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Labour Standards in a Global Environment

Editors

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Editorial

Labour Standards and Trade: In Search of Impact and Alternative Instruments

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Abstract
Labour standards have become an almost routine feature of trade agreements. However, we have little knowledge about whether this linkage is effective; both in absolute terms but also in comparison to other instruments that promote labour standards on a global level. Such alternative instruments include public-private agreements, value chain management and procurement policies. The articles in this thematic issue will provide insights that further the debate on the effectiveness of the connection between labour rights and international trade, looking at both 'traditional' trade agreements and 'alternative' instruments.

Keywords
Bangladesh Sustainability Compact; global value chain; International Labour Organization; labour standards; public procurement; social clause; trade agreements

Issue
This editorial is part of the issue "Labour Standards in a Global Environment", edited by Gerda Van Roozendaal (University of Groningen, The Netherlands) and Jan Orbie (Ghent University, Belgium).

1. Two Generations of Research

Until now, academic work on labour clauses in Free Trade Agreements (FTAs) has focused mainly either on understanding the background of the instrument (the 'why') or on the process side (the 'how').

First, the 'why'. The case for linking labour provisions to trade arrangements has been made from economic, normative, ideological and strategic frames (e.g. Burgoon, 2004; Charnovitz, 1987; van den Putte, 2015; Van Roozendaal, 2015; Waer, 1996). The combination of all these reasons has made such provisions less contested and resulted in a near-consensus that labour rights have a place in trade arrangements (International Labour Organization [ILO], 2015). As Kolben states in this issue, it is now more unusual not to include labour provisions in FTAs than to include them (Kolben, 2017). However, while the provisions may have made FTAs more acceptable in the eyes of those concerned about the effects of free trade, it does not mean that the trade- labour linkage has silenced the opposition to free trade or resulted in unequivocal support. The article by Riethof (2017) on Brazilian trade unions in this issue shows clearly that the debate on the underlying motivations for the labour-trade linkage continues to be relevant.

A second line of closely related research concentrates on the 'how'. Now that we have a growing number of FTAs with labour provisions, the question arises as to how they work and how they can be compared. While this research includes the 'why' question on the varying motivations, it extends it to analysing the procedures and institutions that have been established for the promotion of labour rights through trade agreements. Specifically, a large number of studies have comparatively

analysed labour standards in US and EU trade agreements (Brown, 2015; Ebert & Posthuma, 2013; Horn, Mavroidis, & Sapir, 2009; ILO, 2015; Oehri, 2015), examining whether they have been inspired by protectionist or normative interests (the 'why'), while showing that the US holds a 'hard' (or 'sanctions-based') and the EU applies a 'soft' (or 'incentives-based') approach (the 'how'). Comparative analyses with non-EU and non-US FTAs are less common, however.

Meanwhile, a growing but still nascent strand of literature explores how public actors can engage in alternative ways to globally promote labour rights beyond FTAs. These studies look specifically at how public actors can facilitate private schemes for corporate social responsibility and more responsible supply chains. In a recent special issue, Burgoon and Fransen (2017) analyse the 'important but unresolved empirical controversy on the nature and effectiveness' of (the interaction between) public and private initiatives for the promotion of labour rights. They find that public interventions strengthen private labour policy while private interventions do not affect or substitute for public labour policy.

However, the literatures on 'traditional' and 'alternative' approaches to the international promotion of labour rights have only started to dig into questions of effectiveness. There is also much confusion on how impact should be conceptualised and operationalised (e.g. intermediate versus direct impact) and a lack of data about labour standard practices makes impact assessment a difficult task. Building on existing insights, this thematic issue aims to take the debate one step further by conceptualising different forms of impact, exploring different forms of effectiveness of labour provisions in existing FTAs, and examining alternative approaches beyond FTAs.

2. Our Approach

Our main interest in publishing this thematic issue is that we believe that the changes made to the FTAs should result in an improvement of labour standards, directly in terms of labour practices in a specific country or indirectly, i.e. the conditions for improving labour standards should be adapted in such a way that it would ultimately result in a direct impact. At the same time, we are interested in what kind of alternatives could be developed.

With regard to the first issue, the more direct impact, it should be noted that measuring this remains something of a challenge. The value of large N-studies is restricted because of the lack of reliable data on changes in de facto labour standards worldwide. Therefore, we have chosen to concentrate in this thematic issue on contributions that focus on comparative and single case studies. Such studies provide a more detailed insight into the nature of the impact and the reasons for (a lack of) direct impact. The country studies in this volume on South Korea (Van Roozendaal, 2017), Peru (Orbie, van den Putte, & Martens, 2017), and also to a certain extent Brazil (Riethof, 2017), are illustrations of this approach. Also Oehri (2017) departs from a local perspective, examining civil society complaints in the Dominican Republic and Mexico. In addition to answering the question how trade agreements influence labour practices, the study by Gansemans, Martens, D'Haese and Orbie (2017) turns the question around, and looks at how the protection of labour standards influences market access.

Secondly, the improvement of labour practices through FTAs can also take place via the intermediate impact of the development or linkage of institutions, the changes in laws and regulations, the funding of development and the empowerment of civil groups (see also van den Putte, 2016). Different studies in this thematic issue address intermediate impact. The case study by Oehri (2017) on the US FTAs complaint procedure is an example of the development of institutions. In this thematic issue, this is also addressed in the study by Marx, Ebert and Hachez (2017), which points to improvements in the dispute settlement mechanism in EU and US FTAs. The study by Kolben (2017), on the other hand, links a supply chain approach to FTAs, while Gansemans et al. (2017) specifically analyse the supply chain of pineapples. Changing of laws and regulations and empowerment of groups are addressed in the contributions on Peru, South Korea and to a lesser extent on Brazil.

Thirdly, some interesting alternatives are being assessed and explored. The article by Martin-Ortega and O'Brien (2017) looks at the impact of public procurement, while Vogt (2017) focuses on the impact of the Bangladesh Sustainability Compact, a public-private initiative, and compares this to the effects of the private Bangladesh Accord for Fire and Building Safety.

3. Conceptualising Impact

Clauses on labour standards in FTAs should improve labour practices. As the model below (Figure 1) shows, we call such improvement the ultimate impact.[1]

This model and its elements (adapted from van den Putte, 2016, pp. 82–86) acknowledges that the intermediate impacts may not necessarily lead to the improvement of labour practices, or in some cases may be the effect of, or affect, legal improvements before achieving practical improvements. The intermediate impacts may take place in the field of *development*. Through an FTA, children might be supported to attend school instead of working or labour inspections might be funded (van den Putte, 2016, pp. 83–84).[2] The *empowerment* of civil society (including trade unions), either unilaterally or in networks with businesses and government, takes place when an FTA leads to increased collaboration that strengthens the position of civil society. An intermediate impact may also be accomplished when *institutions*

[1] van den Putte (2016, p. 82) calls it outcome impact, and Marx et al. (2017) refer to this in this issue as 'goal achievement effectiveness'.
[2] van den Putte classifies the introduction of a labour inspection system as an institutional impact (2016, p. 83).

