

Sustainable Development in TTIP: A Highest Common Denominator Compromise?

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I. Introduction

The impact of TTIP leaks on the negotiations of and debate about the Transatlantic Trade and Investment Partnership (TTIP) has been more limited than its name and announcement would lead us to expect. This is, first, because the leaked 'consolidated documents' only show the European Union's (EU) and United States' (US) positions on a number of negotiating areas but does not unveil concessions made by either side in the pursuit of a compromise. Therefore, it contains little surprising information for observers of the negotiations. But a second reason for the lack of uproar is that for only about half of the expected chapters in TTIP a text has been leaked, either because there is no consolidated text yet for the other issues in the negotiations or because Greenpeace did not get hold of it.

One of the chapters lacking in the TTIP leaks is on 'Trade and Sustainable Development'. This is an interesting issue area because the advocates often argue that this chapter will help ensure that TTIP upholds and strengthens social and environmental standards¹. However, the credibility of this claim depends on how strong this chapter will eventually turn out to be. A leaked consolidated text could have given us an indication of this.

In this short piece, we will speculate about the possible outcomes in this area. In the remainder of this article we will focus primarily on labour provisions². However, our conclusions to large extent also apply to environmental provisions in TTIP. While these provisions touch upon a wide variety of issues related to sustainable development, many concern areas of social and environmental risk regulation, such as with regard to health and safety at work or trade in and environmentally sound management of chemicals and waste. We will, in the next section, explain that the EU and the US have different approaches to the inclusion of labour provisions in free trade agreements (FTAs). We will then argue that these two approaches can be integrated in a lowest common denominator or a highest common denominator way

(this should rather be seen as a continuum of potential outcomes), and we will outline what we already know about TTIP in this area. We conclude that if the negotiators want to live up to their promise that TTIP will have beneficial social and environmental effects they should integrate the EU and US approaches at the highest level.

II. EU and US Approaches to Trade and Labour

Both the EU and the US started to include labour provisions in their FTAs in the mid-1990s. The US initiated this practice with the North American Agreement on Labour Cooperation (NAALC) as a parallel agreement to the North American Free Trade Agreement (NAFTA), which was signed in 1992 and entered into force in 1994. In the EU, this started with the agreements with countries at the southern shore of the Mediterranean, called Euro-Med Agreements, of which the EU-Tunisia Association Agreement signed in 1995 was the first.³ Both entities developed this approach further in the coming two decades.

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1 Cecilia Malmström, "TTIP – what's in it for labour, environment and sustainable development", 6 November 2015, available on the Internet at: <https://ec.europa.eu/commission/2014-2019/malmstrom/blog/ttip-whats-it-labour-environment-and-sustainable-development_en> (last accessed on 16 May 2016).

2 We do this because of word constraints, because the literatures on labour and environmental provisions in trade agreements have been quite separated, because most scholarship on trade and sustainable development has focused on labour rights, and because the US has the tradition to deal with labour and environmental provisions separately (while the EU integrates them in a sustainable development chapter). This difference in structuring labour and environmental provisions could be accommodated by including chapters in TTIP on trade and labour, trade and environment and trade and sustainable development, as in the EU-Canada Comprehensive Economic and Trade Agreement.

3 Lore Van den Putte and Jan Orbie, "EU bilateral trade agreements and the surprising rise of labour provisions", 31 *International Journal of Comparative Labour Law and Industrial Relations* (2015), pp. 263 et seq.

Labour provisions in EU and US FTAs not only evolved over time, both also adapted these provisions to some extent to the partner country in such treaties. However, a current template or approach can be discerned for both entities. The EU's approach to labour provisions in trade agreements is often called 'promotional' or 'soft' while the US template is often termed 'conditional' or 'hard'⁴. In more specific terms, how do the EU's and US' approaches to trade and labour differ?

