

Labour Standards and Mega-Regionals: Innovative Rule-Making or Sticking to the Boilerplate?

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Labour Standards and Mega-Regionals: Innovative Rule-Making or Sticking to the Boilerplate?

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ABSTRACT:

The requirement to adopt minimum labour standards is now standard practice in free trade agreements negotiated by major trading powers such as the EU and US. However, such practice has historically been contested by developing countries, who contend that the requirement to increase labour and social protection standards is designed to remove one of the few competitive advantages that developing countries have over developed countries in attracting foreign investment. More recently, the EU and the US have also sought to use so-called ‘mega-regionals’ to promote labour standards. This was a significant development in that their proponents were keen to stress that these agreements would set the benchmark for labour protection provisions in FTAs, readily admitting that one of the central aims pursued by such agreements was to redefine the rules of the global trading system. The paper aims to assess the labour standards provisions included in EU and US FTAs, determine the rationale behind the inclusion of such provisions, and examine the extent to which mega-regionals such as the TTIP and the TPP marked a significant departure from past practice.

I. INTRODUCTION

The requirement to adopt minimum labour standards is now standard practice in free trade agreements (FTAs) negotiated by major trading powers such as the EU and US. However, such practice has historically been contested by developing countries, who contend that the requirement to increase labour and social protection standards is designed to remove one of the few competitive advantages that developing countries have over developed countries in attracting foreign investment. More recently, the EU and the US have also sought to use so-called ‘mega-regionals’ to promote labour standards. This was a significant development in that their proponents were keen to stress that these agreements would set the

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benchmark for labour protection provisions in FTAs, readily admitting that one of the central aims pursued by such agreements was to redefine the rules of the global trading system. The paper aims to assess the labour standards provisions included in mega-regionals such as the TTIP and the TPP to determine the extent to which these agreements mark a significant practice from past EU and US FTA practice. Section 2 of the paper examines the rationale behind the push for the inclusion of labour protection standards in trade agreements as well as the ultimate rejection of such proposals at the multilateral level. Section 3 discusses the manner in which the EU and the US have sought to disseminate minimum labour protection standards through FTAs and examines the limits of this practice. Section 4 discusses how mega-regional FTAs, in particular the TTIP and the TPP, were packaged by their proponents as the most ambitious FTA provisions on labour issues to date, and analyses the extent to which this claim is justified in the text or proposed text of these agreements. This section will also discuss how the recent collapse of these agreements may affect the trade labour linkage issues in EU and US FTAs.

II. RATIONALE FOR TRADE LABOUR LINKAGE

The linking of trade and labour protection standards is typically based on economic and values-based arguments. From an economic perspective, there is the notion that divergences in labour standards between different countries lead to unfair competitive advantages in global trade. The ‘competitive advantage’ argument here is that lower cost of labour allows exporters to sell goods at cheaper prices and allow the same countries to attract foreign investment. There is also a related concern that the adoption of lower standards in some countries may cause a race to the bottom, whereby other countries would be encouraged to lower their labour standards in order to counteract the supposed unfair competitive advantage gained by the former. Historically, the solution proposed to this perceived problem has been to use trade agreements to impose minimum standards of labour protection and

enable trading partners to impose trade sanctions against trading partners that fail to comply or enforce such standards for protectionist purposes (so-called social clause²). The objective thus pursued is to iron out, or at least minimise, divergences in labour standards between countries.

However, the ‘competitive advantage’ argument is, in general, heavily disputed for a number of reasons. Firstly, there is little empirical evidence to suggest that lower labour standards significantly affect trade flows of foreign investment³. For example, it is notable that many countries with low labour standards, such as China, struggle to attract foreign investment. In addition, the idea that low labour standards in some countries will lead to a race-to-the-bottom is highly questionable, to the extent that labour standards typically reflect differences in productivity as well as societal choices which depend on the level of economic development of a given country⁴. Developed countries tend to adopt high standards of labour protection because not only is there a political demand from their constituents to do so but also because they are able to absorb the resulting costs. By contrast, many developing countries are simply not in a position to achieve “a trade-off between monetary and non-monetary wealth”⁵. The use of trade sanctions as a tool to coerce third countries to maintain minimum standards of labour protection has also been criticised, not least because such sanctions tend to produce adverse consequences for all parties involved: a trade sanction will invariably lead to price increases which will simultaneously cause welfare costs the country applying the sanction and economic deterioration in the country subject to the sanction⁶.

² Virginia A. Leary, “Workers’ Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, US Laws)” in Hudec R. and Bhagwati, J. (eds.), *Fair Trade and Harmonization: Pre-requisites for Free Trade?*, (Cambridge MIT Press, 1996) 177-231.

³ See Dany Rodrik, “Labour Standards in International Trade: Do they matter and what do we do about them?”, in Robert Lawrence, Dany Rodrik and John Whalley (eds.) *Emerging Agendas for Global Trade: High Statkes for Developing countries*, Policy Essay no.20 Overseas Development Council, Washington D.C.; Remy Bazillier, “Trade, environment and labour,” Institut du Develoement durable et des relations Internationales, No.08/2005, p.11-13.

⁴ Bernard Hoekman and Martin Kostecki, “Towards Deeper Integration? The ‘Trade and’ Agenda” in Bernard Hoekman and Martin Kostecki, (eds) *The Political Economy of the World Trading System: WTO and Beyond*, (Oxford University Press, 2001), 415.

⁵ Gary Burtless, Robert Lawrence, Robert Litan and Robert Shapiro, *Globophobia: Confronting Fears about Open Trade* (The Brookings Institution, Washington D.C, 1998), 122..