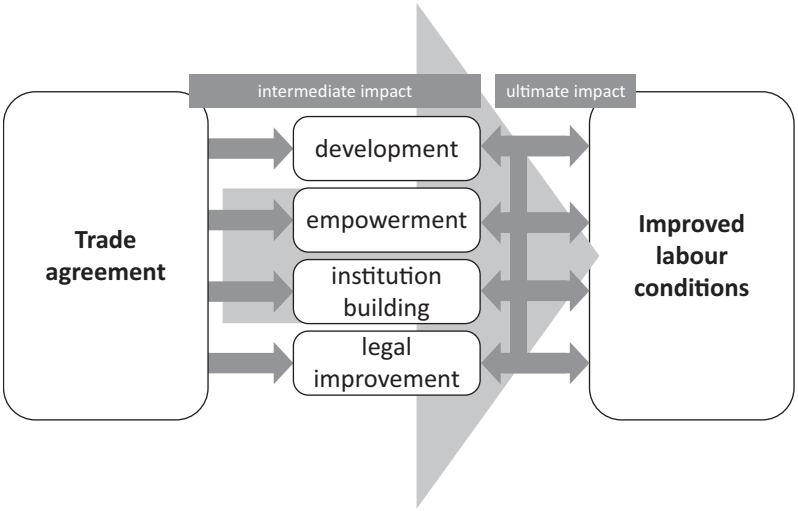

Figure 1. Conceptualising impact on labour conditions.

are built as a direct consequence of an FTA's legal requirements, e.g. for dispute settlement bodies or advisory committees. This, in turn, can affect empowerment of civil society.

Finally, *legal improvements* concern changes in laws and regulations, and the ratification of ILO conventions. Legal improvement may impact practices, but may also be nothing more than a paper tiger. Legal improvements may follow directly from commitments in an FTA, but may also be stimulated through civil society empowerment and institution building, for example. Finally, commitments flowing from FTAs may directly impact practices.

4. Main Findings

The case study by Van Roozendaal (2017) on South Korea shows no ultimate impact, even though South Korea is confronted with numerous FTAs with labour standard provisions. This suggests that until now, these provisions have not been taken seriously, either by South Korea or by any of the signatory countries. A similar lack of political will is demonstrated in the article on Peru (Orbie et al., 2017). The labour provisions in the agreement have been designed in a conservative and flexible way, and the implementation of commitments in the trade agreement also leaves much to be desired. This can be explained by the Peruvian government's neoliberal approach and the EU's reluctance to push harder for compliance with labour rights. While Peru and South Korea are very different in terms of economic development (World Bank, 2017), they are both considered to be free countries by Freedom House (2017). This does indicate that democratic countries are not necessarily interested in improving labour rights, and that this lack of interest is not necessarily explained by a lack of economic development.

If, on the basis of the above, we argue that the ultimate impact of FTAs is limited, what about the intermediate effects that might—in the medium or long run—determine the ultimate impact? The empowering effects of FTAs are related to the position of civil society and are often the effect of institution building. The articles by Orbie et al. (2017) and Van Roozendaal (2017) in this issue show that there is very limited impact. Riethof (2017) is more positive in terms of how Mercosur has created space for civil society. She also shows that civil society empowerment can be an unintended consequence of trade agreements, as opposition to the Free Trade Area of the Americas has fostered regional civil society collaboration. The clearest result comes from the study by Oehri (2017), which looks at the opportunity US FTAs provide to file complaints about non-compliance with labour rights provisions in the labour chapters of the agreements. She shows that not only powerful civil society organisations have a chance of having a compliance accepted. In this way, institutions provided for by an FTA may also increase empowerment of individuals who do not have international back-up, specific expertise or broader support (such as Father Hartley in the Dominican Republic). In addition, legal improvements were found in Brazil, where national courts made use of Mercosur's Declaration of Social and Labour Rights (see, e.g., Riethof, 2017, in this issue).

As we have found indications that FTAs have so far not lived up to the expectations of improving labour standards, should we consider them beyond repair? Two articles in this thematic issue come with innovative ideas to adjust the FTAs. Marx et al. (2017) study the dispute settlement mechanism of EU and US FTAs and arrive at the conclusion that elements of other instruments could help to fill the gaps in the current complaint and dispute settlement provisions, also by allowing more third (non-state) parties acknowledgement. Kolben (2017) shows how labour standards could be improved by combining a supply chain approach with FTAs, creating a more tailor-made instrument.

Finally, the Generalized System of Preferences may be a more effective instrument for social conditionality

than bilateral trade agreements, provided that it is used in a legitimate way and embedded within wider social and development policies (Vogt, 2017). In this regard, Vogt (2017) points to recent developments where the EU's threat to withdraw Everything but Arms preferences for Bangladesh might induce reforms of the Bangladesh Labour Act. It remains to be seen to what extent the EU is able and willing to link unilateral trade preferences with Bangladesh's compliance with the Compact.

Despite these limited results in terms of effectiveness, several authors recognise that it may be too early to tell. Indeed, most of the labour provisions in trade agreements have only recently been established and cannot be expected to deliver immediate results. Moreover, several contributors note some optimism in terms of rising awareness of consumers *and* business, such as the growing international policy and national practice linking public procurement and global labour rights shows (see Martin-Ortega & O'Brien, 2017). In this regard, a more promising avenue may be to step away from the sole focus on FTAs and pursue alternative avenues for the promotion of labour rights (see in this issue Kolben, 2017; Martin-Ortega & O'Brien, 2017; Vogt, 2017).

Developments such as those studied in this thematic issue need our attention in the future. They should be aimed at refining the impact measurement of FTAs and at understanding why impact is limited and how it should be improved. At the same time, innovative ideas that offer additional instruments are needed.

Conflict of Interests

The authors declare no conflict of interests.

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Article

The Impact of Labour Rights Commitments in EU Trade Agreements: The Case of Peru

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Abstract
While the inclusion of labour rights in European Union (EU) trade agreements has become an 'unobjectionable norm', analyses of their impact have been largely absent from the literature. This article aims to partly fill this gap in existing research by examining the impact of labour rights commitments in the EU–Peru–Colombia agreement, with particular reference to the agricultural sector in Peru. Following a brief background overview of labour rights in agriculture in Peru, we draw up the analytical framework for assessing the impact of these commitments. We discern three distinctive legal commitments and find that they are flexible and conservative, also compared to provisions in other EU trade agreements. Subsequently, we assess the impact of these commitments by analysing to what extent they are being upheld in practice. Empirical evidence from several sources, including field research, shows that the Peruvian government has failed to implement the labour rights commitments in several respects. In the conclusions, we point to the cautious role of the EU, which has scope to monitor Peru's labour rights compliance more proactively.

Keywords
agriculture; European Union; labour; Peru; sustainable development; trade

Issue
This article is part of the issue "Labour Standards in a Global Environment", edited by Gerda Van Roozendaal (University of Groningen, The Netherlands) and Jan Orbie (Ghent University, Belgium).

1. Introduction

Recent European Union (EU) trade agreements contain a separate Title on 'Trade and Sustainable Development' where the Parties pledge to respect a number of social and environmental principles. This resonates with a growing concern that trade agreements should not only promote economic interests but should also take broader values into account. While the inclusion of labour rights in EU trade agreements has become an 'unobjectionable norm' (Van den Putte & Orbie, 2015), analyses of their impact have been largely absent from the literature. This article aims to partly fill this gap by examining the impact of labour rights commitments in the EU–Peru–Colombia agreement, with particular reference to the agricultural sector in Peru.

Our contribution to existing research is twofold. First, we provide an analytical framework specifying what exactly the labour rights commitments in the sustainable development title of the EU–Peru–Colombia agreement imply. While existing studies have analysed these commitments, this has often been done to illustrate the absence of enforceability through sanctions. Instead, we provide a more detailed account of the labour rights commitments. This also involves a comparison with other recent agreements concluded by the EU. While existing research has neglected the differences between the 'new generation' trade agreements, we show that the provisions on civil society monitoring in the EU–Peru–Colombia agreement are less far-reaching than in other agreements, and that this has potentially important implications in practice.