In terms of the substantial provisions included in these agreements, EU FTAs incorporate multilateral instruments, most importantly the Core Labour Conventions of the International Labour Organisation (ILO) and more recently also the ILO's Decent Work Agenda. Its trade agreements stipulate that parties reaffirm their commitment to the Decent Work Agenda and commit to respecting, promoting and realising in their laws and practices, the fundamental rights of the 1998 ILO Declaration. Moreover, EU agreements require that the parties shall effectively implement the ILO Conventions that they have ratified and that they should make sustained efforts towards ratifying the other fundamental Conventions as well as other Conventions classified as 'up-to-date' by the ILO. In the case of US trade agreements a new template for labour provisions was drafted in 2007 with the May 10 bipartisan Congressional-Executive agreement⁵. In contrast to the EU, the US does neither refer to ILO Conventions nor to the Decent Work Agenda, but only states that each party shall adopt

and maintain in its statutes and regulations and practices the rights as stated in the 1998 ILO Declaration. The explanation for this is straightforward: the US has only ratified two out of the eight Core Labour Conventions. A non-lowering clause in both the EU's and US' FTAs stipulates that the parties shall not waive or otherwise derogate from (or offer to waive or derogate from) its labour laws in a manner affecting trade or investment between the parties⁶.

Apart from this fixed template, the US often adds additional requirements to trade agreements that partners should successfully implement as a precondition for the FTA to enter into force. These are often very detailed requirements, such as the hiring of a specified number of labour inspectors and assigning a specified number of judicial police investigators to support prosecutors in charge of investigating criminal cases involving union members and activists, like in the Colombian Action Plan Related to Labor Rights⁷. The EU agreements also include labour rights commitments that go beyond the ILO Core Conventions. However, it concerns a general commitment without reference to specific laws or practices, and there is no pre-ratification conditionality⁸.

With regard to enforcement, the EU opts for soft mechanisms such as dialogue, cooperation and naming and shaming. It foresees a civil society dialogue mechanism through which civil society organisations meet both domestically as well as transnationally to discuss the implementation of the sustainable development chapter. Besides, in case of an alleged labour violation, a party may request government consultations through which the parties shall make every attempt to arrive at a mutually satisfactory solution. If they don't, ultimately, a party (but not civil society organisations) may request that a panel of experts be convened to examine the matter. This panel may issue recommendations on the implementation of the chapter on sustainable development. In EU FTAs, it is explicitly stipulated that parties only have recourse to the procedures mentioned above and, consequently, not to the general dispute settlement provisions of the agreement. This is the main difference with enforcement provisions for labour provisions in US agreements. US FTAs also foresee dialogue and cooperation (including, but to a more limited extent, with civil society) through a Labor Affairs Council and stipulate that the parties shall initially seek to resolve disputes through these consultative mechanisms. Contrary to the EU's approach,

4 International Institute for Labour Studies, "Social Dimensions of Free Trade Agreements", 6 November 2013, available on the Internet at: <http://www.ilo.org/global/research/publications/WCMS_228965/lang-en/index.htm> (last accessed on 18 May 2016).

5 Office of the United States Trade Representative, "Bipartisan Agreement on Trade Policy", May 2007, available on the Internet at: <https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf> (last accessed on 16 May 2016).

6 The interesting question how these provisions may affect the interpretation of other chapters of TTIP, such as on investment (and investment protection in particular), is beyond the scope of this article. Similarly, we do not discuss provisions on sustainable development in other chapters than the one dedicated to this topic specifically.

7 Office of the United States Trade Representative, "Colombian Action Plan Related to Labor Rights", April 7 2011, available on the Internet at: <<https://ustr.gov/sites/default/files/uploads/agreements/morocco/pdfs/Colombian%20Action%20Plan%20Related%20to%20Labor%20Rights.pdf>> (last accessed on 16 May 2016).

8 Jeffrey Vogt, "The Evolution of Labor Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership", 18 *Journal of International Economic Law* (2015) pp. 827 et seq.

however, any person may file a submission with the US government regarding alleged non-compliance with the labour commitments. Ultimately, these procedures could lead to a case before the general dispute settlement mechanism of the agreement. This implies that non-implementation of labour provisions in US FTAs can result in sanctions, while this is not possible under EU agreements⁹.