⁶ Martin Will and Keith E. Maskus, “Core labor standards and competitiveness: implications for global trade policy”, *Review of International Economics* 9.2 (2001), 317-328; Bernard Hoekman and martin Kostecki

There are also value-related arguments that surround the trade-labour linkage debate, to the extent that certain labour rights are also recognised as fundamental human rights. Thus, as Bhagwati explains, countries may wish to reserve the right to withhold trade concessions where there is evidence that a competitive advantage has been gained by another country by not applying universally accepted human rights such as the prohibition of slavery⁷. However, the limits of the value-based argument are that there are very few labour rights that are universally accepted as human rights, and that the importance attached to particular human rights may vary significantly depending on the cultural preferences and economic conditions of each country⁸.

The above considerations show why the trade-labour linkage is by no means an uncontroversial issue. This is further demonstrated in the conflicting positions adopted by different WTO Members when discussing proposals for the incorporation of rules on labour within the remit of WTO law⁹. Developed countries, in particular the likes of the United States and the EU, have repeatedly argued that WTO law should address the issue of labour standards in some way. The US has traditionally packaged their proposals in economic language based on ‘race to the bottom’ arguments. Conversely, the EU has tended to promote trade-labour linkages by focusing on the normative dimension of the proposals and in particular by emphasizing the “universal nature of labour standards”¹⁰. However, proposals for the negotiation of WTO rules on the relationship between trade and labour rights have been consistently rejected by developing country WTO Members because of the perception that the

(2001), “Towards Deeper Integration? The ‘Trade and’ Agenda” in Bernard Hoekman and martin Kostecki, (eds) *The Political Economy of the World Trading System: WTO and Beyond*, (Oxford University Press, 415.

⁷ Jagdish Bhagwati, “Trade Liberalisation and ‘Fair Trade’ Demands: Addressing the Environmental and Labour Standards Issues” *The World Economy* [2001] 18(6), 753-755.

⁸ Ibid.

⁹ Gonzalez Montserrat Garibay, “Trade-Labour Linkage from the Eyes of the Developing Countries: A Euphemism for Protectionist Practices”, *The Eur. Foreign Aff. Rev.*, 14 [2009], 763.

¹⁰ Ibid, 769.

real objective pursued is to protect developed countries against the competitive advantage of the availability of low skilled labour in developing countries¹¹.

III. PAST FTA PRACTICE

1. *Labour protection in EU and US FTAs*

Whilst the EU and the US failed in their attempts to introduce labour standards within the framework of WTO law, they have been able to pursue this agenda in the context of bilateral and regional trade agreements, where their negotiating leverage can be used more potently. Both EU and US FTAs include dedicated chapters with respect to labour standards, which tend to follow a fairly similar approach as far as labour protection is concerned¹². The overall aim is to use FTAs to promote and disseminate internationally recognised labour standards and to ensure that trading partners do not deliberately weaken social protection in order to gain a competitive advantage in international trade. Firstly, they generally require parties to implement minimum internationally recognised labour standards. Such standards cover both labour rights (e.g., the freedom of association, collective bargaining and the prohibition against child labour) and rules on working conditions (e.g., minimum wage and social security rights) enshrined in treaties negotiated under the auspices of the International Labour Organisation (ILO)¹³. Secondly, the FTAs contain provisions requiring parties not to lower labour standards or refrain from enforcing such standards in order to attract foreign investment. The commitments to maintain and uphold levels of labour protection are phrased in strong terms and are intended to create a ratchet effect whereby the parties are dissuaded from lowering labour standards. But the normative implications of such provisions are not

¹¹ Larry DiMatteo, Kiren Dosanjh, Paul L. Frantz, and Peter Bowal, “The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime” *Vand. J. Transnat'l* [2003] L. 36, 124.

¹² The US typically includes a “Labour” chapter in its FTAs whilst the EU FTAs include “sustainable development” chapters which address both labour and environmental protection issues.

¹³ For a review of ILO standards see: Philip Alston, “Core labour standards’ and the transformation of the international labour rights regime”, *European Journal of International Law* 15.3 (2004): 457-521; Jordi Agustí-Panareda, Franz Christian Ebert, and Desiree LeClercq. “ILO Labor Standards and Trade Agreements: A case for consistency” *Comp. Lab. L. & Pol’y J.* [2014] 36 347.

entirely clear. Firstly, broad references to ‘domestic labour laws’ indicate that these obligations go beyond the mere application and enforcement of minimum standards enshrined in the international instruments listed in the FTAs. The obligation is wide in scope in that it covers any form of domestic legislation relating to labour or environment protection issues. However, the agreements do not define more precisely what would constitute a labour law, nor do they list the laws of FTAs parties that would be covered by such obligations. Another practical difficulty presented by such clauses is that they would only be applicable if the lowering of standards is designed “to affect” trade between parties or promote foreign investment. There is, as of yet, no guidance or jurisprudence clarifying how to determine the trade effects of the failure to apply or enforce labour standards¹⁴.