Second, we apply this analytical framework to assess the impact of these legal commitments. Whereas academic research on the EU's inclusion of labour norms in trade has expanded in recent years (e.g. Marx, Wouters, Rayp, & Beke, 2015), most studies focus on the design of the EU's trade-labour linkage, often comparing it to the trade-labour linkage of the US (Campling, Harrison, Richardson, & Smith, 2016; International Institute for Labour Studies, 2013, 2016). Here, a distinction is often made between a 'soft' EU approach and a 'hard' US approach (Brown, 2015; Ebert & Posthuma, 2011; Horn, Mavroidis, & Sapir 2010). While the limited number of impact analyses focus on large-N quantitative data (Gansemans, Martens, D'Haese, & Orbie, 2017, in this issue; Postnikov & Bastiaens, 2014) or third country level analysis (Oehri, 2015a, 2015b; Van Roozendaal, 2017; Vogt, 2017), we aim to delve deeper into the case of labour rights in the agricultural sector in Peru, considering specific sub-cases such as labour inspection, health and safety at work regulations, and export regimes. Moreover, we analyse the provisions on civil society involvement, as these foresee trade union participation and are seen by the EU as a key mechanism to promote labour rights.

While this study has an explicit focus on the agricultural export sector, we also consider the broader context and evolution of labour rights in Peru. Our findings on the labour rights commitments in the trade agreement are also relevant to Colombia (and to some extent to countries subject to other EU trade agreements), and our analysis of its impact, for instance through civil society involvement, is also relevant to other sectors in Peru (and to some extent to Colombia and other trade agreements). Since Peru has struggled to implement (core) labour rights and agriculture is one of the most precarious sectors, this may seem a difficult case where significant EU impact cannot be expected. On the other hand, there is in this case much scope for external actors to achieve progress, and large-N studies (Postnikov & Bastiaens, 2014) suggest that free trade agreements that include labour provisions do improve labour rights. Such studies should be complemented with detailed case studies of specific (sectors within) countries to gain more in-depth empirical knowledge of how exactly the labour rights commitments within the trade agreement are being implemented on the ground. While not all the findings may be generalizable, they may be relevant for further comparative analysis using the same analytical framework as in this study. The focus on Peru is also appropriate because the EU–Peru–Colombia agreement is one of the earliest of the new generation of EU trade agreements (signed in 2010, in force since 2013).

Methodologically, this article is based on the trade agreement and other primary sources, secondary literature, participatory observation in an EU Domestic Advisory Group (DAG) meeting of the EU–Peru–Colombia agreement where a previous version of the article was presented (7 April 2016) and a transnational meeting in Brussels (8 December 2016), and most importantly a field visit to Lima and Trujillo (February–March 2016) which involved about 40 semi-structured interviews with officials from the EU, Peru and EU member states, employers and business associations, exporters, academics, NGO representatives, activists, trade unionists and workers. Interviews were also held with officials and stakeholders in Brussels.[1]

The structure of the article is as follows. First, we explain our focus on the agricultural sector in Peru and provide the necessary background on this case. Second, we draw up the analytical framework for assessing the impact of the trade agreement, focusing on three distinctive labour rights-related commitments. In this stage, we find that the legal commitments are flexible and conservative. Third, we examine to what extent these commitments have been upheld in recent years, thereby assessing the impact of the agreement in Peru. Empirical evidence suggests that the labour rights commitments have had no discernible impact. Fourth, the conclusions point to the cautious role of the EU in engaging even with the 'soft' approach to promote labour rights through trade.

2. Background: Peru, Labour Rights and Agriculture

During the negotiation, ratification and implementation phases of the EU–Peru–Colombia agreement, most of the debate in the EU, for instance in the European Parliament, concerning labour and human rights has focused on Colombia (see, for example, the debate on the trade agreement in the European Parliament in Strasbourg on 22 May 2012). Despite being 'in the shadow' of Colombia, significant problems with labour rights exist in Peru.

The labour rights situation in Peru displays three characteristics. First, the level of informality is still very high (more than 68% in 2012 according to FORLAC, 2014). Second, the labour law is highly fragmented. While Peru has an elaborate labour code, legislation is dispersed, resulting in almost 40 different labour regulations applying to different kinds of work (Organisation for Economic Co-operation and Development [OECD], 2015, pp. 87–89; Verbeek, 2014). Third, there are serious shortcomings with the core labour standards (CLS). Peru has ratified the eight fundamental conventions of the International Labour Organization (ILO) on trade union rights, child labour, forced labour and non-discrimination. However, concerns have been raised regarding their implementation, as will be shown below.

Labour rights concerns are most prominent in the mining and agricultural sector. While the situation in the extractive industry has been amply documented (see, for example, Verité, n.d.), less research has been done on the agricultural sector (for exceptions, see, for example, Ferm, 2008; Schuster & Maertens, 2017), even though

[1] We do not reveal the names of interviewees, as several have asked us not to disclose their identity or institutions. We can provide names upon request, if the interviewees have given permission for us to do so. When necessary, quotations from Spanish have been translated in English.

this sector is notorious worldwide for poor working conditions and income distribution (Cheong, Jansen, & Peters, 2013, p. 9). Another reason for focusing on agriculture is the importance of this sector in Peru's economy. The agricultural export sector, especially in non-traditional goods such as asparagus, avocado and grapes, has been an important driver of Peru's growing economy in the last decade in terms of the number of companies, export volume and jobs (CEPAL, OIT, & FAO, 2012a, p. 199; International Commission of Jurists, 2014, pp. 12–13; Velazco & Pinilla, 2017). In 2015, the agricultural sector as a whole represented 7.8% of Peru's Gross Domestic Product and employed nearly 25% of the economically active population in 2013 (World Bank, 2017a, 2017b). Finally, even compared to the US market, Peru has exported a large amount of its agricultural produce to the EU.

The Agricultural Sector Promotion Law (Law No. 27360) seems to be paramount in this story. This law was enacted in 2000 to promote private investment and increase competitiveness and productivity in the sector by reducing labour costs and granting tax exemptions to companies (CEPAL et al., 2012a, p. 228). The first article of the law, which describes its general objective, states that its primary purpose is to support investment and development in the agricultural sector.

3. Analytical Framework: Flexible and Conservative Commitments

In order to be able to assess the impact of the trade agreement's labour rights provisions, we need to specify what exactly the treaty partners have committed to. Surprisingly, very little research has been conducted so far to analyse precisely what the Parties have committed to within the different EU trade agreements. Despite several ambiguities in the legal text of the agreement, we can discern three basic commitments: (1) upholding ILO CLS, (2) not lowering domestic labour law, and (3) promoting civil society involvement. Below, we will specify each of these commitments with reference to the legal text; taken together, this constitutes our analytical framework for assessing impact in the next section. The framework is analytical (but not theoretical or conceptual) as it summarises various specific textual commitments in three broad categories, which then serves to structure the empirical analysis. Despite differences in precise legal provisions, the same framework can therefore also be used to analyse labour rights commitments in other new generation EU trade agreements. The first and second commitments could lead to what Van Roozendaal and Orbie (2017) call institution building and legal improvement impact, whereas the third corresponds to empowerment impact.

