

# **The Use of Labour Clauses in Free Trade Agreements**

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## CONTENTS

|  |    |
|--|----|
| Introduction                                     | 1  |
| Definition of labour provisions                  | 1  |
| International Labour Organisation                | 3  |
| Historical perspective                           | 4  |
| Rationale for Labour Provisions                  | 6  |
| Labour and Trade                                 | 7  |
| The United States and European Union approaches  | 8  |
| Sustainable Development Strategy                 | 9  |
| Generalized System of Preferences                | 9  |
| Trade Agreements- A case study                   | 10 |
| Why labour right provisions are not enforceable? | 16 |
| Conclusion                                       | 20 |

# The Use of Labour Clauses in Free Trade Agreements

## Introduction

In the last twenty-five years we have seen a significant increase of provisions dealing with labour standards in trade agreements. This paper will be looking at how the use of labour clauses in Free Trade Agreements (FTAs) has historically evolved, and to what extent this is effective in achieving the objectives. In this context, a case study of two trade agreements (Comprehensive Progressive Trans-Pacific Partnership ‘CPTPP’ and EU-Canada Free Trade Agreement or Comprehensive Economic and Trade Agreement ‘CETA’) will be done to examine the labour chapter and its implications. This paper will also try to understand how use of labour clauses in trade agreements could be made more effective in promoting the labour standards.

## Definition of labour provisions

Labour provisions take different forms in different countries. In the great majority of trade agreements that include labour provisions, the parties commit themselves to not lowering their labour standards or derogating from labour law in order to attract trade or investment<sup>1</sup>. Since labour standards differ from country to country, depending on the development stage, income levels, the growth of political, social, and cultural institutions, they cannot be applied uniformly<sup>2</sup>. It becomes difficult to clearly distinguish between labour standards that are internationally recognized and those of dependent on domestic circumstances.<sup>3</sup> The labour provisions could be in various forms dealing with different matters about social practice and labour laws.

International Labour Organisation (ILO) has defined trade related labour provisions in the following manner:<sup>4</sup>

references to any standard that addresses labour relations or working terms or conditions; mechanisms for monitoring or promoting compliance with labour standards; such as consultative groups; and /or a framework for cooperation, such as sharing the best practices, seminars and forums”.

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<sup>1</sup> *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* (International Labour Organisation, 2017) at 5.

<sup>2</sup> Robert M Stern “Labor Standards and Trade Agreements” (2003) IDEAS <[ideas.repec.org/p/mie/wpaper/496.html](http://ideas.repec.org/p/mie/wpaper/496.html)> at 2.

<sup>3</sup> At 2.

<sup>4</sup> *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, above n1, at 1.

The policy mechanisms relating to labour provisions can be provided in different forms at various stages such as: pre-ratification measures (parties have to make legal or regulatory changes before entry into force of the agreement); post-ratification measures (parties are obliged to effect legal or regulatory changes once the agreement enters into force); technical cooperation in the form of training and resources; monitoring the implementation of labour chapter; dispute settlement, imposition of sanctions on violations (fines); and economic incentives or disincentives such as enhanced / reduced market quota in exchange for social performance.<sup>5</sup>

There is no international agreement on the inclusion of such social clauses, however, it has become a standard practice to include them in unilateral, bilateral and regional trade agreements. In order to achieve consensus, some core labour standards have been identified which may be applied universally.<sup>6</sup> In addition to core standards, there are some other standards which are less universally recognized and they relate to “acceptable conditions of work,” which include: a minimum wage; limitations on hours of work; and occupational safety and health in the workplace.<sup>7</sup> Around 72 per cent of all labour provisions included in trade agreements refer to ILO instruments<sup>8</sup>, in which most of them also include legally binding commitments to the core internationally recognized labour standards.<sup>9</sup> These labour provisions, according to ILO, provide an opportunity to the government and other stakeholders<sup>10</sup> to discuss issues related to decent work, and provide the government with a policy feedback which help improve the governance, increase productivity and enhance social cohesion.<sup>11</sup>

Corporate Social Responsibility (CSR) commitments are now being referred to in the FTAs and investment agreements. This trend has evolved with the new forms of production such as global supply chains.<sup>12</sup> The approach currently being followed is promotional in nature, with limited number of agreements referring to specific instruments<sup>13</sup>, but they have potential<sup>14</sup>. The CSR provisions, mainly directed at States<sup>15</sup>, can be monitored by workers, employers and States through the implementation of mechanisms envisaged in trade

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<sup>5</sup> At 5-6.

<sup>6</sup> Stern “Labour Standards and Trade Agreements”, above n2, at 2.

<sup>7</sup> At 2.

<sup>8</sup> *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, above n1, at 5.

<sup>9</sup> These are the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the elimination of discrimination in the workplace and the abolition of child labour.

<sup>10</sup> Stakeholder involvement” is a diverse concept that potentially includes a large range of different types of non-State actors. Although the involvement of non-State actors, such as NGOs, labour advocates, the media or the general public is implicitly dealt with as well, our use of the term is primarily focused on the social partners. This is in line with how stakeholder involvement has traditionally been understood from an ILO perspective, where an emphasis is put on social dialogue and tripartism, with freedom of association and freedom of expression forming the basis for meaningful involvement (see, for example, 1998 ILO Declaration on Fundamental Rights and Principles at Work).

<sup>11</sup> *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, above n1, at 5.

<sup>12</sup> At 5.

<sup>13</sup> Generally, they refer to internationally agreed guidelines such as the ILO MNE Declaration, the OECD Guidelines and the UN Global Compact.

<sup>14</sup> At 5.

<sup>15</sup> At 119.

agreements.<sup>16</sup> Trans-Pacific Partnership Agreement (TPP) the Comprehensive Economic and Trade Agreement are the latest two agreements that make direct reference to CSR and labour.<sup>17</sup>

## **International Labour Organisation**

Founded in 1919, the International Labour Organisation has been mandated to maintain and develop a system of international labour standards (ILS) with the purpose of promoting opportunities for both men and women to acquire decent and productive work, in conditions which must ensure ‘freedom, equity, security and dignity’ for them.<sup>18</sup> In line with the functioning of ILO, the International labour standards (ILS) which are legal instruments, are drawn up by within its tripartite framework (governments, employers and workers) that set out the basic principles and rights at work.<sup>19</sup> These legal instruments are either Conventions (or Protocols), “which are legally binding international treaties that may be ratified by member states”, or Recommendations, which are non-binding guidelines.

The ILO can be requested by members to provide advice and technical cooperation relating to design and implementation of labour provisions in trade agreements.<sup>20</sup> This role is in accordance with the ILO’s constitutional mandate, i.e., the 1944 Declaration of Philadelphia, which affirms the aims and principles and makes the ILO responsible to review the economic and financial policies and measures of its Members, and at the international levels, in the light of the ‘fundamental objective of social justice’.<sup>21</sup> The ILO has identified eight Conventions that are considered to be consisting of ‘fundamental principles and rights at work’ that include “freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.”<sup>22</sup>

ILO Declaration on Fundamental Principles and Rights at Work (1998) also cover the principles contained in fundamental or core conventions.<sup>23</sup> In 2008 the ILO reaffirmed its mandate with respect to the link between trade and labour in the Declaration on Social Justice for a Fair Globalization (2008). It is the third major statement of principles and policies from the ILO and its Members on achieving social justice.”<sup>24</sup>

The ILO Centenary Declaration for the Future of Work is a reaffirmation of ILO’s own relevance and significance in the changing world relating to work and its conditions.<sup>25</sup> The

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<sup>16</sup> At 5.