There are, however, some notable differences between the EU and the US approaches. Firstly, although both the EU and the US FTAs refer to ILO standards, the scope of standards covered by US FTAs is narrower than that of EU FTAs. US FTAs typically require parties to maintain laws, regulations and practices in accordance with the core labour standards established by the ILO Declaration on Fundamental Principles and Rights at Work¹⁵. These core standards represent minimum labour protection standards, which are also recognised as fundamental human rights and include the freedom of association, the elimination of all forms of forced labour, abolition of child labour and the requirement of non-discrimination with respect to employment and occupation¹⁶. By contrast, the scope of EU FTAs often extends beyond core labour standards by also requiring parties to maintain laws in accordance with the ILO Decent Work Agenda¹⁷ and, in the case of the EU-Central America FTA, by requiring

¹⁴ There is, however, an ongoing dispute between the US and Guatemala which focuses on this precise issue. The submissions of the parties can be access at: <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr>.

¹⁵ Ferdi De Ville, Jan Orbie, and Lore Van den Putte, “Sustainable development in TTIP: a highest common denominator compromise?” *European Journal of Risk Regulation* 2 (2016), 291.

¹⁶ Robert Kissack, “Labour Standards. An Historical Account of the EU Involvement with (in) the ILO” in Amandaine Orsini (ed.) *The European Union With (in) International Organisations: Commitment, Consistency and Effects Across Time* (Ashgate, 2016): 76-77.

¹⁷ See Article 13(1) Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea OJ L 127; Article 191(2) Economic Partnership between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part OJ L289/I/3. Article 23(3) Comprehensive Economic and Trade Agreement between Canada on the one part and the

compliance with ILO conventions which regulate the core ILO standards, such as ILO Convention 87 concerning Freedom of Association and Protection of the Right to Organise and ILO Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively¹⁸. Such difference in scope between the EU and the US FTAs is explained to a large extent by the fact that that the US, unlike EU Member States, is not a signatory to most ILO Conventions¹⁹.

With respect to the requirements to not derogate, waive or fail to enforce labour protection standards, there is one EU FTA that adds to this practice by providing that parties must not lower “the level of protection provided by domestic social and labour legislation”²⁰. This ‘non-lowering’ clause effectively requires parties to lock-in existing levels of labour protection”²¹. However, the main difference between the EU and the US approach lies with respect to the enforceability – or lack thereof- of such obligations. US FTAs typically subject labour provisions to the dispute settlement mechanism and allow the suspension of benefits against a FTA party if it is shown that non-enforcement resulted from a sustained or recurring course of action or inaction and has occurred in a manner affecting trade or investment between the parties²². The EU, with the exception of the EU-CARIFORUM Economic

European Union and its Member States (CETA). The CETA was signed on 30 October 2016 and is currently awaiting approval from the European parliament. The parts of the agreement that fall under the EU’s exclusive competence will be provisionally applied once the European Parliament’s approval is secured. Those parts that fall within the EU’s shared competence will only enter into effect following ratification by each EU Member State. Text available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

¹⁸ Article 286(2) Council Decision of 25 June 2012 on the signing, on behalf of the European Union, of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, OJ L 346.

¹⁹ Ferdi De Ville, Jan Orbie, Lorre Van de Putte, “TTIP And Labour Standards”, Directorate general for Internal Policies Department: Economic and Scientific Policy, IP/A/EMPL/2015-07, p.33. 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).

²⁰ Article 193 EU-CARIFORUM EPA.

²¹ Lorand Bartels, “Social issues: Labour, environment and human rights” in Simon Lester, Bryan Mercurio and Lorand Bartels (eds), *Bilateral and regional trade agreements: case studies - Volume II* (Cambridge University Press, 2016), 381.

²² See for example Articles 174)(5) and Annex 20A US-Singapore FTA; Roman Grynberg, “Labour Standards in US and EU Preferential Trading Arrangements” 40(4), 632-633; Cathleen Cimino-Isaacs, “Labor Standards in the TPP”, in Cathleen Cimino-Isaacs and Jeffrey J. Schott (eds.) *Trans-Pacific partnership: An Assessment* (Peterson Institute for International Economics, Washington D.C., 2016)264-265.

Partnership Agreement (EUC-EPA)²³ generally does not subject its sustainable development chapters to the FTA dispute settlement mechanisms, meaning that whilst the obligations included in these chapters are legally binding, they are also not enforceable. Instead, EU FTAs typically provide that where the parties are unable to resolve an issue regarding the sustainable development provisions, the parties may request that the matter be examined by a panel or group of experts²⁴, whose task it is to issue a report containing recommendations. Although these recommendations are not binding, the KOREU FTA²⁵, the Colombia-Peru FTA²⁶, the EU-CA FTA²⁷, the EU-Singapore FTA²⁸ and the CETA²⁹ all provide that the sustainable development committee must monitor the implementation of the recommendations by the parties.

The substantive labour protection provisions of EU and US FTAs are complemented by procedural frameworks which are intended to ensure the implementation of these agreements and to promote future cooperation on labour matters that arise between the parties. The US FTAs establish Labour Affairs Councils composed of representatives of both parties who meet annually to discuss various issues pertaining to the implementation of a review of labour provisions³⁰. They also establish mechanisms for cooperative consultations that are intended to resolve labour related disputes amicably³¹. The EU sustainable development chapters typically establish two separate cooperative frameworks³². Such cooperative frameworks fit with the EU's historically "soft" approach towards trade-labour/environment

²³ It should be noted that although the EU-CARIFORUM EPA subjects disputes concerning sustainable development provisions to its dispute settlement mechanism, although even in that case, the ability to suspend market access concessions as a result of the violation of any sustainable development objective is ruled out. Article 23(2) EC-EPA.

²⁴ Articles 189.6 & 195.6 CEPA; Article 13.15 KOREU FTA; Article 284 Colombia-Peru FTA, Article 297-301 EU-CA FTA ; Article 13.16 EU-Singapore FTA.