First, the Parties commit to complying with the four 'core' and universal labour rights or principles of the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Each of these four corresponds to two ILO conventions: freedom of association and the effective recognition of the right to collective bargaining (Conventions No. 87 and 98), the elimination of forced or compulsory labour (No. 29 and No. 105), the abolition of child labour (No. 138 and No. 182) and the elimination of discrimination in respect of employment and occupation (No. 100 and No. 111). In the chapter on trade and sustainable development of the EU–Peru–Colombia trade agreement, each Party commits itself to 'the promotion and effective implementation in its laws and practice and in its whole territory' (Art. 269.3) of these ILO CLS. The agreement does not explicitly stipulate that ratification of the eight ILO conventions is necessary. Prior to securing its market access through this trade agreement, Peru was a beneficiary of the EU's unilateral Generalised System of Preferences Plus (GSP+). This system includes a social conditionality regime that requires the 'ratification and effective implementation' of all ILO core conventions (Velluti, 2015). GSP preferences may be partly or completely withdrawn when compliance with these conventions is lacking. Therefore, the legal enforcement provisions in the trade agreement are weaker compared to those in the previous trade regime under the GSP+. That said, in practice, also under the GSP+, the EU has rarely resorted to withdrawal of preferences. Peru had already ratified the relevant ILO conventions in 2002 and there are no indications that the GSP+ has improved the implementation of labour rights in the country (Orbie & Tortell, 2009, pp. 677–678). However, the point remains that it has become more difficult to sanction non-compliance with the ILO conventions, which may be relevant provided that there is sufficient political will within the EU to take such steps.

Second, the Parties make a strong commitment not to lower *de jure* or *de facto* the level of protection provided in the labour law, at least not in a way that would foster trade or investment. The obligation to 'upholding levels of protection' is written down very clearly in Art. 277. It states that 'no Party shall waive or otherwise derogate from its environmental and labour laws in a manner that reduces the protection afforded in those laws, to encourage trade or investment' (Art. 277.1), and that 'A Party shall not fail to effectively enforce its environmental and labour laws through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties' (Art. 277.2). It is clear that this commitment concerns not only the *de jure* level of protection, but also *de facto* enforcement or any other forms of derogation to the level of protection that the law seeks to establish.

While this broadens the scope of this commitment, there is also a limitation in that there needs to be an impact of the non-lowering on trade and investment. The difficulty is not only that one has to prove that there has been a weakening of labour standards, but also that this has been done in such a way that trade and/or investment has been encouraged. Both the intentionality behind such measures and their economic impact on trade and investment are difficult to demonstrate.

In addition, the Parties' right to regulate is stressed. They have 'the right…to a reasonable exercise of discretion with regard to decisions on resource allocation relating to investigation, control and enforcement of domestic…labour regulations and standards, while not undermining the fulfilment of the obligations undertaken under this Title' (Art. 277.3) and 'Nothing in this Title shall be construed to empower the authorities of a Party to undertake labour…law enforcement activities in the territory of another Party' (Art. 277.4). These provisions aim to establish limitations against international interference in the domestic regulation and application of labour rights.

Third, civil society meetings should take place in order to discuss and monitor these commitments to sustainable development (cf. empowerment impact). These meetings should be organised at two levels: domestically (within each Party) and transnationally (involving civil society from each Party). The domestic mechanisms of each Party (see Art. 281) should 'have a balanced representation'. Their task seems to extend beyond merely discussing the implementation of the chapter on trade and sustainable development: they 'may submit opinions and recommendations on the implementation of this Title, including on their own initiatives'. Such a domestic mechanism is often called a DAG. The transnational mechanism is organised in the context of the annual meeting of the Parties' Sub-committee on Trade and Sustainable Development, which is the intergovernmental body that oversees the implementation of this chapter. The same stakeholders as in the domestic mechanism should be given the opportunity to participate in these sessions. These are open meetings to which the public at large can also attend. The purpose is 'to carry out a dialogue' between civil society and governments on the implementation of the chapter on trade and sustainable development.

Again, as with the two previous commitments, there is a significant degree of flexibility for governments. A comparative analysis (using the database of Martens, Van den Putte, Oehri, & Orbie, 2018) shows that these provisions are more constrained than in most other agreements (for a detailed analysis see Orbie & Van den Putte, 2016). Among other things, the governments are not obliged to establish a new domestic mechanism to monitor this chapter on trade and sustainable development (Art. 281), the provisions for the domestic mechanism do not specify that members need to be 'independent' (Art. 281) and overall the agreement provides a great deal of leeway for governments to organise the meetings as they see fit (Art. 281). Many of the other recent trade agreements are more explicit on the need to establish a new mechanism (such as the EU–Korea agreement) or stress the need for independent membership.

In conclusion, the labour rights commitments are conservative and flexible. By 'conservative', we mean that they mostly aim to maintain the status quo (e.g. on domestic labour law and civil society mechanisms). No specific and additional labour reforms are required, nor is it necessary to establish a new civil society mechanism. By 'flexible', we mean that there is much leeway for the governments when it comes to labour protection at the domestic level and the functioning of the civil society mechanisms. Specifically, on upholding CLS and non-lowering domestic labour law, there is a significant degree of flexibility for governments, provided that (1) domestic labour protection is consistent with the ILO CLS, and (2) a reduced *de jure* or *de facto* level of protection does not serve to foster trade or investment. On promoting civil society dialogue, there is a significant degree of flexibility for governments, provided that (1) a domestic committee or group should exist, (2) it should be consulted by its government, and (3) the same stakeholders should be given the opportunity to participate in the transnational meeting.

4. Assessing Impact

In order to assess the impact of the labour rights commitments in the trade agreement, this section will systematically apply this analytical framework to the *de facto* situation of labour rights in Peru (with specific reference to the agricultural sector).

4.1. Upholding ILO CLS

Even though Peru has ratified the eight ILO core conventions, serious shortcomings can be noticed when it comes to the 'implementation in practice', as required in Art. 269.3. Reports and indicators from international institutions show that practices of child labour, forced labour, discrimination and violations of trade union rights continue to exist in Peru, and this is also the case in the agricultural sector. We make a distinction between 'process or enabling rights' such as trade union rights and 'outcome rights' such as the eradication of child labour as the former should enable the latter.

When it comes to child labour and forced labour, 33.5% of children aged five to 14 are engaged in child labour (UNICEF, n.d.; United Nations Development Programme, 2015). Most of them work in the agricultural sector or on the street. An estimated 0.218% of the population in Peru is in modern slavery (Walk Free Foundation, 2014). Interestingly, these shortcomings have already been reported by the European Commission. In its assessment report on the GSP+ scheme, the Commission analyses Peru's compliance with the eight conventions, partly relying on the findings of the ILO expert bodies (European Commission, 2016). It concludes that 'Peru has been taking several steps and has made some progress in implementing the ILO core labour standards', in particular regarding forced labour and child labour. However, it also finds that 'Peru faces problems in practically implementing and enforcing the fundamental conventions' and that 'stronger efforts are required' (European Commission, 2016, p. 260). Furthermore, Mujica argues that

although there have been improvements in the national policies on child labour and forced labour, there continue to be problems in practice (2015, pp. 8–10).

When it comes to trade union rights, there is no clear evidence of any progress: quite the contrary. Trade union rights, as covered under ILO Conventions 87 and 98 on freedom of association and collective bargaining, are fundamental as they can create an enabling environment to protect other labour rights. Through the empowerment of workers, improvements in 'outcome rights' such as child labour can be expected (Barrientos & Smith, 2007; Lieberwitz, 2006).