<sup>17</sup> At 116.

<sup>18</sup> “Introduction to International Labour Standards” ILO <[www.ilo.org](http://www.ilo.org)>

<sup>19</sup> “Conventions and Recommendations” ILO <[www.ilo.org](http://www.ilo.org)>

<sup>20</sup> *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, above n1 at 1.

<sup>21</sup> At 1.

<sup>22</sup> At 20.

<sup>23</sup> At 20.

<sup>24</sup> At 21.

<sup>25</sup> “ILO Centenary Declaration for the Future of Work, 2019” International Labour Organisation <[www.ilo.org](http://www.ilo.org)>

nature of work is being altered by the technological developments, demographics and climate change. The Declaration calls for specific actions, including realization of gender equality in work, quality education, universal social protection, respect for workers' fundamental rights, adequate minimum wage, limits on working time, safety and health at work, policies to promote decent work and productivity.<sup>26</sup> It also calls for policies and measures to ensure the privacy and protection of personal data, and readiness for the challenges and opportunities in world of work in the age of digital transformation.<sup>27</sup>

## Historical perspective

The attempts to include worker's rights and labour standards in trade agreements dating back to Havana Charter of the International Trade Organisation (1948) were not successful.<sup>28</sup> It was expected that the General Agreement on Tariffs and Trade (GATT) would include labour rights commitments. However, labour provisions were excluded (other than article XX(e) which allows to withdraw market access concessions if the goods were produced using forced or prison labour).<sup>29</sup> At the time of negotiation of the World Trade Organisation (WTO), the issue of social clauses to be brought in international trade regulations again came up but it met resistance from the developing countries who thought it will be used as a protectionist measure against them<sup>30</sup>. A labour agreement may only be possible if the countries were confident that it would lead to more, not less, trade.<sup>31</sup>

However, after the non-inclusion of labour clauses in the WTO did not mean that the idea become irrelevant.<sup>32</sup> The United States together with some EU countries, Japan and Canada continued for pressing social rights to be included in international trade relations<sup>33</sup>. Singapore WTO Ministerial Declaration<sup>34</sup> stated that the 'International Labour Organisation is the competent body to set and deal with' the core labour standards<sup>35</sup>. The Doha Ministerial

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<sup>26</sup> "The ILO Centenary Declaration for the Future of Work is Transmitted to the United Nations" (17 July 2019) <[www.ilo.org](http://www.ilo.org)>.

<sup>27</sup> "The ILO Centenary Declaration for the Future of Work is Transmitted to the United Nations", above n26

<sup>28</sup> Sandra Polaski "Protecting Labor Rights through Trade Agreements: An Analytical Guide" (2004) Carnegie Endowment <[www.carnegieendowment.org/pdf/files/2004-07-polaski-JILP.pdf](http://www.carnegieendowment.org/pdf/files/2004-07-polaski-JILP.pdf)>

<sup>29</sup> Stern "Labor Standards and Trade Agreements", above n2 at 12

<sup>30</sup> *Social Dimension of Free Trade Agreements* (International Labour Organisation, 2015) at 18.

<sup>31</sup> Céline Carrere, Marcelo Olarreaga and Damian Raess "Labor Clauses in Trade Agreements: worker protection or protectionism?" (August 2017) IDEAS <[www.ideas.repec.org/p/fdi/wpaper/3959.html](http://www.ideas.repec.org/p/fdi/wpaper/3959.html)> at 4.

<sup>32</sup> Adalberto Perulli "The perspective of social clauses in international trade" (2018) Archive of European Integration <[www.aei.pitt.edu/100475/](http://www.aei.pitt.edu/100475/)> at 4.

<sup>33</sup> Stern "Labour Standards and Trade Agreements", above n2, at 13.

<sup>34</sup> Singapore WTO Ministerial 1996: Ministerial Declaration WT/MIN(96)/DEC 18 December 1996, Art 4.

<sup>35</sup> Singapore Declaration Art 4: "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration."

Declaration (2001)<sup>36</sup> reaffirmed the position and the debate appeared all but over. Presently, labour standards are not subjected to WTO laws.

Since the early last century there has been a greater emphasis on the trade liberalization because of its effects on increasing the employment opportunities and the economic growth. We also have seen a consistent rise of free trade agreements and social clauses being included in the bilateral and regional trade agreements. The labour standards were lowered in some countries during the process of trade liberalization which brought this phenomenon under scrutiny, and in particular trade agreements.<sup>37</sup> With the idea of making the phenomenon of globalization more socially sustainable, a debate continues how to make sure that liberalization of trade improves labour standards rather than undermining them.<sup>38</sup>

The first instance in which the United States has negotiated an agreement dealing with labour standards within a trade agreement was the North American Agreement on Labour Cooperation (NAALC) which was signed in 1994 as part of the regional trade agreement between the United States, Canada and Mexico (NAFTA).<sup>1</sup> The labour concerns integrated into a trade agreement was a step towards recognition of workers' social rights.<sup>39</sup> The number of labour clauses in trade agreements has grown since the inclusion of the labour clause first time in NAFTA, this can be imagined from the statistics that 34 percent of agreements signed in 1995 included labour clauses, 42 per cent in 2000, 50 per cent in 2005, 70 per cent in 2010 and 84 per cent in 2014.<sup>40</sup>

A study by ILO says that from the first trade agreement to include a labour provision in 1994 to 2016, there were 77 trade agreements that included labour provisions<sup>41</sup>. Around two-thirds of the trade agreements coming into existence after 2008 had labour provisions. Around 80 per cent agreements signed now contain such provisions, which make the parties to commit not lowering their labour standards or derogate from labour law in order to boost competitiveness.<sup>42</sup>

These provisions could be included either in preamble, annexed to treaty (in the case of NAALC) or forming a specific chapter of FTA. Often, the obligations are non-binding or taking a conditional form or expressed in a "soft" way, to promote compliance<sup>43</sup>. The US-Jordan (2001) was the first agreement that introduced a special section on labour, which was subsequently followed in the United States' agreements<sup>44</sup>. The scheme of a specific chapter

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<sup>36</sup> World Trade Organisation "Doha WTO Ministerial 2001: Ministerial Declaration" WT/MIN(01)/DEC/1 (Adopted on 14 November 2001)

<sup>37</sup> *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, above n1, at 1.

<sup>38</sup> *Social Dimensions of Free Trade Agreements*, above n 30, at 6.

<sup>39</sup> Perulli "The perspective of social clauses in international trade", above n32, at 63

<sup>40</sup> Carrere, Olarreaga and Raess "Labor Clauses in Trade Agreements: worker protection or protectionism?", above n31, at 2.

<sup>41</sup> The number of labour clauses in trade agreements has grown since the inclusion of the labour Clause first time in NAFTA, this can be imagine from the statistics that 34 percent of agreements signed in 1995 included labour clauses, 42 per cent in 2000, 50 per cent in 2005, 70 per cent in 2010 and 84 per cent in 2014.

<sup>42</sup> Perulli "The perspective of social clauses in international trade", above n32, at 35.

<sup>43</sup> At 64.