III. Labour Provisions in TTIP

How will these templates be integrated in TTIP? The differences between the EU and US approach to labour provisions can be combined in a lowest or a highest common denominator way. On the lowest common denominator side, substantially, the relevant chapter in TTIP would only require the parties to comply with the fundamental rights included in the 1998 ILO declaration (while only finding a violation if a failure to comply with this declaration affects transatlantic trade or investment), without the obligation to respect the Core Labour Conventions or the requirement to (strive to) ratify them, neither would other labour standards such as those included in the ILO Decent Work Agenda be mentioned. With regard to enforcement, no recourse to the dispute settlement, no possibility of sanctions and no extensive involvement of civil society would be foreseen. At the highest common denominator side, the clear obligation to comply with (and possibly even to ratify) Core Labour Conventions and the decent work agenda would be combined with enforcement provisions that would both seriously involve and empower civil society (including trade unions) in the implementation of the trade agreement. In addition, it would allow for sanctions as the ultimate instrument to ensure compliance.

As stated at the beginning of this article, TTIP leaks did not contain a document about labour provisions. What do we know about this issue area in TTIP, then?

The European Commission made public its textual proposal on Trade and Sustainable Development on 6 November 2015¹⁰. This proposal starts with a disclaimer stating that ‘additional proposals, including on institutional aspects, civil society participation and dispute settlement, will be developed at a later stage’. Hence, the provisional textual proposal of the EU mainly contains substantial provisions. Section I lays out the context (art. 1) and the objec-

tives (art. 2) of the Chapter and reaffirms the parties’ right to regulate in the area of sustainable development in a manner not inconsistent with the multilateral labour standards and agreements included in art. 4 and multilateral environmental governance and rules included in art. 10. Section II deals with the labour aspects of trade and sustainable development (arts. 4-9) while Section III is about the environmental aspects (arts. 10-16). Finally, Section IV deals with horizontal issues (arts. 17-21).

Art. 4 on multilateral labour standards and agreements contains the most important substantial obligations. It states (§ 1) that the parties agree to promote the development of their trade and investment relations in a manner conducive to the realisation of the Decent Work Agenda and its four strategic objectives (employment protection, social protection, social dialogue and fundamental principles and rights at work). With regard to the latter strategic objective, § 2 stipulates that each party shall ensure that its laws and practices respect, promote and realise the fundamental ILO Conventions and in this context, to continue to make sustained efforts towards ratifying these Conventions and their Protocols, as well as other Conventions and their Protocols that are classified as up-to-date by the ILO. Paragraph 3 states that each party shall ensure to protect health and safety at work and decent working conditions for all, including with regard to wages and earnings, working hours and other conditions of work in order to ensure a minimum living wage. The remainder of art. 4 states that the parties: shall effectively implement the ILO Conventions they have ratified (§ 4); shall implement the recommendations adopted by the ILO where they exist in areas covered by up-to-date Conventions (§ 5); and recognise the need of an adequate system of labour inspections to ensure the effective enforcement of their labour laws (§ 6). The final paragraph (§ 7) of art. 4, balancing the prohibitions of social dumping and disguised protectionism, states that the parties recognise that the violation of fundamental principles and rights at work cannot be invoked or other-

9 The possibility for sanctions remains largely hypothetical for now as only one public submission on labour violations in Guatemala has reached the stage of dispute settlement. At the time of writing, the outcome is still uncertain.

10 European Commission, “EU Textual Proposal: Trade and Sustainable Development”, 6 November 2015, available on the Internet at: <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf> (last accessed on 16 May 2016).

wise used as a legitimate comparative advantage and that labour standards should not be used for arbitrary or unjustifiable discrimination or protectionist purposes.

Articles 5 to 8 then specify in considerable detail the obligations that respect of the fundamental labour rights entails, namely with regard to: freedom of association and the right to collective bargaining (art. 5; ILO Conventions 87 and 98), elimination of forced or compulsory labour (art. 6; ILO Conventions 29 and 105), effective abolition of child labour (art. 7; ILO Conventions 138 and 182) and equality and non-discrimination in respect of employment and occupation (art. 8; ILO Conventions 100 and 111). Art. 9, finally, lays out a number of priority areas and activities for the parties to cooperate on the labour aspects of trade and sustainable development at bilateral, regional and global level.

Substantially, the EU textual proposal on labour aspects of trade and sustainable development is relatively ambitious. With the provisions on enforcement (institutional aspects, civil society participation and dispute settlement) not included yet, this leaves open the possibility for a highest common denominator compromise, if the US would accept this substantial EU proposal, and would itself put forward a proposal on dispute settlement that includes the possibility to have recourse to the general dispute settlement mechanism of the agreement in case of violations of labour provisions.