Peru was given a rating of four by the International Trade Union Confederation (ITUC) in the 2017 Global Rights Index; this rating is given to countries where systematic violations are reported (ITUC, 2017). In such countries, the government and/or companies continuously threaten workers' fundamental rights by making serious efforts to crush their collective voice. Relying on ILO reports, the European Commission also produced a critical evaluation of trade union rights in Peru.

Our interviews with workers and trade union representatives in Lima and Trujillo confirmed these obstacles to strike, to join a trade union, to bargain collectively, and to take legal action against trade union discrimination, also in the agricultural sector. For example, several interviewees mentioned that some workers did not receive a new contract because they were affiliated to a trade union, and that some were forced to de-unionise in order to see their contract renewed. They also mentioned practices whereby union representatives are framed for allegedly engaging in fraudulent practices in order to damage their credibility. Other violations of trade union rights include the alleged practice of drawing up 'black lists' of trade unionists, which makes it almost impossible for dismissed workers to find another job. These interviewees confirm practices that have also been documented in other reports (Fonds voor Ontwikkelingssamenwerking, 2015; International Commission of Jurists, 2014). For example, the general survey by the ITUC mentions several anti-union practices in agricultural export companies in 2014, with violent repression and detainment of workers at CAMPOSOL and the sacking of a newly elected trade union leader at TALSA[2] (ITUC, n.d.).

Several explanations for these alleged violations can be given. Interviewees often point to the widespread use of temporary contracts. Specifically for the agricultural sector, there is the special law for the promotion of agricultural export products, Law No. 27360, under which workers enjoy only half of the workers' benefits provided under the general labour law (see below). According to several sources, including a prominent labour lawyer, this law is used beyond its original rationale. For example, temporary contracts are allowed to accommodate the specificities of seasonal labour in agriculture. However, large agricultural export companies cultivate several products all year round and employ the same labourers for these different products (see also Mujica, 2015). By hiring workers permanently on a temporary contract, it is far more difficult for them to organise themselves. More fundamentally, there is a strong anti-union climate in Peru, going back to historical episodes of political violence and economic collapse in the 1980s, which have been linked to trade union activities, and to the subsequent repressive reactions during President Fujimori's tenure (1990–2000). According to Mujica (2015, p. 10), the government (referring to the Humala government, 2011–2016) lacks the capacity and willingness to address this issue. He emphasises that this is not a problem of individual cases of violations of trade union rights, but that there has been a systematic policy behind the violations by the Peruvian governments. According to a European NGO representative with long expertise in labour rights in Peru, the situation for trade unions has actually worsened in recent years. The labour movement also suffers from internal divisions, as we witnessed in the agricultural sector in Trujillo and also in the representation of the unions in Lima.

It is not surprising, therefore, that the level of unionisation is extremely low in Peru. Peruvian unions never regained the status they enjoyed during the pre-Fujimori era (Gil Piedra & Grompone Velásquez, 2014; Sulmont Samain, 2006). Trade union density was 4.2% in 2012 (ILO, n.d.). The figures are even lower in agriculture. In 2010, of 98,467 unionised people in the private sector, only 2,651 were agricultural workers. So while unionisation is already very low at the national level, it is even lower in the agricultural sector, which represents only 2.69% of all unionised people in Peru (RedGe, 2012, p. 24). In 2010, about 1.4–1.7% of workers in the agricultural sector were unionised. In the Ica region, there used to be twelve trade unions, whereas now there are only two organisations that could be regarded as trade unions.

In the agricultural export sector, it should be noted that CAMPOSOL negotiated a collective labour agreement in December 2015. This agreement deals inter alia with economic benefits, labour conditions, health, CSR and union issues. However, trade union representatives at CAMPOSOL state that in practice, the social situation at CAMPOSOL is no better than at other agricultural export companies.

Whether these shortcomings represent a lack of 'implementation in practice' as required in the agreement remains difficult to determine, as the EU and its trading partners have not established clear benchmarks to evaluate gradations of implementation. In the context of the GSP(+), it has been noticed that the EU only resorts to sanctions when the ILO has established a Commission of Inquiry, which constitutes the highest level of condemnation (Orbie & Tortell, 2009, p. 676); this does not mean that the threshold for identifying violations of the core labour rights should be set so high (Vogt, 2015). While the above-mentioned violations seem serious and sys-

[2] CAMPOSOL and TALSA are major agricultural exporters in the La Libertad region.

tematic, the EU could engage in a reflection with its trading partners, civil society and the ILO on when exactly the core labour rights commitments are properly (even if never completely) implemented.

4.2. Non-Lowering Domestic Labour Law

Our research indicates three sub-cases where the labour protection has been lowered since the entry into force of the trade agreement with the EU: (1) *de facto* weakening of labour inspection; (2) *de facto* continuation of special (labour) regimes; (3) *de jure* lowering of health and safety at work. However, it remains difficult to ascertain whether this has an (intended) impact on trade or investment. Interestingly, in July 2015 a public submission was filed with the US Department of Labor by international NGOs and Peruvian workers' organisations, among others, under the US-Peru trade agreement (International Labor Rights Forum, 2015). The main allegation concerned the failure of the Peruvian government to effectively enforce its labour laws in the textile and agricultural sectors. While some consultation has taken place, the issue is still pending. No official public submission system exists under the EU agreement.

4.2.1. *De Facto* Weakening of Labour Inspection

While Peru has one of the most regulated labour markets in the world, it is among the countries with the lowest level of compliance with labour regulation (OECD, 2015, p. 87). Although a new inspection agency, named SUNAFIL (Superintendencia Nacional de Fiscalización Laboral), was created in 2012, there is a widespread consensus among interviewees that this agency has not functioned. Since it started functioning on 1 April 2014, at least four structural problems have been identified.

First, as emphasised by an ILO official, SUNAFIL's resources are 'ridiculously low'. A labour lawyer stressed that the amount of underfunding is 'amazing'. There are currently only about 500 labour inspectors in Peru. SUNAFIL has 394 inspectors nationwide, of which 227 are spread over nine of the twenty-five regions (US Department of State, 2015, p. 33). The US Department of Labor recently requested Peru to establish SUNAFIL offices in all regions as soon as possible (US Department of Labor, 2016, p. 19). In some regions there is only one labour inspector, and in the region of La Libertad there are only nine inspectors although this is a major agricultural export region where more than 80,000 companies are active (Mujica, 2015, p. 14).

Second, SUNAFIL does not function autonomously from the Peruvian government and its Ministry of Labour. According to a former official of this ministry, in 2014 the government deliberately changed the management of SUNAFIL in order to enhance its grip on the agency. An expert in labour law states that the labour inspectors previously based at the Ministry of Labour 'only changed the shirt' and in practice 'nothing has changed except the logo'. As a result of the continuing efforts by the government to control SUNAFIL, four different directors have been appointed since its creation in 2014.

Third, independence from companies is limited. One interviewee complained that in some cases labour inspectors are dependent on companies for their daily work, giving the example of an inspector who needed to rely on car transport provided by the company due to the lack of any transport of his own. Lack of fuel and transport, having to pay for transportation and being denied access to businesses are general problems for inspectors in Peru (US Department of Labor, 2014, p. 4). According to one interviewee, some labour inspectors have been hired by the companies that they previously needed to inspect.