²⁵ Article 13.15 (2) KOREU FTA.

²⁶ Article 185 (4) Colombia-Peru FTA.

²⁷ Article 301 (3) EU-CA FTA.

²⁸ Article 13.17(9) EU-Singapore FTA.

²⁹ Article 23.11 CETA.

³⁰ Article 18(5) US-Australia FTA; Article Article 17(5) US-Colombia FTA; Article 16(4) CAFTA-DR FTA; Article 19(5) KORUS.

³¹ Article 18(6) US-Australia FTA; Article 17(1) US-Colombia FTA; Article 15(6) US-Bahrain FTA; Article 16(6) CAFTA-DR FTA; Article 19(7) KORUS.

³² See, for example, Articles 189 and 195 CEPA; Articles 13.12 – 13.15; Article 283-285 Colombia-Peru FTA, Articles 294-297 EU-CA FTA ; Article 13.15 EU-Singapore FTA.

linkage – that is, one that is based on continued dialogue and cooperation, rather than “hard” prescriptive rules. Firstly, the agreements create institutional bodies where cooperation between the parties can occur. This includes the requirement for each party to establish a contact point within each party’s administration which can be used by the other party in order to address queries regarding the implementation of the sustainable development chapter provisions. The agreements also create committees on trade and sustainable development composed of officials from each side. The task of these committees is to oversee the implementation of the agreement and discuss matters of common interest or any other matter within the scope of the chapters on a regular basis³³. The committees are then supplemented by advisory bodies which comprise independent representative organisations of civil society representing labour groups, business organisations and other relevant stakeholders³⁴. These are consultative bodies which can be used by stakeholders to make recommendation on the implementation of sustainable development chapters.

2. Impact of labour protection provisions in FTAs

The question of whether labour provisions in FTAs actually lead to the adoption and enforcement of higher labour standards remains open to question. This is due in part to the lack of reliable data as well as methodological challenges³⁵. There is, however, a clear discrepancy between the effects of labour protection standards in FTAs on developed country and developing country FTA signatories. It has been noted that in North-North agreements, labour provisions have barely impacted on the domestic regulatory systems of signatories. For example, whilst the EU-Korea FTA requires parties to respect and realise the fundamental rights and principles contained in the ILO Declaration, the reality is that South Korea has been

³³ See, for example, Article 195 EU-CARIFORUM FTA; Article 13(3) EU-Korea FTA; Article 280 EU-EU Colombia/Peru FTA

³⁴ See, for example, Article 13-13 EU-Korea FTA; Article 282 U-Colombia/Peru FTA; Article 238 CETA.

³⁵ For a review of the economic literature on the effect of labour standards commitments in trade agreements see: Samira Salem and Faina Rozental, “Labour Standards and Trade: A review of recent Empirical Evidence” *Journal of International Commerce and Economics* [2012] 4(2) 1-33.

severely criticised for violating core labour rights and is yet to sign four of the eight core ILO conventions³⁶.

Assessing the impact of labour provisions in the context of FTAs characterised with power asymmetries is an altogether more complex task. With respect to the US, whilst a number of submissions have been filed in relation to violation of labour provisions in US FTAs, only one has led to actual arbitration procedure³⁷. However, there is evidence that such agreements have led to improvement of labour rights protection in the territory of the signatories. For example, Hafner-Burton has shown that US trade partners tend to increase their labour standards significantly during the FTA negotiation process³⁸. This is in part due to the fact that opposition of the U.S. Democratic Party to the signing of trade agreements with countries with low labour standards typically acts as an incentive for the latter to undertake significant domestic reforms³⁹. Equally, Dewan and Ronconi have shown that Latin American countries that have signed a trade agreement with the US have tended to experience dramatic improvements in the enforcement of labour laws after the entry into force of such agreements⁴⁰. With respect to EU FTAs, the picture is a mixed one. Although Postnikov and Bastiaens present evidence that the cooperative frameworks established in EU FTAs and, in particular, that the increased involvement of civil society actors in these frameworks has led to improvement of labour rights in EU partner states⁴¹, a more recent study focused on the operation of the EU-Peru FTA has shown the limitations of the EU's sustainable development chapters both in terms of the implementation of minimum labour standards and the

³⁶ See Joo-Cheong Tham and Kenneth Ewing "Labour Clauses in the TPP and the TTIP: A Comparison Without a Difference?", *Melbourne Journal of International Law* [2016] 17, 29.

³⁷ Mary Jane Bolle, "Overview of Labor Enforcement Issues in Free Trade Agreements" Congressional Research Service, 22 February 2016

³⁸ Kim Moonhawk, "Ex Ante Due Diligence: Formation of PTAs and Protection of Labor Rights" *International Studies Quarterly* [2012], 704-719/

³⁹ Holger Janusch, "Labor Standards in U.S. Trade Politics" *Journal of World Trade* [2015] 49(6) (2015), 1060-1065.

⁴⁰ Sabine Dewan and Lucas Ronconi, "US Free Trade Agreements and Enforcement of Labor Law in Latin America" IDB Working Paper Series No. IDB-WP-453, November 2015.

⁴¹ Evgeny Postnikov and Ida Bastiaens, "Does dialogue work? The effectiveness of labor standards in EU preferential trade agreements" *Journal of European Public Policy* [2014] 21(6), 923-940.

effectiveness of cooperation in stimulating compliance with such standards⁴². In short, labour protection provisions included in FTAs have generally led - to a limited degree - to the adoption, and in some cases increased enforcement, of minimum labour standards. However, this has tended to be a one-way process where large industrialised trade powers require smaller economies to implement higher standards of labour protection, whilst not subjecting themselves to similar disciplines. FTAs are therefore primarily being used to expand labour standards favoured by the EU and the US and, in doing so, to incrementally ratchet up standards of the international trading system.