<sup>44</sup> At 64.

about Labour or in the European Union tradition the labour provisions inserted in a separate chapter “Trade and Labour” or “Trade and Sustainable Development” has since continued.<sup>45</sup>

Since 2009, for providing labour clauses in a trade agreement, it has almost become a standard practice to refer to the ILO Declaration on Fundamental Principles<sup>46</sup> and Rights at Work of 1998.<sup>47</sup> Moreover, the ratification and implementation of other instruments, such as the ILO fundamental Conventions, other ILO Conventions classified by the ILO as up to date, and internationally agreed frameworks such as the Decent Work Agenda, are being included in some more recent agreements.<sup>48</sup> In the last few years, there has emerged a new trend of mega trade agreements such as TTIP, CPTTP, and so on. In these new agreements, in addition to economic dimension of trade exchanges, regulations related to social and environmental concerns are included.<sup>49</sup>

### **Rationale for Labour Provisions**

The rationale for including Labour provisions in the FTAs is normally based on two perspectives: (1) Economic; and (2) Social<sup>50</sup>. In the context of economic perspective, the labour provisions are regarded as tools against unfair competition, because such violations are likely to distort competitiveness and lead to social dumping<sup>51</sup>, so they must be treated in a similar manner the way other violations cause unfair trade practices. The competitiveness may incite producers or countries to violate domestic laws and compromise on social progress, which might put even greater pressure on other competitive countries (race-to-the-bottom) regard to labour standards.<sup>52</sup> This justification is more based on idea of a regulated market, in which a minimum of internationally recognized social norms is a pre-requisite for trade.<sup>53</sup> The purpose is to facilitate the liberalization of international trade “by guaranteeing equality of basic legal conditions for any economic operator”.<sup>54</sup>

From a social perspective the rationale is the safeguarding of social protection.<sup>55</sup> It is more concerned with the ‘value’ perspective i.e., it is not linked much to the “fair” dealing of trade system, but concerned with promotion of fundamental human rights and values.<sup>56</sup> This is basically from the perspective of human rights that labour provisions must respect labour

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<sup>45</sup> At 63–64.

<sup>46</sup> The Declaration covers four principles and associated rights that are considered fundamental for social justice, namely: freedom of association; the elimination of all forms of forced or compulsory labour; the abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

<sup>47</sup> Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements, above n1, at 2.

<sup>48</sup> At 2.

<sup>49</sup> Perulli “The perspective of social clauses in international trade”, above n32, at 5.

<sup>50</sup> *Social Dimensions of Free Trade Agreements*, above n30, at 5.

<sup>51</sup> At 5-6.

<sup>52</sup> Jean-Marc Siroën “The use, scope and effectiveness of labour and social provisions and sustainable development aspects in bilateral and regional free trade agreements” EC <ec.europa.eu> at 2.

<sup>53</sup> *Social Dimensions of Free Trade Agreements*, above n30, at 7.

<sup>54</sup> Perulli “The perspective of social clauses in international trade”, above n32, at 9.

<sup>55</sup> *Social Dimensions of Free Trade Agreements*, above n30, at 6.

<sup>56</sup> At 6.



related human rights and social justice values which are reflected in ILO conventions and other international human rights treaties.<sup>57</sup>

The reason for difficulties encountered by the social clause at the global level is the conception of the international division of labour, which is based on the classical theory of comparative advantages.<sup>58</sup> The Singapore declaration rejected the use of labour standards for protectionist purposes and agreed that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. This stance was reaffirmed in Doha declaration. The ILO's Declaration on Social Justice and a Fair Globalization 2008.<sup>59</sup> clearly states that "the violation of labour principles and fundamental rights can neither be invoked nor utilized as legitimate comparative advantages", thus renouncing the theory of comparative advantages and the practices of social dumping.<sup>60</sup>

## Labour and Trade

The developing countries which generally have weaker worker protection often argue that the inclusion of labour clauses in trade agreements leads to hidden protectionism as such clauses can be used against them to withdraw market access. This reasoning has led to them not to cooperate for any kind of labour agreement in the framework of WTO.<sup>61</sup> A counter-argument given is that the enforcement of minimum labour standard through labour clauses in trade agreements may actually help increase the demand for their products to developed countries, thus leading to higher trade flows.<sup>62</sup> Celine et.al argue that 'inclusion of labour clauses does not have a significant impact on bilateral trade flow. According to ILO, trade agreement containing labour provisions have enhanced the value of trade by 28 per cent on average, as against 26 per cent for an agreement which does not have labour provisions<sup>63</sup>. The results do not corroborate the proposition that labour clauses are Used for protectionism, making doubtful the reluctance shown by low-income countries to include labour clauses in trade agreements. Surprisingly, the low-income countries have benefitted from the labour clauses in north-south trade agreements. The impact is even stronger where such agreements provide for deep cooperation<sup>64</sup>.

Moore and Scherrer have argued that the new generation of trade agreements (such as CPTPP and CETA) have broader and progressive social chapter, but they include protections for investors such as ISDS mechanism<sup>65</sup>, which gives right to investors to sue national

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<sup>57</sup> At 6-7.

<sup>58</sup> Perulli "The perspective of social clauses in international trade", above n32, at 18.

<sup>59</sup> ILO Declaration on Social Justice for a Fair Globalization (Adopted in 2008)

<sup>60</sup> Perulli "The perspective of social clauses in international trade", above n32, at 19.

<sup>61</sup> Carrere, Olarreaga and Raess "Labor Clauses in Trade Agreements: worker protection or protectionism?", above n31 at 3.

<sup>62</sup> At 3.

<sup>63</sup> *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, above n1, at 3.

<sup>64</sup> Carrere, Olarreaga and Raess "Labor Clauses in Trade Agreements: worker protection or protectionism?", above n31, at 1.

<sup>65</sup> Madelaine Moore and Christoph Scherrer "Conditional or Promotional Trade Agreements - Is Enforcement Possible?" (June 2017) FES <[www.library.fes.de/pdf-files/bueros/singapur/13446.pdf](http://www.library.fes.de/pdf-files/bueros/singapur/13446.pdf)> at 7.

governments. This creates a paradox in relation to international labour standards (ILS) as often non-binding social chapters are set against the guaranteed investor rights, which are enforceable through ISDS by outside courts.<sup>66</sup>

### **The United States and European Union approaches**

According to the ILO, if the trade agreement contains labour provisions which have economic consequences, in terms of sanctions or benefits, it means that an FTA is ‘conditional’. The trade agreement having labour provisions but those are not linked with economic consequences, that FTA is considered ‘promotional’ The promotional approach provides mechanisms for dialogue and cooperation and /or monitoring. The cooperation could be in the form sharing knowledge and development assistance/ aid<sup>67</sup>.

The conditional approach is normally adopted by the US and Canada, as they impose compliance with economic consequences in the form of sanctions or benefits. This compliance could be ex-ante (pre ratification) where certain conditions must be met before ratification of the agreement or post-ratification where conditions are to be met afterwards through the continued monitoring and capacity building process.<sup>68</sup> However, in practice we observe that sanctions are largely theoretical and generally not applied and dispute resolution through dialogue is preferred.<sup>69</sup>

The promotional approach is mainly adopted by the European Union and New Zealand. South-South agreements when they include social clauses also adopt a promotional approach, such as knowledge sharing and cooperation mechanisms, etc.<sup>70</sup>

According to the ILO, around 40 per cent of agreements include labour provisions having adopted conditional approach, while the remaining 60 per cent agreements that include labour provisions are promotional in nature.<sup>71</sup> Broadly speaking the above two approaches are distinct but not without many areas which may be overlapping; such as promotional labour provisions are sometimes also made legally binding, and compliance issues are addressed through a formally laid out institutional framework.<sup>72</sup> In practice both the European Union and the United States tend to follow a soft approach, avoiding sanctions even where they could be applied.<sup>73</sup>

### **Sustainable Development Strategy**

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<sup>66</sup> At 6–7.

