type: none"> • Specialised committee on Trade and Sustainable Development.
	Enforcement	<ul style="list-style-type: none"> • Same dispute settlement with the main agreement. US-VN Labour Side Agreement is enforceable through the same dispute settlement mechanism that applies to the TPP. • Monetary assessment with fine up 50 percent of the level of the benefits the panel has determined or if the panel has not determined the level, 50 percent of the level that the complaining Party has proposed to suspend. • Trade sanctions. 	<ul style="list-style-type: none"> • Separate dispute settlement. • Disputes solved through consultation; Panel of Experts. • No remedies or sanctions.

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