IV. TTIP AND TPP – CONSOLIDATION OF EXISTING TEMPLATE

1. Mega-regionals – setting global rules and values?

The near state of paralysis of the WTO since the collapse of the Doha Development round and the continued reluctance of the WTO membership to embrace the reform proposals put forward by larger industrialized nations has led the latter to shift their focus to other fora. In particular, free trade agreements have increasingly been used to promote the type of trade rules which have been continuously rejected by developing countries at the multilateral level since the 1990s. These “deep” FTAs regulate a host of issues, from technical norms, procurement, investment protection and intellectual property rights to social and environmental protection, which are largely untouched under WTO law. Initially these FTAs were mostly bilateral and concluded by and between developed and developing countries where the former could use their superior bargaining power to push through their offensive economic interests and regulatory positions⁴³.

⁴² Jan Orbie and Lore Van de Putte, “Labour Rights in Peru and the EU trade Agreement: Compliance with commitments under the sustainable development chapter” OFSE Working Paper, August 2016. Available at: <https://biblio.ugent.be/publication/8055501/file/8055504.pdf>.

⁴³ Peter Drahos, “Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution Journal of World Trade” [2007] 41(1), 200; L. Winters, “The WTO and Regional Trade Agreements: Is it all over for Multilateralism?”, EUI Working Papers, RSCAS 2015/94, 10.

More recently, however, there has been a trend towards the negotiation of so-called mega-regional agreements, such as the EU-US Transatlantic Trade and Investment Partnership (TTIP), Transpacific Partnership (TPP), and the China-backed Regional Comprehensive Economic Partnership (RCEP). These agreements are distinctive in terms of their geographical scale and the breadth and depth of topics addressed, and because of the goals that they pursue. The rationale for mega-regional FTAs goes beyond the circumvention of a stunted multilateral or the pursual of economic interests. It is also fueled by geopolitical concerns. This is the case of the TPP, a trade agreement that includes countries such as Australia, Canada, Malaysia, Mexico, Singapore and Japan, and was borne out of the US Obama administration's choice to pivot its foreign policy towards the Asia-Pacific region to offset the mounting power of China⁴⁴. At the time, the TPP was seen not just as an opportunity to access the lucrative Asia-Pacific market, but also as a means to challenge China's attempts to become the central actor in economic governance in the region.

The negotiation of the TPP provided an incentive for the EU to also pursue its own mega-regional FTAs. This was in part due to the fact that the EU did not want to find itself in a position where its firms were being discriminated against in terms of accessing one of the biggest regional markets in the world, and one that would set the template for future deep trade rules. As a consequence, the EU decided to launch FTA negotiations with countries such as Japan, New Zealand and Australia and, critically, to initiate talks with the US on the Transatlantic Trade and Investment Partnership (TTIP). Both the EU and the US frame the TPP and the TTIP as key instruments in the race with emerging economies, especially China, to define the future rules of international trade. In this light, the Obama administration stated that one of the main aims of the TPP was to set the "economic rules of the road before others

⁴⁴ Gabriel Feylbermayr and Rahel Aichele, *How to make TTIP inclusive for all? Potential economic impacts of the Transatlantic Trade and investment Partnership*, Study for the IFO Institute, 30 August 2015, 25-27; L. Winters, *supra* footnote 43, 10.

will”⁴⁵ and that these rules should “reflect America’s values”⁴⁶. This ‘values driven trade agenda’ placed a great deal emphasis on labour protection standards, with the TPP billed by its proponents as the “highest-standard trade agreement in history”, arguing that “TPP sets a global precedent for doing trade right”⁴⁷. A similar approach was followed on the other side of the Atlantic, where TTIP was described as being “about more than that economic boost, though. It is also about who will set global standards for the regulation of goods and services in the 21st century. TTIP would strengthen the hand of Europe and America in that process. And that means strengthening our shared Atlantic values, from the fundamentals of democracy and the rule of law, to key areas such as the environment and social standards”⁴⁸. For the EU, the TTIP offered the opportunity not just to enshrine existing labour protection standards but also to “go further than ever before in a bilateral trade agreement to promote these standards at home and abroad”⁴⁹. The TPP and the TTIP were therefore both being packaged as trade agreements that would raise the bar in terms of ensuring high standards of labour protection and set the template for future trade agreements.

2. Labour protection standards and the TPP

The TPP was described in some quarters as a potential game-changer for social rights in US FTAs⁵⁰. Like other US FTAs, the TPP includes a comprehensive chapter on labour

⁴⁵ Michael Froman, “If We Don’t Write The Rules Of The Global Economy, Others Will”, GE Reports, 6 November 2015. Available at: <http://www.gereports.com/amb-michael-froman-if-we-dont-write-the-rules-of-the-global-economy-others-will/>.

⁴⁶ David Nakamura, “Deal reached on Pacific Rim trade pact in boost for Obama economic agenda”, Washington Post, 5 October 2015. Available at: https://www.washingtonpost.com/business/economy/deal-reached-on-pacific-rim-trade-pact/2015/10/05/7c567f00-6b56-11e5-b31c-d80d62b53e28_story.html?utm_term=.90dacdc3f87e.