<sup>67</sup> *Social Dimensions of Free Trade Agreements*, above n30, at 1.

<sup>68</sup> Moore and Scherrer “Conditional or Promotional Trade Agreements, above n 65,,at 2.

<sup>69</sup> At 4.

<sup>70</sup> *Social Dimensions of Free Trade Agreements*, above n 30, at 1.

<sup>71</sup> At 1.

<sup>72</sup> At 1.

<sup>73</sup> Moore and Scherrer “Conditional or Promotional Trade Agreements, above n 65, at 4.

After the Treaty of Lisbon (2007) the European Union adopted the strategy to use the Sustainable Development model as a regulatory framework that can stabilize and institutionalize the link between social rights and free trade.<sup>74</sup> The EU strategy is that trade regulations should contribute towards the 2030 Agenda for Sustainable Development, which focuses on economic aspects and the advancement of social and environmental objectives.<sup>75</sup> as we see in the case of TTIP CETA<sup>76</sup> and EPA.

The ILO's 'Decent Work Agenda of 2000'<sup>77</sup> seeks for "employment creation, social protection, rights at work, and social dialogue" and was integrated into 2030 Agenda for Sustainable Development<sup>78</sup>. The Goal-8 of Agenda affirms to promote sustainable economic growth, employment and decent work. It also undertakes to promote a rules-based multilateral trading system, while its Goal 17, seeks to made efforts for trade liberalization.<sup>79</sup> The Decent Work Agenda has been recognised and taken up by the United Nations Economic and Social Council (ECOSOC) in particular, as well as by the European Union, which has committed to promoting decent work, notably in its trade agreements<sup>80</sup>.

## Generalized System of Preferences

The Generalised System of Preferences (GSP) agreements by the EU provide a good model of positive linkage between international trade and social rights<sup>81</sup>. The GSP is the unilateral agreement where sanctions are imposed in case the beneficiary country resorts practices which are in contravention of the ILS<sup>82</sup>. It also includes a promotional sanction, in the form of special "regime of stimulation", to help promote the adoption of advanced social policies in the beneficiary country.<sup>83</sup> The regime (GSP+) "is an agreement of particular subsidizations for sustainable development and good governance" that allows duty free tariffs for goods of those countries which have ratified and implemented the ILO and the UN conventions on labour, human rights, environment and good governance, and also agreed to a regular monitoring.<sup>84</sup> The US also adopts different agreements in order to support developing countries, allowing a preferential access.<sup>85</sup>

## Trade Agreements- A case study

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<sup>74</sup> Perulli "The perspective of social clauses in international trade", above n 32, at 36.

<sup>75</sup> Perulli "The perspective of social clauses in international trade", above n 32, at 7.

<sup>76</sup> CETA Preamble recognises the importance of international human rights in the trade exchanges as it envisages the implementation of treaty in a way consistent with the enforcement of labour and environmental laws.

<sup>77</sup> The Sustainable Development Agenda 2030

<sup>78</sup> "Decent work" International Labour Organisation <[www.ilo.org](http://www.ilo.org)>

<sup>79</sup> ILO *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, above n1 at 8.

<sup>80</sup> Siroën "The use, scope and effectiveness of labour and social provisions and sustainable development aspects in bilateral and regional free trade agreements" above n52 at 1.

<sup>81</sup> Perulli "The perspective of social clauses in international trade", above n32, at 52.

<sup>82</sup> Perulli "The perspective of social clauses in international trade", above n32, at 53.

<sup>83</sup> At 53.

<sup>84</sup> At 54.

<sup>85</sup> At 54.

As a case study, I will examine two recent trade agreements, Comprehensive Progressive Agreement for Trans-Pacific Partnership (CPTPP)<sup>86</sup> and Comprehensive Economic and Trade Agreement (EU-Canada) CETA, in which labour provisions have been much broadened and deepened. I will try to find out the evolution of the two main approaches in regard to labour obligations and dispute settlement mechanisms in these agreements. I will also examine how various mechanisms therein adopted would ensure better stakeholder involvement in the processes. The agreements will be analysed in framework of four key dimensions, i.e., purposes of labour chapter; the nature of labour provisions; legal obligations; and the institutional processes provided for.”<sup>87</sup>

## 1. Comprehensive Progressive Agreement for Trans-Pacific Partnership (CPTPP)

The CPTPP has included labour chapter with the aim to promoting compliance with internationally recognised labour rights, and to enhance cooperation and consultation among the parties on issues of labour rights. It provides the necessary mechanisms with a view to ensuring the effective enforcement of labour laws in the Parties.<sup>88</sup>

### *A. Purposes and obligations*

The CPTPP includes strong obligations around labour standards.<sup>89</sup> The main obligations are provided in Art. 19.3.1, which are as below:<sup>90</sup>

#### Article 19.3: Labour Rights

1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour and, for the purposes of this Agreement, a

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<sup>86</sup> The Trans-Pacific Partnership Agreement (TPP) is a free trade agreement that would liberalise trade and investment between 12 Pacific-rim countries. The countries are New Zealand, AUstralia, Brunei DarUssalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, the Us and Viet Nam. The concluded TPP Agreement was signed in February 2016. New Zealand, which is the depository for the TPP, ratified the Agreement in May 2017. Japan has also ratified it. However, the TPP Agreement cannot enter into force until it is also ratified by four other signatories, including the Us. The US has notified that it does not intend to become a party to the Agreement. In light of the US withdrawal, ministers from the remaining 11 members affirmed the economic and strategic importance of the TPP. On 23 January 2018, negotiations were concluded on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

<sup>87</sup> Joo-Cheong Tham "Labour standards and trade agreements: An exploratory analysis of the 'Labour' chapter of the Trans-Pacific Partnership Agreement" (Incomplete draft for circulation only to participants of CELRL workshop on 'The Evolving Project of Labour Law) at 4.

<sup>88</sup> "CPTPP outcomes: Labour" DFAT <[www.dfat.gov.au](http://www.dfat.gov.au)>.

<sup>89</sup> New Zealand Ministry of Foreign Affairs and Trade "Trans-Pacific Partnership Agreement (TPP)" <[www.mfat.govt.nz](http://www.mfat.govt.nz)>.

<sup>90</sup> *Trans-Pacific Partnership Agreement* Art 19.3.1

prohibition on the worst forms of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

The obligations set out above.<sup>91</sup> refer only to ILO Declaration and are therefore ‘soft’ in nature. Parties are obliged to provide a minimum level of labour protection (beyond the obligations relating to ILS)<sup>92</sup>. However, a violation in ‘Labour Rights’ will only occur when a ‘party has failed to adopt or maintain a statute, regulation or practice in a manner affecting trade or investment between the Parties’,<sup>93</sup> which makes it difficult for other party to prove such a linkage.

The parties have agreed not to waive or derogate from their domestic labour laws, in a manner affecting trade or investment between the parties.<sup>94</sup> Such waiver or derogation is subject to any inconsistency with (i) right affirmed in the ILO 1998 Declaration, or (ii) weakens or reduces adherence to rights governing ‘acceptable conditions of work’ with respect of minimum wages, hours of work and OSH, in a special trade zones. The difficulty is how a party can prove that any derogation or waiver in labour law of another party has affected trade or investment between. This can result in the weakening of the labour protection under the TPP. Generally, the US approach proposes obligations in relation to waiver and non-derogation that apply to all labour laws. The TPP’s ‘Labour’ chapter confines it narrowly to inconsistency with rights under the ILO 1998 Declaration, and the weakening of these rights or ‘acceptable conditions of work’ in relation to special trade zones.<sup>95</sup>

The parties have made a commitment not to use labour standards ‘for protectionist trade purposes.’<sup>96</sup> Interestingly, obligation on ‘protectionism’ may be unenforceable given the lack of definition as to what is ‘protectionism’<sup>97</sup>.