Fourth, SUNAFIL's sanctioning power is limited. A law was passed determining that henceforth a 'preventive approach' would be taken to promoting labour rights in Peru. Instead of sanctioning companies that do not comply with labour law, the idea is to work on corrective measures that would be more effective in the long run. If SUNAFIL finds an employer to be in violation of labour law, this employer has three years to prevent and correct the violations (US Department of State, 2014, p. 38). At the same time, the new law has weakened the criminal responsibilities of employers for accidents at the workplace. Criminal penalties are limited to 'those cases where employers have 'deliberately' violated safety and health laws and where labour authorities have previously notified employers who have chosen not to adopt measures in response to a repeated infraction' (US Department of State, 2015, p. 34; see also below on the new health and safety law).

Interestingly, the 'weakening' of labour inspections has been recognised by the European Commission in its GSP+ report (European Commission, 2016, p. 257). The report points to new economic measures by the government 'that have limited the capacity for action of labour inspection'. An ILO official also confirmed that 'while the goal of the creation of SUNAFIL was to have a better labour inspection, in practice it has become worse because of a lack of resources'.

4.2.2. *De Facto* Continuation of Special (Labour) Regimes

Second, the continuation of the Agricultural Sector Promotion Law (Law No. 27360) and the blocking of the project for a unified labour law might be seen as going against the commitments in the chapter on trade and sustainable development. The special export regime for agriculture has existed since 2000 and was renewed in 2006 until the end of 2021. As stated before, the primary objective of the law was to support investment and development of the agricultural sector. The labour movement criticises the law for the flexibility that it provides to employers in the agricultural sector compared to the general labour law (e.g. halving holiday entitlements, longer

working hours and lower compensation for unfair dismissal) (CEPAL et al., 2012b, p. 289).

Several sources also indicate that the law is no longer necessary, since its original objective was reached in the first ten years of its functioning (International Commission of Jurists, 2014, p. 9). Indeed, the purpose of the agricultural export law was to provide opportunities to Peruvian producers to integrate in the international economy. According to the International Commission of Jurists (2014), the law provides 'highly flexible contract systems that favour investment but at the same time promote precarious employment and discourage the formation of trade unions'. It further states that the law reduces the level of workers' protection with the aim of encouraging investment and promoting the growth of agro-exports. Precisely for this reason, a labour lawyer also posited that the law is unfair: it provides fewer benefits for the same work, solely to lower the labour cost for companies.

Over the past 15 years, the Peruvian labour law has become so fragmented that 'the exception has become the rule'. The general labour law has been hollowed out and, according to one interviewee, applies to only about 10% of employees. In 2013, about 7% of all formally employed workers in Peru were working under the agricultural export law (Mujica, 2015, p. 6). There have been several attempts to streamline the agricultural export law, alongside other exceptional regimes, into one General Labour Law. Soon after the reinstatement of the 'Consejo Nacional de Trabajo y Promocion de Empleo' (or General Council of Labour and Promotion of Employment) (CNTPE, hereafter: National Council) in 2001, attempts were made to agree on a unified labour law (Ministerio de Trabajo Peru, n.d.). In 2011, new attempts were undertaken. While in 2012 there was allegedly a consensus on about 90% of the articles, there is no political will from the government, and there is also opposition to the project from the employers' side (Fernandez-Maldonado Mujica, 2015, p. 153; PLADES, 2014, p. 14). While the employers' side aimed to continue the discussion in the National Council, the labour groups wanted the Peruvian government to resolve outstanding issues.

It remains to be seen whether the agricultural export law will be extended again after 2021, something which two interviewees mentioned as a likely scenario. Meanwhile, the Peruvian Association of Exporters has requested the prolongation of Law No. 27360 until 2041, something for which President Kuczynski (in office since 2016) has already expressed support (Perú 21, 2016). Nonetheless, labour reform does not seem to be one of this President's priorities (Inside US Trade, 2016).

4.2.3. *De Jure* Lowering of Health and Safety at Work

The revision of the law on safety and health at work constitutes a clear example of a *de jure* weakening of labour law in Peru. Notably, this has happened since the entry into force of the trade agreement. In 2011, a law on safety and health at work was approved (Law No. 29783). It was considered to be a progressive law that had been elaborated with input from the labour movement. However, the new law was considered to bring along too many implementation costs for companies, which lobbied for its modification. As a result, it was amended in July 2014 (Law No. 30222), shortly after it entered into force (in April 2014). It was changed on several points, such as the frequency with which medical checks need to take place, and the need for redeployment within the same company following an industrial accident. Importantly, as mentioned above, the criminal responsibility of employers in the case of accidents at the workplace was lowered, making it less likely that accidents will lead to sanctions. Instead, the new law opts for a 'preventive approach'. This is an important aspect because in the construction sector alone there is at least one casualty per month. In addition, the modification of the law was passed without its submission to tripartite dialogue (PLADES, 2014, p. 14).

Although it seems clear that these modifications have weakened the level of labour protection, evaluations of the nature of these changes vary from being 'rather small' (according to a labour lawyer) to being '(very) significant' (according to NGOs and the labour movement). Trade unionists in the agricultural export sector state that the new law is not known or at least not applied by employers.

Similar to the creation of SUNAFIL, the original law on safety and health was one of the electoral promises made by President Humala (2011–2016). Again, however, his centre-left government proved unable or unwilling to implement the initiative. In the same context, it should be noted that more progressive members of the Ministry were dismissed and that a new Minister of Labour, who was considered to be closer to the business community, was installed. Because the economic and the political elite in Peru are closely interwoven, it becomes difficult even for centre-left politicians to create and enforce regulations and institutions that improve labour rights. This is further reinforced by the anti-union climate in Peru and the general Atlanticist, free trade orientation that has characterised the country in recent years.

These three sub-cases show that there are deficiencies in the law and practice of labour rights in Peru. However, it is more difficult to assess whether this violates the commitments in the trade agreement (see Table 1). In the cases of labour inspection and safety and health, there has been a *de facto* and *de jure* lowering of protection; however, it is difficult to ascertain whether this has (intentionally) encouraged trade or investment (with the EU). In the case of the special agricultural sector promotion law, it is clear that a flexible labour regime has been established in order to stimulate export competitiveness; however, this system predates the entry into force of the trade agreement with the EU. In general, it is very difficult to prove that changes in labour rights protection

Table 1. Summary of compliance with domestic labour law commitments

	Lowering since 2013	Encourage trade/investment
Labour inspection	Yes (*de facto*)	?
Special regimes	No (to be checked after 2021)	Yes
Health and safety	Yes (*de jure*)	?

were put in place in order to encourage trade or investment. As such, the potential of the non-lowering clause in EU trade agreements seems rather compromised.

4.3. Promoting Civil Society Dialogue

The trade agreement provides that each Party 'shall consult domestic labour and environment or sustainable development committees or groups, or create such committees or groups when they do not exist' (Art. 281). The Peruvian government has opted not to create a new group but instead to consult existing committees. In the area of labour rights, this is the National Council. This decision does not go against the letter of the agreement, which also provides that 'the constitution and consultation of such committees or groups…shall be in accordance with domestic law' (Art. 281). However, in practice three issues emerge.

First, there is a consensus among our interviews with (former) members of the National Council that the domestic mechanism does not effectively exist (RedGe, n.d.). One civil society actor said that it is an ineffective space where 'you should send issues you don't want to succeed'. This was confirmed by an ILO representative who called the National Council 'ineffective, irregular and more consultative than deliberative'. The National Council seems to have become paralysed in the last two or three years. Several interviewees indicated that they did not know whether it had been convening again regularly or not.