⁴⁷ Office of the United States Trade representative, “The President’s Trade Agenda – 2016”. Available at: <https://ustr.gov/sites/default/files/2016-Trade-Policy-Agenda>.

⁴⁸ C. Malmstrom and J. Hill, “Don’t believe the anti-TTIP hype – increasing trade is a no-brainer”, The Guardian, 16 February 2015. Available at: <http://www.theguardian.com/commentisfree/2015/feb/16/ttip-transatlantic-trade-deal-businesses>.

⁴⁹ Cecilia Malmstrom, “TTIP – what’s in it for labour, environment and sustainable development?”, 6 November 2015. Available at: https://ec.europa.eu/commission/2014-2019/malmstrom/blog/ttip-whats-it-labour-environment-and-sustainable-development_en.

⁵⁰ Ronald Brown, “Labor Implications of TPP”, Working Paper, East-West Center Workshop on Mega-regionalism – New Challenges for Trade and Innovation, 16. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2745524.

issues which requires parties to generally adopt laws and regulations on ILO core labour rights, namely the freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced labour or compulsory labour, the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation⁵¹. The agreement also includes broad obligations regarding domestic procedural guarantees such as the requirement under Article 19(8) TPP to ensure that judicial proceedings for the enforcement of labour laws are fair, equitable and transparent, comply with due process of law and do not lead to unreasonable fees or time limits or unwarranted delays. This obligation is then complemented by the standard non-derogation clause which prohibits parties from weakening labour protections afforded in domestic legislation in order to encourage trade or investment and an ‘enforcement clause’ requiring parties not to fail to enforce its laws through a sustained course of action or inaction⁵².

There is nothing particularly original or novel about the aforementioned provisions which borrow extensively from the text of past US FTAs. However, one area where the TPP departs from past practice lies in the negotiation of a number of bilateral side agreements negotiated between the US and Vietnam, Malaysia and Brunei – that is, those TPP parties which have been identified as maintaining relatively low labour standards and as having a poor record of ratifying ILO labour conventions⁵³. The side agreements provide that these countries must put into effect a number of reforms to their domestic regulatory systems in order to benefit from duty free access to the United States⁵⁴. Each of these side agreements contains detailed requirements for labour reforms that are specific to the concerned party. These include obligations to reform legislation on forced labour, child labour, the protection

⁵¹ Article 19(3) TPP.

⁵² Article 19(5) TPP.

⁵³ Brunei Darussalam – United States Labour Consistency Plan, 4 February 2016; United States – Malaysia Labor Consistency Plan, 4 February 2016, United States – Government of the Socialist Republic of Viet Nam Plan for the Enhancement of Trade and Labour Relations, 4 February 2016. Available at: <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

⁵⁴ Paragraph II Brunei Darussalam – United States Labour Consistency Plan; Paragraph II United States – Malaysia Labor Consistency Plan; Paragraph II United States – Government of the Socialist Republic of Viet Nam Plan for the Enhancement of Trade and Labour Relations.

of labour unions, union membership, collective bargaining, judicial proceedings and enforcement on labour matters.

From an institutional perspective, the TPP establishes a cooperative framework for the parties to discuss the implementation of the agreement as well as a variety of labour law issues both at a regional or multilateral level. The TPP establishes a Labour Council which would meet every two years unless decided otherwise by the parties, and counts among its functions the duty to agree on a general work programme concerning labour cooperation and capacity building activities and to facilitate public participation and awareness of the implementation of the Labour Chapter⁵⁵. There is an obligation for each party to establish contact points to receive and consider written submissions from nationals of one the parties in relation to matters covered in the Labour Chapter which can then be reviewed by the TPP. The agreement follows past US FTA practice by a setting up a procedure allowing for bilateral cooperative dialogues between the parties⁵⁶. Each party can make a written request to another party requesting a dialogue concerning a labour issue affecting trade or investment⁵⁷. Through this dialogue, which must begin within 30 days from the submission of the written request, it is hoped that parties can collectively develop solutions to problems that arise from the lack of compliance and enforcement of labour laws, such as the development of action plans aiming at the promotion of labour inspections, independent verification of labour compliance and cooperative programmes and capacity building projects⁵⁸. Finally, all provisions of the Labour Chapter are subject to the TPP's dispute settlement procedure. Firstly, parties can request labour consultations with another party if they identify a matter that requires adjudication, and if no solution is found, the requesting party may request the establishment of a panel⁵⁹. Such panel will have the power to issue a report determining whether a violation of the agreement has occurred, and in the event where a responding party fails to rectify the violation, the

⁵⁵ Article 19(12) TPP.

⁵⁶ Article 19(11) TPP.

⁵⁷ Article 19(11) (2) TPP.

⁵⁸ Article 19(11) (6) TPP.

⁵⁹ Article 19(15) TPP.

complaining power has the rights to suspend benefits derived from the agreement⁶⁰. Here, again, it should be noted that the institutional provisions of the TPP are generally in line with past US FTAs.