The parties are to discourage, ‘through initiatives it considers appropriate’ the importation of goods produced by forced or compulsory labour, including child labour.<sup>98</sup> They shall endeavour to encourage enterprises to voluntarily adopt social responsibility initiatives<sup>99</sup>. However, this is also a ‘soft’ obligation as it does not create any binding commitment.<sup>100</sup>

The Parties are obliged not to fail “to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or

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<sup>91</sup> The footnote 5 in Article 9.3.2. clarifies that ‘acceptable conditions of work as determined by that Party’

<sup>92</sup> *Trans-Pacific Partnership Agreement* Art. 19.3.2

<sup>93</sup> *Trans-Pacific Partnership Agreement*, footnote 4 of Chapter 19.

<sup>94</sup> *Trans-Pacific Partnership Agreement* Art 19.4 (a)

<sup>95</sup> *Trans-Pacific Partnership Agreement* Art 19.4 (b)

<sup>96</sup> *Trans-Pacific Partnership Agreement*, Article 19.2.2.

<sup>97</sup> Tham "Labour standards and trade agreements", above n 87 at 13.

<sup>98</sup> *Trans-Pacific Partnership Agreement*, Article 19.6.

<sup>99</sup> *Trans-Pacific Partnership Agreement*, Article 19.7.

<sup>100</sup> Tham "Labour standards and trade agreements", above n 87 at 13.

investment between the Parties”.<sup>101</sup>

The parties are obliged to promote public awareness of their labour laws and also imposes obligations in terms of procedural guarantees to ensure that workers and employers have access to fair, equitable, and transparent labour tribunals for the enforcement of their labour rights.<sup>102</sup> The obligations concerning procedural guarantees are more stringent obligations.<sup>103</sup>

### *B. Institutional processes*

No pre-ratification mechanisms are present in the Labour chapter of CPTPP.<sup>104</sup> As post-ratification monitoring and enforcement mechanisms, the Labour chapter provides for three distinct processes: (a) domestic mechanisms; (b) dialogue between the Parties; and (c) dispute-settlement.<sup>105</sup>

For domestic mechanisms, the Parties have to designate official ‘contact points’ in relation to the Labour chapter who will be required to receive and consider written submissions from the public and liaise with them on matters related to Labour chapter.<sup>106</sup> The Parties are also required to establish a national labour consultative or advisory body or similar mechanism<sup>107</sup>, for members of its public to provide views on matters regarding this chapter. These political processes are to be the principal domestic avenue for the public of agreement Parties to raise issues related to the ‘Labour’ chapter.<sup>108</sup>

The ‘Labour’ chapter envisages two mechanisms for dialogue between the Parties First, it provides a long list of activities and topics on which the Parties can cooperate.<sup>109</sup> Second, it sets up a mechanism under for Parties to discuss specific matters arising between them though ‘Cooperative Labour Dialogue’ process.<sup>110</sup> This process provides for public engagement and its outcome can be made public, subject to Parties choice.<sup>111</sup>

The dispute-settlement process of the ‘Labour’ chapter consists of two stages. The first stage involves the ‘Labour Consultations’ between the disputing parties<sup>112</sup> while the second stage relates to the general dispute-settlement procedure under Chapter 28 of the TPP. The procedure for ‘labour consultations’ must be used before the dispute

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<sup>101</sup> *Trans-Pacific Partnership Agreement*, Article 19.5(1).

<sup>102</sup> *Trans-Pacific Partnership Agreement*, Article 19.8.

<sup>103</sup> Tham "Labour standards and trade agreements", above n 87 at 16.

<sup>104</sup> The US had reached bilateral agreements with Brunei, Malaysia and Vietnam which commit the latter three countries to detailed and significant changes of their labour laws prior to the TPP entering into force and subject these commitments to the dispute-settlement mechanisms under the TPP. These ‘Labour Consistency Plans’ for Brunei, Malaysia and Vietnam are respectively 5, 10 and 11 pages long.

<sup>105</sup> Tham "Labour standards and trade agreements", above n 87 at 17.

<sup>106</sup> *Trans-Pacific Partnership Agreement*, Article 19.13

<sup>107</sup> *Trans-Pacific Partnership Agreement* Art. 19.14.2

<sup>108</sup> *Trans-Pacific Partnership Agreement* At 18.

<sup>109</sup> *Trans-Pacific Partnership Agreement* Art 19.10,

<sup>110</sup> *Trans-Pacific Partnership Agreement* Art 19.11

<sup>111</sup> Tham "Labour standards and trade agreements", above n 87 at 18.

<sup>112</sup> *Trans-Pacific Partnership Agreement*, Article 19.15.

settlement provisions of CPTPP are employed.<sup>113</sup> The dispute settlement mechanism under Chapter 28 is detailed and prolonged.<sup>114</sup> The disputing Parties are obliged to implement the Final Report of Panel.<sup>115</sup> and in the event of non-implementation faced with suspension of benefits in the form of compensation (and trade sanctions).<sup>116</sup>

The Labour Council, comprising governmental representatives, is entrusted with oversight functions in matters relevant to Labour chapter, including reviewing reports from contact points. The Council shall also review the implementation of the 'Labour' chapter after five years of Agreement.<sup>117</sup> The Council in discharge of its functions is required to receive and consider the views of interested persons on matters related to this Chapter.<sup>118</sup>

CPTPP does not provide for an agency independent of the state parties. The ILO has no mandatory role unless the Parties *may* involve the ILO under any cooperative activity.<sup>119</sup> The parties *may* involve the ILO in the process of 'Cooperative Labour Dialogue' for an independent verification of compliance or implementation,<sup>120</sup> and the Labour Council 'shall, as appropriate' liaise with the ILO.<sup>121</sup>

## 2. Canada and European Union FTA (CETA)

CETA has provisionally entered into force on September 2017, but it will enter force fully when all EU members ratify it. The EU in the adoption of external relationships has a precedent of having as an aim sustainable development, as it has been for the CETA. As a matter of fact, the EU has long since adopted a regulation model intended to combine trade liberalization and respect of social rights through the Generalized System of Preferences (GSP).<sup>122</sup>

### A. *Labour Provisions*

In CETA the social clauses are inserted in Chapter 22: "Trade and Sustainable Development"; Chapter 23: "Trade and Labour"; and Chapter 24: "Trade and Environment". Since 2008 the EU has included 'sustainable development' chapter in FTA which contains provisions relating to aspects of sustainability and human rights. Inspired by US and Canadian FTAs, the Parties adopt two separate chapters on labour and environmental standards (including ILO core labour standards), obliging not to Use labour and environmental regulation as a means of economic protection<sup>123</sup>. The parties

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<sup>113</sup> *Trans-Pacific Partnership Agreement*, Article 19.15(13).

<sup>114</sup> Tham "Labour standards and trade agreements", above n 87 at 18.

<sup>115</sup> *Trans-Pacific Partnership Agreement*, Article 28.18.

<sup>116</sup> *Trans-Pacific Partnership Agreement*, Article 28.19.

<sup>117</sup> *Trans-Pacific Partnership Agreement*, Article 19.12.