Trade unionist (former) members complain that the government consistently ignores recommendations made by the National Council. In addition, they state that laws are being passed without consultation with the National Council, which did not even discuss the trade agreement with the EU. Some members, including some trade unions, have withdrawn from the Council in protest at this state of affairs. Some trade unionists argue that it only exists to give Peru an international image of social dialogue and is only there for photo opportunities. In addition, the National Council is not an independent mechanism. It is chaired by the Ministry of Labour, its convocation depends on the will of the Minister of Labour, and the presence of government officials in the meetings further jeopardises its autonomous functioning. This was confirmed by several interviewees. The European Economic and Social Committee (EESC) laments the presence of government representatives as going against the nature of such mechanisms as civil society bodies (EESC, 2016). This is not contrary to the letter of the agreement, however. Contrary to the EU agreement with Central America (Art. 294(4–5)), for example, the provisions on the domestic civil society mechanism do not specify that the members need to be 'independent'.

Second, from our interviews there are no indications that the implementation of the chapter on trade and sustainable development is discussed in this forum. In fact, the members of the Council whom we interviewed were not aware that, since the entry into force of the trade agreement with the EU, they were tasked with the monitoring of this chapter. A representative of a major union in the agricultural sector was surprised to hear that the Council was also supposed to play such a role. Several EU DAG members confirmed that their Peruvian partners were not aware of a domestic mechanism. The EESC recently also lamented the fact that the Peruvian mechanism has never met to discuss the sustainable development aspects of the trade agreement with the EU (EESC, 2016). Interviewees in Peru are sometimes aware of the transnational meetings, but they do not know that there should also be a domestic component.

Taking all this into account, it is not surprising that the National Council has ostensibly not submitted any 'opinions' or 'recommendations' on the implementation of the chapter on trade and sustainable development, a possibility that is provided for in the agreement (Art. 281). The only coordinated initiative from civil society about the implementation of this chapter concerns a letter written by RedGe (Red Peruana por una Globalización con Equidad) and signed by 13 civil society organisations, addressed to the Head of the EU Delegation in Lima (RedGe, 2015). This letter expresses concerns about the deterioration of labour and environmental rights and criticises various changes to the law and policy. In addition, the authors request the EU to put these issues on the agenda of the intergovernmental Sub-Committee on Trade and Sustainable Development.

The non-functioning of the Peruvian DAG has been lamented by its EU counterpart. The EU DAG sent a letter to the Peruvian government asking for more information about the composition of the Peruvian (and Colombian) DAG so that the European DAG could contact its counterparts to coordinate (Iuliano, 2015). There has not been an official reply to this letter, but the Peruvian government has made it clear that issues related to social dialogue are a purely internal Peruvian matter. This was also made clear to us by the Peruvian Ministry of Trade. The EU Delegation in Lima also confirmed that, when requested for more information about the domestic civil society mechanism, such as the frequency of its meet-

ings, the participating members, the agenda etc., the Peruvian government replied 'this is not your business'. While the treaty does not require the Peruvian government to provide this information, our interviews indicate that consultation has not taken place, which goes against the letter of Art. 281.

Third, the commitment to allow domestic stakeholders the opportunity to participate in the transnational sessions is also not being implemented (Art 282.2). Peruvian civil society has been underrepresented in the transnational civil society meetings. Thus far, three transnational civil society meetings have taken place in the context of the annual meeting of the Sub-Committee on Trade and Sustainable Development. The first meeting (Lima, in 2014) is generally seen as substandard or even 'terrible' as it was more a debriefing about the trade agreement than a true dialogue; what's more, as the meeting of the Sub-Committee was delayed by more than three hours, there was no time for the governments to really listen to civil society. In addition, the translation system did not work properly. The representative of one of the main union federations indicated that he had only been informed about the meeting two or three days earlier, which of course hampered effective preparation. Although the second meeting (Bogotá, in 2015) was evaluated as more substantial by some observers, no members of Peruvian civil society were present. Their absence was due to various factors, including their lack of capacity, limited budgets, and other priorities; yet it seems clear that the Peruvian government had not facilitated their involvement in any way. Several of our interviewees from Peruvian civil society as well as some members of the EU DAG confirmed that there had been no announcements by the authorities in Peru in relation to the transnational meeting. The third meeting (Brussels, in 2016) was described by the organisers as an historic achievement because civil society representatives from all three countries were present. This claim should, however, be put into perspective. Peruvian civil society participation was very limited and no Colombian civil society participated; a Dutch organisation represented Colombian interests instead. In addition, video conferencing was meant to overcome the distance and related funding issues. However, the link did not work until half way through the meeting. The dysfunctionality of the Peruvian National Council and presence of officials during its meetings were repeatedly criticised; however, the Peruvian officials made it clear that there were no prospects of a new *ad hoc* mechanism (in contrast to Colombia). In conclusion, the research shows that the Peruvian government failed to empower a domestic mechanism that can perform the monitoring role effectively, to consult this group, and to facilitate its participation in the transnational meetings. This should be seen in the context of a general unwillingness to include civil society actors in the discussions on the implementation of the trade agreement.

In sum, it seems that the restrictive legal provisions on civil society meetings, which grants considerable leeway to the Peruvian government (see Section 3), have an impact on the *de facto* involvement of civil society. While it has yet to be determined whether the meetings function more effectively in practice under EU trade agreements with more far-reaching provisions on civil society involvement, ongoing research on the EU–Korea and EU–Central America agreements suggests that this is the case. At least, Korean and Central American DAG members are aware of their role in the trade agreements, linkages with the transnational meetings are more established, and the independence of members is less contested. European Commission officials whom we interviewed also admitted that it was a mistake not to specify that DAG members need to be independent, adding that this had been remedied in subsequent agreements.

5. Conclusions

This article has shown that the EU's legal improvement, institution building and empowerment impact in promoting labour rights through its trade agreement with Peru has been non-existent. First, the legal provisions were drafted in a conservative way that leaves ample flexibility for the Peruvian government, even compared to other EU agreements. Second, these provisions have not been fully implemented and have even been violated in a number of cases. We identified serious shortcomings with the implementation of ILO core conventions, the lowering of domestic labour law, including labour inspection, and the near-absence of civil society dialogues. While it may be too early to draw definite conclusions, as ongoing large-N studies suggest that promotional labour clauses may reduce breaches of labour rights in the long run, this detailed sector and interview-based case study of Peru's compliance with core labour rights, health and safety regulations, labour inspection, export promotion regimes and civil society mechanisms illustrates the complexity of EU trading partners' compliance with labour rights commitments. In addition to its empirical contribution, the article has, we hope, set the stage for further comparative analysis with other sectors and countries by making use of the proposed analytical framework.

In terms of explanations for the non-impact of the trade agreement, we can point to the role of the Peruvian government, interests of the agro-export sector, and the traditional anti-union climate. In addition, it is clear that the EU has not strongly insisted on more robust provisions in the chapter on trade and sustainable development and that it has been relatively responsive to the Peruvian and Columbian governments' reservations in this regard. The EU's reluctance to take firm action against violations of trading partners' (core) labour rights already characterised the GSP+ trading regime with Peru that preceded the trade agreement (even if theoretically the former system was more enforceable through trade sanctions). Officials interviewed at the Commission's DG Trade concede that some language in the chapter on trade and sustainable development should have been

stronger and suggest that they have taken these lessons into account for subsequent agreements. To what extent this has indeed been the case and what this means for the practical application of labour rights remains to be studied in further research.