3. *Labour Protection standards and the TTIP*

With respect to the TTIP, in 2015 the EU issued a textual proposal dealing, inter alia, with the labour aspects of the agreement (Textual Proposal)⁶¹. The proposal was limited in scope, in so far as it did not deal with institutional issues such as civil society participation and dispute settlement mechanisms. Instead, the proposal focuses exclusively on the promotion of substantive international labour norms and in this respect at least, the EU has shown a willingness to build upon its existing template language. The proposal provides that each party must ensure that its laws and practices respect, promote and realise within an integrated strategy, in its whole territory and for all, the internationally recognised core labour standards which are the subject of ILO Conventions, namely: i) the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced labour or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation⁶². This requirement to comply with core labour standards is in line with previous EU and US FTA practice. However, the textual Proposal departs from such practice by providing detailed descriptions of the various principles that are subsumed in these rights and must be upheld by the parties as well as by listing measures that must be adopted in order to put these rights into practice⁶³. For example, with respect to the freedom of association and the right to collective bargaining, Article 5 of the Textual Proposal enjoins each party to uphold and implement in their laws and practices the right to form and join trade unions and the inherent corollary of the right to strike, the right to establish and join employers' organisations, the effective recognition of collective

⁶⁰ Article 18(20) TPP.

⁶¹ EU Textual Proposal, 6 November 2015. Available at: http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf.

⁶² Article 4(2) Textual Proposal.

⁶³ Articles 5 to 9 Textual Proposal.

bargaining and effective social dialogue. In addition, the Textual Proposal also lists measures that must be put in place by the parties to ensure that these rights are realised in practice. Once more, in the area of the freedom of association, parties must implement effective policies and measures for social dialogue, for information and consultation of workers through dialogue, adequate protection against acts of anti-union discrimination, maintain the right to negotiate, conclude and enforce collective agreements, etc⁶⁴. This approach, which is replicated for all other core labour rights covered by the Textual Proposal, is designed not just to promote adoption and compliance with core labour rights but also to set out in detail how such rights can be operationalised. In relation to ‘working conditions’, the Textual Proposal is far less ambitious in that it merely provides a broad obligation to ensure the protection of health and safety at work and decent working conditions for all. There is no detailed description of how such standards can be implemented in practice, and only a very brief and non-exhaustive list of areas and issues that must be covered by domestic legislation (e.g., decent working conditions must relate to wages and earnings, working hours and other conditions in order to ensure a minimum living wage)⁶⁵.

Beyond the dissemination of international norms, the Textual Proposal also follows current EU FTA practice by establishing by establishing a clear link between trade and labour standards. Article 7 of the Textual Proposal provides:

1. The Parties recognise that it is inappropriate to weaken or reduce the levels of protection afforded in domestic environmental or labour laws in order to encourage, or in a manner affecting, trade or investment.
2. A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental or labour laws as an encouragement for, or in a manner affecting, trade or investment.

⁶⁴ Article 5(3) Textual Proposal.

⁶⁵ Article 4(3) Textual Proposal.

2. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental or labour laws as an encouragement for, or in a manner affecting, trade or investment.

Paragraph 1 harks back to the EU-CARIFORUM EPA's non-lowering clause. However, unlike the EU-CARIFORUM EPA, this clause is phrased in non-binding terms, merely stating that parties must "recognise that it is inappropriate to weaken or reduce the levels of protection"⁶⁶. With respect to paragraphs 2 and 3, this type of language, which is intended to prohibit parties from resorting to social dumping, can be found in other EU FTAs and is subject to a number of limitations, from the lack of clarity on the scope of labour provisions covered, to the difficulty in determining the causal link between derogation from standards and trade or investment and the absence of any enforcement mechanism⁶⁷. In short, barring a few additions, the Textual Proposal does not significantly deviate from standard EU FTA practice. The most notable change is that whilst not going as far as some EU FTAs which require the ratification and compliance with key ILO Conventions, the Textual Proposal would constitute an upgrade in terms of the minimum labour standards typically promoted in US FTAs.

4.4 *The collapse of TPP and TTIP and future of labour provision in FTAs*

The analysis of both the text of the TPP Labour Chapter and the EU's textual proposal for the TTIP shows that the EU and the US have sought to use mega-regional agreements to consolidate and disseminate their existing template for labour provisions in trade agreements. Neither text shows a willingness on the part of their proponents to innovate or depart significantly from the existing boilerplate language included in EU and US FTAs. In this sense, at least, the mega-regionals can be viewed as the latest instalment in the ongoing attempts of large industrialised powers to use their increased bargaining powers in the context of bilateral or regional trade agreements to impose regulatory positions that were rejected at

⁶⁶ Article 17(1) Textual Proposal

⁶⁷ Giovanni Gruni, "Law or Aspiration? The EU Proposal for a Labour Rights Clause in the Transatlantic Trade and Investment Partnership" *Legal Issues of Economic Integration* [2016] 43-44.

the multilateral level, with the aim of incrementally raising labour standards whilst reducing the ability of countries to lower the application and enforcement of such standards to gain a competitive advantage in trade.

However, the EU's and the US's dalliance with mega-regional trade agreements seems to be at an end for the time being. On 23 January 2017, President Donald Trump signed an executive order formally ending the US' participation in the TPP. This followed a US presidential electoral campaign where President Trump routinely linked free trade and trade agreements with the loss of manufacturing jobs – a message that played very well with a significant portion of the US electorate - and vowed to radically change the US's approach to negotiating trade agreements. As for the EU, the prospect of concluding the TTIP was always a remote one. The TTIP negotiations have from the very start been beset by relentless criticism from the public, civil society, and politicians in Europe because of its perceived threat to the regulatory autonomy of the EU and its Member States. There were concerns regarding the potential impact of the agreement on social and environmental standards, public services and, in particular, the potential of the investor-state dispute settlement (ISDS) mechanism will undermine the ability of EU Member States to legislate in pursuit of public interest objectives. The inauguration of Donald Trump - who has expressed a certain degree of antipathy towards the EU and a far more mercantilist approach to trade negotiations than his predecessors – has only served to further reinforce the suspicion that the TTIP.