<sup>118</sup> *Trans-Pacific Partnership Agreement*, Article 19.14(1).

<sup>119</sup> *Trans-Pacific Partnership Agreement* Article 19.10(3).

<sup>120</sup> *Trans-Pacific Partnership Agreement* Article 19.11(6)(b).

<sup>121</sup> *Trans-Pacific Partnership Agreement* Article 19.12(9)

<sup>122</sup> Perulli "The perspective of social clauses in international trade", above n32, at 42.

<sup>123</sup> At 47.

recognize that economic and social development as well as environmental protection are mutually interdependent and contributory toward sustainable development. They make a commitment to promote the development of international trade in a manner that contributes to the achievement of sustainable development goals.<sup>124</sup>

*B. Purposes and obligations*

In the ‘Trade and Labour’ chapter ‘the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards’; and they ‘shall not waive or derogate from its labour law and standards...to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory’, or, again, ‘shall not...fail to effectively enforce its labour law and standards to encourage trade or investment’.<sup>125</sup> We can see that despite their commitment to keep the levels of protections for workers, the problem remains how to find evidence to prove a link between the lowering of domestic labour standards and the intention to encourage trade or investment.<sup>126</sup> These provisions in the “Trade and Labour” chapter suggest their role in the context of free trade.<sup>127</sup>

CETA chapter 23 “Trade and Labour”, contains obligations concerning the ILO but they differ from the past EU FTAs as no direct reference to the ILO’s Fundamental core Conventions has been made therein.<sup>128</sup> Instead, references are made) to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) that comprises commitment to (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation; as well as (art. 23.1.2) to the ILO Declaration on Social Justice for a Fair Globalisation (2008) and to the ILO Decent Work Agenda. The parties are thus committed to respect (a) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; (b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and, (c) non-discrimination in respect of working conditions, including for migrant workers- but there is no direct reference to the ILO core Conventions.<sup>129</sup>

Despite the lack of reference to the ILO Core Convention<sup>130</sup>, ‘each party reaffirms its commitment to effectively implement in its law and practices in its whole territory the fundamental ILO Conventions that Canada and the Member States of the European

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<sup>124</sup> At 47.

<sup>125</sup> *EU-Canada Free Trade Agreement (Comprehensive Economic and Trade Agreement)* Art 23.4.

<sup>126</sup> Perulli “The perspective of social clauses in international trade”, above n32, at 46.

<sup>127</sup> At 46.

<sup>128</sup> At 48.

<sup>129</sup> At 48.

<sup>130</sup> At 48.



Union have ratified respectively. The Parties shall make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so'.<sup>131</sup>

### *C. Institutional Processes*

In keeping with the 'soft' European approach, the CETA does not have a special mechanism for sanctions if commitments on labour clauses are not followed.<sup>132</sup> The Agreement envisages a special 'Committee on Trade and Sustainable Development' to oversee the implementation of those Chapters and can also 'carry out its duties through dedicated sessions comprising participants responsible for any matter covered, respectively under these Chapters'<sup>133</sup> (on Trade and Labour as well as for that on Trade and Environment). Any decision or report of this Committee is to be made public and it shall keep updated the Civil Society Forum on the implementation of the Chapter.<sup>134</sup> This Civil Society Forum is 'composed of representatives of civil society organisations established in their territories' and shall be convened once a year or otherwise agreed. The Parties in this Forum 'shall promote a balanced representation of relevant interests, including independent representative employers, unions, labour and business organisations, environmental groups, as well as other relevant civil society organisations as appropriate.'<sup>135</sup> The participation of trade unions in Civil Society Forum, could be channelized to spread practices of transnational collective bargaining at a regional level, promoting the social dialogue between European and Canadian social partners.<sup>136</sup> This Forum may also facilitate the court or the inspectorate's intervention in labour disputes, thereby reinforcing the effectiveness of social provisions which otherwise lack specific sanctions mechanism.<sup>137</sup> In CETA the Parties 'recognize the importance of social dialogue on labour matters among workers and employers, and their respective organisations, and governments, and commit to the promotion of such dialogue' (Art. 23.1 CETA). Further, the Social Clause could be considered as a tool to improve international social dialogue.<sup>138</sup>

### Comparison between the two agreements

From above analysis one can see that regarding labour and the environment both FTAs have set more detailed or higher standards than previous FTAs, emphasizing the enforcement of rules. TPP labour provisions are more elaborate than previous trade pacts.<sup>139</sup> Both agreements have similarity on labour issues such as procedural guarantees, cooperation, public submissions, multilateral labour documents and

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<sup>131</sup> *EU-Canada Free Trade Agreement* Art 23.3.4.

<sup>132</sup> Perulli "The perspective of social clauses in international trade", above n32, at 49.

<sup>133</sup> *EU-Canada Free Trade Agreement* Art 22.4.1.

<sup>134</sup> Perulli "The perspective of social clauses in international trade", above n32, at 49.

<sup>135</sup> *EU-Canada Free Trade Agreement* Art 22.5.2.

<sup>136</sup> Perulli "The perspective of social clauses in international trade", above n32, at 49.

<sup>137</sup> At 49.

<sup>138</sup> At 49.

<sup>139</sup> Hang Wang "The Future of Deep Free Trade Agreements: The Convergence of TPP (and CPTPP) and CETA?" (April 2019) Research Gate < <https://www.researchgate.net/publication/328139448> > at 13

institutional arrangements.<sup>140</sup> As a matter of fact both the agreements converge in increasing labour protection. They refer to the International Labour Organisation Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 (ILO Declaration) and the concept of Decent Work outlined by the ILO.<sup>141</sup> while CETA establishes stronger obligations to act under the ILO Declaration of 1998<sup>142</sup> and to promote its principles according to the ILO Declaration on Social Justice for a Fair Globalization of 2008.<sup>143</sup>

Regarding institutional arrangement, national labour consultative or advisory bodies need to be established or maintained under both agreements for labour issues.<sup>144</sup> These advisory bodies are open to the public and also consulted by the state Parties.<sup>145</sup>, or the CETA Committee on Trade and Sustainable Development.<sup>146</sup> A number of provisions in CPTPP are quite innovative e.g., acceptable conditions of work,<sup>147</sup> labour rights protection in export processing zones.<sup>148</sup> and trade in goods produced by forced or compulsory labour.<sup>149</sup> Also, TPP requires domestic law to ensure acceptable work conditions in three areas (i.e. minimum wages, hours of work, and occupational safety and health).<sup>150</sup> This is quite an unprecedented development as it is “the first time the provisions have been explicitly stated as labour rights.”<sup>151</sup> The US had signed labour consistency plans with Malaysia, Brunei and Vietnam as ex-ante reform in labour laws of these countries. Since the withdrawal of the US from TPP, these plans have not been effective but they constitute good reference in the future negotiations.<sup>152</sup>

### **Why labour right provisions are not enforceable?**

Although inclusion of ILS in trade agreements is step in right direction but either it's rarely enforced or it's not possible due to lack of an effective enforcement process. Some agreements have sanctioning approach, but it is rarely enforced, either due to lack of political will or the capacity.<sup>153</sup> The agreements with 'conditional' approach normally contain more detailed processes, dispute settlement mechanism, commitments and monitoring procedures. The US labour chapters are more in favour of pre-ratification conditionality (ex-ante) for bringing regulatory change (in US-Bahrain and US-Oman agreements). Studies have shown that FTAs having pre-ratification conditionality including specific institutional and legal

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<sup>140</sup> At 14.