The US position can be derived from its 'Bipartisan Congressional Trade Priorities and Accountability Act of 2015'¹¹ (also known as Trade Promotion Authority, or TPA) and more specifically from Section 2 Trade Negotiating Objectives, (b) Principal

Trade Negotiating Objectives, (10) Labor and the Environment. The TPA does not seem to preclude a highest common denominator compromise. It sets out as US negotiating objectives to ensure that the parties adopt and maintain measures implementing internationally recognized core labour standards and that they do not waive or derogate from their statutes or regulations implementing these core labour standards and do not fail to enforce their labour laws effectively in a matter affecting trade or investment. This is in line with the traditional US approach. It does not go as far as the EU textual proposal but the latter is also not in contradiction with the US TPA. With regard to enforcement, the TPA mandates the United States Trade Representative to ensure that enforceable labour obligations are subject to the same dispute settlement and remedies as other enforceable obligations under the agreement.

Hence it seems that a highest common denominator compromise on trade and labour should be possible in TTIP. What might still be problematic on the European side is that the European Parliament in its Resolution on TTIP of 8 July 2015 has asked the European Commission 'to ensure that the sustainable development chapter ... aims at the full and effective ratification, implementation and enforcement of the eight fundamental International Labour Organisation (ILO) Conventions and their content, the ILO's Decent Work Agenda and the core international environmental agreements'¹². This is also the position of the European Trade Union Confederation¹³. It has been argued that the difficulty for the US to ratify Core Labour Conventions is related to the US federal system. After the US rejoined the ILO in 1980, it was stipulated in a 1988 US Senate resolution that 'there is no intention to change State law and practice by Federal action through ratification of ILO Conventions'¹⁴. But as the European Parliament and ETUC also ask that labour provisions be enforceable before the general dispute settlement mechanism, a compromise seems plausible where the EU does not require the US to ratify the six Core Labour Conventions it has not ratified yet, the US agrees with the EU's more ambitious substantial provisions, and the EU accepts (in line with EP and ETUC demands) enforceability of labour provisions before the general dispute settlement mechanism. In its state of play after the 12th Round of negotiations, the EU seems to indicate that its strategy is to trade off ambition on substance for enforceability: '[d]iscussions about en-

11 US Congress, "Bipartisan Congressional Trade Priorities and Accountability Act of 2015", 11 May 2015, available on the Internet at: <<https://www.congress.gov/114/bills/s995/BILLS-114s995rs.pdf>> (last accessed on 16 May 2016).

12 European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership TTIP, 2014/2228(INI).

13 ETUC, "Position on the Transatlantic Trade and Investment Partnership", 25 April 2013, available on the Internet at: <<https://www.etuc.org/documents/etuc-position-transatlantic-trade-and-investment-partnership#.VzmPl0t2mSA>> (last accessed on 16 May 2016).

14 See United States Council for International Business, "Issue Analysis: U.S. Ratification of ILO Core Labor Standards", April 2007, available on the Internet at: <https://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf> (last accessed on 16 May 2016).

forceability could be addressed as soon as there is sufficient common understanding on the substantive disciplines for the chapter¹⁵.

IV. Conclusions

The chapter on Trade and Sustainable Development, and its labour aspects in particular, are an important part of TTIP. The advocates of the agreement often refer to this chapter to argue that TTIP will uphold and strengthen rather than weaken labour and environmental standards. In this article, we have argued that to live up to this promise (and hence to help ensure trade unions' and other civil society actors' support of TTIP), the negotiators have to integrate the EU's and US' approaches to trade and labour in FTAs at the highest common denominator. While requir-

ing the US to ratify the Core Labour Conventions seems politically difficult, this would imply that the US accepts the EU's more ambitious substantial provisions while the EU accepts the US' approach to dispute settlement, including the possibility of sanctions in case of non-compliance. While this may still not be the most optimal approach from a social rights perspective (as ratification of ILO conventions does make a difference), it would have the advantage of combining the strengths of the EU's and US' approaches. Moreover, the new template might provide a 'gold standard' for future trade agreements concluded by the US and the EU.

15 European Commission, "The Transatlantic Trade and Investment Partnership (TTIP) – State of Play", 27 April 2016, p. 6, available on the Internet at: <http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154477.pdf> (last accessed on 16 May 2016).