What could be the impact of the demise of these mega-regional trade agreements on labour provision in EU and US trade agreements? At the time of writing there is no indication that either intend to substantively alter their approach with regard to the labour dimension of their FTAs. The current US administration has repeatedly signalled its intention to focus on the negotiation of bilateral trade agreements where it will be better placed to extract further concessions of its trade partners. Given the protectionist rhetoric adopted by the same administration it seems highly likely that the US will continue to require its trading partners to comply with minimum labour standards. Indeed, it may well wish to replicate the prescriptive

approach to labour provisions developed in the TPP in future FTAs. There are also no signs that the EU intends to move away from its current approach to labour provisions. In fact, the inclusion of labour-related obligations in the sustainable development chapters of EU FTAs is one of the few non-controversial areas of the EU's current trade policy. However, the future of such provisions may be called into question in light of an ongoing judicial procedure where the European Court of Justice has been asked to determine the contours of the EU's competence to exclusively negotiate and conclude certain aspects of its EU-Singapore FTA on behalf of its Member States. One of the many questions put to the Court is whether the sustainable development chapter in this agreement (including labour protection provisions) fell within the exclusive competence of the EU. Although a final opinion is yet to be issued by the ECJ, Advocate General Sharpston opined that some of the provisions in sustainable development chapters do fall outside the scope of the EU's exclusive trade competence⁶⁸ insofar as they do not have a direct and immediate link with the regulation of trade, because they "essentially seek to achieve in the European Union and Singapore minimum standards of (respectively) labour protection and environmental protection, in isolation from their possible effects on trade"⁶⁹.

Should the European Court of Justice confirm the view that the labour protection provisions in EU FTAs fall within the shared competence of the EU, this would mean that such provisions could only enter into force if signed and ratified by every single EU Member State. Given the growing opposition to trade agreements within Europe and the difficulties experienced by the EU in getting its Member States to sign trade agreements such as the CETA, this would effectively give each Member State a right to veto an entire FTA because of the presence of labour protection obligations. There may, as a result, be a temptation to exclude sustainable development chapters from FTAs altogether or, alternatively, to negotiate sustainable development chapters as 'side agreements' that can be ratified by EU Member States separately.

⁶⁸ Opinion 1/15, Opinion of the Advocate General Sharpston 21 December 2016 ECLI:EU:C:2016:99

⁶⁹ Ibid, Paragraph 491.

V. CONCLUSION

The TPP and the TTIP were heralded by their proponents as opportunities to set high standards and re-write the rules of the game in international trade. But when it comes to labour protection provisions, the reality is that the TPP and the textual proposals for the TTIP have not strayed too far from the language typically found in recent EU and US FTAs. There is the odd innovation, such as the TPP side agreements or the proposal for a non-binding non-lowering clause in the TTIP, but ultimately nothing that marks a significant departure with past FTA practice. In this sense, at least, these agreements could be seen as attempts to consolidate existing FTA templates whose aims are to incrementally raise labour standards whilst reducing the ability of countries to lower the application and enforcement of such standards to gain a competitive advantage in trade. At the time of writing, it would appear that these attempts have failed as the chances of either agreement being concluded or/and ratified by the EU and the US are fairly remote. Nevertheless, the text of these agreements provide a clear indication of the continued commitment by these two trade powers to use trade agreements as a tool to disseminate labour protection standards and remove the flexibility available to others to adjust domestic standards in order to promote trade or investment. The upcoming European Court of Justice ruling on the scope of the EU's trade competence is the only factor that may in the future throw a spanner in the works.

However, this approach is not necessarily shared by others. Whilst the EU and the US pursued the TPP and the TTIP, emerging economies and smaller developing economies have also been occupied with the negotiation of their own mega-regionals. China has spearheaded the negotiation of the Regional Comprehensive Economic Partnership, an agreement that encompasses 16 Asian countries (including Australia, India and Japan) but largely eschews regulatory issues such as labour protection standards⁷⁰. Similarly, the negotiation of a

⁷⁰ David Gantz, "The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim" *Ariz. J. Int'l & Comp. L.* [2016] 33 57, 63; See also Mie Oba, "TPP, RCEP, and FTAAP: Multilayered Regional Economic Integration and International Relations", *Asia-Pacific Review* [2016] 23.1, 100-114; Meredith Kolsky Lewis,

Continental Free Trade Area launched by the African Union largely focuses on trade liberalisation and investment protection whilst ignoring labour issues altogether⁷¹. This, of course, should come as no surprise to the extent that emerging and developing economies were the main opponents of the introduction of trade-labour linkages within the fabric of WTO law. In this sense, at least, the approach to trade-labour linkages adopted in mega-regionals largely mirrors the recent evolution of global trade governance and law. The venue for the negotiations of trade issues may have shifted from the multilateral to bilateral or regional settings, but the divisions which undermined reform at WTO level remain fundamentally the same.

“The TPP and the RCEP (ASEAN6) as Potential Paths toward Deeper Asian Economic Integration”, *Asian J. WTO & Int'l Health L & Pol'y* [2013] 8, 359.

⁷¹ Laura Páez, “A Continental Free Trade Area: Imperatives for Realizing a Pan-African Market”, *Journal of World Trade* 50.3 (2016), 533, 549. See also Vincent Angwenyi, “The Tripartite Free Trade Area: A Step Closer to the African Economic Community?” *European Yearbook of International Economic Law* (Springer, 2016) 589-613.