<sup>141</sup> TPP Article 19.10.6(h) and CETA Article 23.3.2.

<sup>142</sup> CETA Article 23.3.1

<sup>143</sup> CETA Article 23.3.2.

<sup>144</sup> TPP Article 19.14.2 and CETA Article 23.8.4.

<sup>145</sup> TPP Article 19.14.2 and CETA Article 23.8.4.

<sup>146</sup> CETA Article 23.9.4.

<sup>147</sup> TPP Article 19.3.2.

<sup>148</sup> TPP Article 19.4 (b).

<sup>149</sup> TPP Article 19.6.

<sup>150</sup> TPP Article 19.3.2.

<sup>151</sup> Wang "The Future of Deep Free Trade Agreements" at 14–15.

<sup>152</sup> At 15.

<sup>153</sup> Moore and Scherrer "Conditional or Promotional Trade Agreements, above n 65, at 7.

reforms, and technical cooperation and capacity building, during the monitoring and implementation stages have greater compliance.<sup>154</sup>

The enforcement process has two sides: (1) ratification of standards; and (2) successful implementation. The first requires the adoption of certain standards into national law while the second involves the response of the government on any violation<sup>155</sup>. The inclusion of labour provisions is limited to institutional measures such as the ratification of the ILO conventions which have not played a significant role in improving labour practices.<sup>156</sup> The prerequisites of an effective enforcement of ILS are not only the conditions that foster labour rights but also the political will of the Parties. The political will depends on power and role of civil society, especially independent trade unions, who can oblige the governments to implement and enforce the labour chapters.

#### *A. Engagement of social partners*

Moore and Scherrer<sup>157</sup> argue that “the inclusion of civil society groups in both the development and implementation of social chapters will give much needed legitimacy to future agreements and trade-labour linkages”. The way social partners are included in the social chapter is also somewhat different in EU and the US. ‘The US public submissions process is an important channel not available in EU agreements.’ EU envisages regular meetings with civil society, while the US activates dialogue process when the problem arises.<sup>158</sup> Only in EU-South Korea agreement civil society forums have been fully implemented and meet regularly.

The EU have also set up mechanisms for the broad civil society participation. CSOs can register them for Civil Society Dialogue on Trade, and this provides them an opportunity to be involved in stakeholder meetings and events.<sup>159</sup> It has been seen that civil society organisations generally feel dissuaded from taking the enforcement route which is time consuming and costly and often made worse by various types of regulations and lack of coherence between the labour standards regimes, as well as procedural access issues.<sup>160</sup> While seen that trend to involve stakeholders is growing, but there is a need to make involvement meaningful which depends on governments to take action.<sup>161</sup>

To involve social partners in the implementation of labour provisions, countries set up advisory mechanisms. Such mechanisms may include permanent consultative bodies, agreement-specific arrangements, or mechanism to involve the wider segments of civil society and the public.<sup>162</sup> Their aim is to promote dialogue between the civil societies of the two trade

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<sup>154</sup> At 7.

<sup>155</sup> At 7.

<sup>156</sup> Jean Marc Siroen and David Andrade “Trade Agreements and Core Labour Standards” (April 2016) Researchgate <[www.researchgate.net/publication/310621600](http://www.researchgate.net/publication/310621600)> at 2.

<sup>157</sup> Moore and Scherrer “Conditional or Promotional Trade Agreements, above n 65, at 12–13.

<sup>158</sup> The EU-CARIFORUM EPA changed the European approach towards civil society engagement as it was institutionalized in a way.

<sup>159</sup> *Assessment of Labour Provisions in Trade and Investment Arrangements* (International Labour Organisation, 2016) at 135.

<sup>160</sup> Moore and Scherrer “Conditional or Promotional Trade Agreements, above n 65, at 7–8.

<sup>161</sup> At 7.

<sup>162</sup> *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, above n1, at 6.

partners. The evidence shows that involvement of social partners promotes an environment which facilitates the improvement of labour standards, through an enhanced public awareness of labour issues, and increased dialogue between governments and the civil society, and bringing the labour issues on political agenda.<sup>163</sup> Stakeholders play an important role in activating various processes provided in the labour chapter.<sup>164</sup> Their close coordination involvement in the monitoring of compliance has also been effective. The Cambodian textile sector shows how governments, employers, trade unions and civil society could coordinate and work together to improve labour standards.<sup>165</sup>

The failure to address civil society concerns by trading partners may limit its efficacy or develop ‘dialogue fatigue’.<sup>166</sup> The failings are also due to the fact that trade partners have lack knowledge of labour issues and do not look at them as priority issue. So despite the formal reciprocal obligations in labour chapters issues are hardly considered.<sup>167</sup> The main problem obviously relates to a lack of political will or trading partners have no tradition of social dialogue. The effectiveness of dialogue process depends upon regular meetings; with the inclusion of labour groups; consultations with governments to raise labour rights issues; and transnational advocacy networks developed outside these forums.

### *B. Institutional mechanisms*

Institutional mechanisms for the involvement of stakeholders differ in terms of scope, specificity and inclusiveness.<sup>168</sup> The scope refers to whether a specific mechanism applies to only a singly agreement or to several others. The mechanisms that apply to several agreements are more permanency.<sup>169</sup> The creation of advisory or consultative bodies may be mandatory or voluntary.<sup>170</sup> There are differences in relation to degree of specifications, e.g., agreements may use general or specific composition of advisory bodies.<sup>171</sup> The inclusiveness implies whether a wide range of stakeholders are to take part in the mechanism or some limited number of fixed participants.<sup>172</sup> Stakeholder involvement can take place through other channels, such as public submissions, cooperation for development or working as advocacy groups.<sup>173</sup>

The agreements having some permanent institutional framework, such as the Labour Department in the United States, or ILO working as advisory or monitoring body, seem more likely to be enforced.<sup>174</sup> In terms of monitoring mechanisms, the US approach is more consistent as United States Trade Representative in conjunction with the Labour Department are mainly responsible for monitoring.<sup>175</sup> This also facilitates creation of more permanent

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<sup>163</sup> At 6.

<sup>164</sup> At 8.

<sup>165</sup> At 7.

<sup>166</sup> Moore and Scherrer “Conditional or Promotional Trade Agreements, above n 65, at 12.

<sup>167</sup> James Harrison “The Labour Rights Agenda in Free Trade Agreements” (2019) 20 JWIT 705 at 713-14.

<sup>168</sup> *Assessment of Labour Provisions in Trade and Investment Arrangements*, above n 162, at 132.

<sup>169</sup> At 132.

<sup>170</sup> At 132.

<sup>171</sup> At 132.

<sup>172</sup> At 132.

<sup>173</sup> At 132-133.

<sup>174</sup> Moore and Scherrer “Conditional or Promotional Trade Agreements, above n 65, at 9.

<sup>175</sup> At 9.

institutional frameworks, knowledge sharing on labour issues, and coordination within the Labour Department for aid and capacity building. This consistency is not visible in the EU, which tend to specify different monitoring or institutional frameworks across each agreement with trading partner. A more common form emerged so far is the Domestic Advisory Group (DAG) to monitor the implementation of the agreement. The DAGs are more formal and agreement specific, and lack of meetings counter their efficiency, except in the EU-South Korea DAG, which holds annual sessions, even though no complaint mechanism is attached to it.

The social partners have been involved in technical cooperation programmes, such as capacity-building and monitoring, for instance the US–Colombia Labour Action Plan (LAP).<sup>176</sup> The pre-requisites for social dialogue in the form of independent social partners and accountable institutions are far from available or practicable in many countries.<sup>177</sup> It is useful to include the ILO as advisory body for technical assistance, monitoring and cooperation purposes.<sup>178</sup>

### *C. Dispute settlement mechanism*

The United States since 2009 (US-Peru) agreement extends the regular dispute settlement mechanism to the labour chapters because of linkage between trade and labour.<sup>179</sup> The findings of dispute settlement procedure are generally binding, even with possibility of imposing monetary fine or sanctions. Only one case (US-CAFTA DR) has gone to the arbitration on failure of Guatemala to enforce its own labour laws. While the US was able to prove to the Panel that different employers had failed to enforce labour law as a sustained or recurring course of action but was unable to demonstrate that such lapses constituted a course of action that was in a manner affecting trade.<sup>180</sup>

On the contrary, the EU with its promotional approach more often employs dialogue and cooperation in the case of violations. No provisions exist for enforcement purpose and only soft pressure can be applied. The EU's agreements with CARIFORUM and South Korea are more comprehensive as they provide the dispute mechanism and civil society engagement. But there is again no option for sanctions or suspension of trade benefits. The inclusion of some form of public submissions process [(US-Guatemala (2006) CPTPP (2018))] allows for civil society groups to participate and lodge complaints, and is likely to result in better enforcement as social partners are able to push for political will. This submission process of course is dependent on viable social partners, trade unions with easy procedural access and the necessary knowledge, as well capacity, and faith in the process. However, due to failing submissions or not being followed up, this process tends to wither away due to “submission fatigue”<sup>181</sup>. Some

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<sup>176</sup> *Assessment of Labour Provisions in Trade and Investment Arrangements*, above n 162, at 140.

<sup>177</sup> Moore and Scherrer “Conditional or Promotional Trade Agreements”, above n 65, at 10.

<sup>178</sup> At 10.

<sup>179</sup> At 10.

<sup>180</sup> Harrison “The Labour Rights Agenda in Free Trade Agreements” above n 167, at 719.

<sup>181</sup> Moore and Scherrer “Conditional or Promotional Trade Agreements”, above n 65, at 10–11.

experts view that instead of the current state-to-state model, the dispute settlement mechanism may be supported by the involvement of a third party.<sup>182</sup>

#### *D. Sanctions*

Whether sanctions<sup>183</sup> should be Used in regard to ILS in social chapters remains debateable. It is argued that sanctions may do more harm than good to developing countries thus withering away any possible ILS benefits. A view prevails that “punitive trade restrictions for non-compliance or enforcement can lead to job losses in developing countries, hurting those that ILS are aiming to benefit”. In most trade agreements the enforcement mechanisms have relied on penalties or negative incentives.<sup>184</sup> The withdrawal of trade preferences under the EU and US GSP system has been employed more often. However, the lack of sanctions within EU agreements has often been cited as the reason for non-enforcement but in fact the situation involves other complexities. Positive sanctions such as condition aid or supplementary market access would provide more incentives than the traditional sanctions of fines or trade cuts. The US-Cambodia agreement on textile is a good example of positive sanction which made good progress for workers in Cambodia.<sup>185</sup> Though sanctions are available in the US but what is actually being utilized are the aid or capacity-building projects (e.g., US-Bahrain and US-Oman and CAFTA-DR agreements). The US-Chile agreement includes sanction/incentive process together. The fines are paid into a fund for improving the specific labour rights violations that occurred, alongside the withdrawal of trade preferences, if so required.

Even though sanctions may act as a deterrent, but what limits their effectiveness is inconsistent application both through the GSP and FTA approach. This situation shows that trading partners often lacked the political will to enforce and equally the lack of social partner capacity. Economic sanctions may perhaps help push forward legislative changes, but certainly have no effect in bringing about changes in attitudes, behaviours and beliefs. There must be clear directives about what happens when violations occur, a well-defined process, and consistency in application, otherwise, whole sanctions system becomes somewhat redundant.

## **Conclusion**

As Joo-Cheong Tham has argued that the question no longer seems that “Should labour standards be part of international trade regulation?”. But the key question now is that “How should labour standards be integrated into international trade regulation?”<sup>186</sup> Even the proponents of trade liberalization have begun to feel the problems associated with trade policy for workers. Harrison says that a joint report of IMF, World Bank and WTO concluded in 2017,

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<sup>182</sup> Axel Marx “Dispute Settlement for Labour Provisions in EU Free Trade Agreements: Rethinking Current Approaches” *Cogitatio* <[www.cogitatiopress.com/politicsandgovernance/article/view/1070/1070](http://www.cogitatiopress.com/politicsandgovernance/article/view/1070/1070)> at 49.

<sup>183</sup> Moore and Scherrer “Conditional or Promotional Trade Agreements”, above n 65, at 13.

<sup>184</sup> Polaski “Protecting Labor Rights through Trade Agreements: An Analytical Guide”, above n 28, at 21.

<sup>185</sup> Siroen and Andrade “Trade Agreements and Core Labour Standards”, above n156, at 4.

<sup>186</sup> Tham “Labour standards and trade agreements (revised text).docx”, above n 27, at 2.

has suggested that ‘adjustment to trade can bring a human and economic downside that is frequently concentrated, sometimes harsh, and has often become prolonged.’<sup>187</sup>

The linkage between trade and labour will only be successful if it is enforced, and some minimum standards are adopted as against maximum standards thus not limiting their enforcement or progress. <sup>188</sup> The inclusion of ILS cannot be an effective instrument itself unless there is not mechanisms to sufficiently enforce those provisions.<sup>189</sup> The lack of enforcement of the existing social chapters in FTAs can be attributed to many factors, which, *inter alia*, included the lack of political will, attitudinal change and the absence of strong independent trade unions; regardless of whether or not sanctions are included.

A meaningful involvement of social partners through public submissions would help making the whole process transparent and responsive. <sup>190</sup> Indeed, the political will can be pushed through pressure from civil society. But for that to happen the civil society groups should have knowledge about the agreement, as well as capacity to put pressure. The social chapter must be included under the same dispute settlement mechanism as the rest of the agreement since it helps aid coherence and reinforces trade-labour linkage, and also integrating ILS into the domain of economic and trade issues. As a policy of deterrence, sanctions should be used as a final resort. The US practice of linking aid and capacity-building training to country specific issues that are highlighted during the negotiation and monitoring stages of agreement is quite useful as it has measurable impact.

There is need to adopt a more proactive approach to the monitoring of labour provisions, and hard enforcement mechanisms and trade sanctions to complement the soft cooperative approach. <sup>191</sup> Equally important is the role of government and private sector employers in guaranteeing respect for labour rights.<sup>192</sup>

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<sup>187</sup> Harrison “The Labour Rights Agenda in Free Trade Agreements” above n 167, at 725.

<sup>188</sup> Mario Artuso and Carolan McLarney “A Race to the Top: Should Labour Standards be Included in Trade Agreements” (2015) SAGE <[www.vik.sagepub](http://www.vik.sagepub)> at 13.

<sup>189</sup> Siroen and Andrade “Trade Agreements and Core Labour Standards” above n156, at 2.

<sup>190</sup> Moore and Scherrer “Conditional or Promotional Trade Agreements, above n 65, at 17.

<sup>191</sup> Melo Araujo “Labour Provisions in EU and US Mega-regional Trade Agreements: Rhetoric and Reality” (January 2018) at 12.

<sup>192</sup> Polaski “Protecting Labor Rights through Trade Agreements: An Analytical Guide”, above n 28, at 22.