Although there are inherent limits to what trade agreements can achieve in terms of promoting labour rights, the EU could clearly have pushed more in both the negotiation and the implementation of the trade agreement (see Orbie & Van den Putte, 2016). For instance, during the trade negotiations the EU could have insisted on specific reforms in areas such as labour inspection (pre-ratification conditionality), and could have demanded the inclusion of a social safeguard clause (when liberalisation has unforeseen negative consequences) as well as sanctions as a last resort. During the implementation, it could insist more on getting information about the existence and functioning of the DAG within Peru (within the intergovernmental Sub-Committee on Trade and Sustainable Development), it could enhance the effective functioning of the civil society meetings (through budgetary and administrative support), it could foster coherence with its own development cooperation policy in Peru (which also involves civil society dialogue, albeit independently from the trade agreement), and engage in cooperation with other actors such as the US (which has filed a complaint against labour rights violations in Peru) and the ILO (which has the relevant expertise but is not formally involved). Given the rising politicisation of trade policy, the debates on the sustainable development dimension of free trade agreements are undoubtedly going to continue and the European Commission has recently published some interesting ideas in a non-paper on this topic (Barbu et al., 2017; European Commission, 2017).

When observers and academics characterise the EU's approach as being 'soft', they usually refer to the absence of sanctions (Campling et al., 2016; Horn et al., 2010; International Institute for Labour Studies, 2013, 2016; Vogt, 2014). However, this analysis shows that even when we leave the sanctions debate aside, the EU is being soft in the sense that it does not seriously implement its promotional approach. Even without changing the existing treaty provisions, the EU could push much harder to realise its soft approach.

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Conflict of Interests

The authors declare no conflict of interests.

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Article

Where Symbolism Prospers: An Analysis of the Impact on Enabling Rights of Labour Standards Provisions in Trade Agreements with South Korea

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Abstract
Can trade agreements be used as a tool for improving the conditions under which people work? The evidence from this study suggests this is not the case, even if the country in question—in this instance South Korea—is a well-developed and democratic country. While over the past six years South Korea has taken part in a number of Free Trade Agreements containing labour provisions, the impact of these on enabling rights has been rather low. This would suggest that without the willingness to enforce these parts of the agreements, or without the willingness to implement them on the Korean side, the inclusion of such provisions remains a fairly symbolic undertaking.

Keywords
Free Trade Agreements; labour; labour standards; South Korea; trade

Issue
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1. Introduction

The large amount of Free Trade Agreements (FTAs) that have been negotiated over the past 25 years—by now involving all World Trade Organization (WTO) members (WTO, 2017a)—demonstrates the importance that States attach to increasing trade as an engine for economic growth. However, FTAs might also lead to a situation in which countries try to increase their competitiveness by continuously keeping their labour standards lower than other countries, or even lowering them. This concern is illustrated by a recent statement of international trade unions: "International trade and investment agreements have contributed to growing imbalances between and within countries. Opaque negotiation processes resulted in one-sided protection of investors' rights, while labour and social rights…came under attack" (Labour 20 [L20], 2017).

While research on the relationship between FTAs and labour protection has resulted in mixed outcomes,[1] FTAs are increasingly seen as providing an opportunity to set minimum standards for the signatory countries. This is illustrated by the fact that in 2013, almost 25% of the trade agreements registered at the WTO as being concluded or notified included labour standards provisions (International Labour Organization [ILO], 2015, p. 19). Although such inclusion could be perceived as a demonstration of a protectionist interest, it can also be viewed as an illustration of a concern for other matters related to trade than purely economic ones. Whichever argument prevails, labour standards provisions make trade agreements easier to accept for those critical of the social effects of globalisation in general and trade agreements in particular. As such, the provisions increase support for trade agreements in more developed countries.[2]

[1] For example, research by Davies and Vadlamannati (2013) and Olney (2013) found that countries compete in the area of labour standards to attract foreign direct investment, while Potrafke (2013) argues that globalization does not lead to a deregulation of the labour market.
[2] See Van Roozendaal (2015).

But are these provisions just paying lip service to labour standards' improvements? This article uses the case of South Korea to show how its many FTAs formulate different labour standards provisions, and analyses the effects of this comprehensive body of commitments and accompanying instruments. It concludes that the effects are largely symbolic.

2. The Korean Case

Until now research has shown that labour provisions in trade agreements have had a limited influence on actual labour standards. It has been suggested that more in-depth case studies are required to identify possible effects (Giumelli & Van Roozendaal, 2016). This article, presenting an in-depth study of Korea,[3] analyses the effects of a set of provisions in the agreements related to the fundamental enabling conventions in the field of freedom of association and the right to organise.[4] Korea is interesting because it is a democratic and developed country (Freedom House, 2017; World Bank, 2017), which suggests it *potentially* has the political will and means to maintain a high level of labour standards. The importance of democracy for enabling labour rights was pointed out by, amongst others, Greenhill, Mosley and Prakash (2009, p. 678),[5] and the importance of economic development by Giumelli and Van Roozendaal (2016, pp. 56–57). In addition, the potential influence of dependence on FTA partner countries as export destinations was shown by Frankowski (2015, pp. 11–12), Greenhill et al. (2009) and Meunier and Nicolaïdis (2006). The US and the EU, two of its FTA partners, were in 2014 the second and third export destination (almost 20% of its exports). While this is by no means "dependency", it could make a difference.

The study takes a different approach than most of the other research on labour provisions in trade agreements; instead of focussing on one FTA, it takes a country—Korea—as a point of departure and looks at the impact of *all* FTAs incorporating labour standards. It demonstrates that even though these agreements together include a broad range of provisions, there are no effects on enabling rights. This is interesting, not only due to the potential for change on the receiving end as was just pointed out, but also due to the fact that the trade agreements facilitate different kinds of institutional arrangements which enable implementation, and involve a wide variety of trading partners, including major ones who should be able to exert pressure.

In order to assess the effectiveness of the FTAs' labour provisions on the ratification of the enabling fundamental Conventions and the related laws and practices, this article uses a simple definition of effectiveness of the Korean FTAs, making a difference between output and impact, the former referring to "the norms, principles and rules constituting the regime itself" and the latter to "the set of consequences flowing from the implementation of and adjustment to that regime" (Underdal, 1992, p. 230). Referring to van den Putte (2016), Orbie and Van Roozendaal point out in the editorial of this special issue that impact refers to intermediate impact (development, empowerment, institution building and legal improvement) and ultimate impact (labour practices). Whether such impact is positive can be measured against the "relative improvement standard". This standard is met when the inclusion of a provision leads to an improvement in the situation relative to that which existed before (Underdal, 1992, p. 231).

This article analyses the different Korean FTAs that include labour standards to understand what kind of conditions and incentives they contain (the output). This is followed by an analysis of the effects and an explanation of the lack of effect (the impact). The output will be assessed on the basis of the original texts of the agreements, while the impact will be assessed through a systematic analysis of reports of the US Department of State (US DOS), the US Department of Labor (US DOL), UN reports (Special Rapporteur on the rights to freedom of peaceful assembly and of association; ILO Committee on the Application of Standards; ILO Committee on the Freedom of Association [CFA]) and the International Trade Union Confederation (ITUC).

3. The Output: Labour Provisions in Korean FTAs

At the beginning of 2017, Korea had signed 16 FTAs (Asia Regional Integration Center [ARIC], n.d.), eight of which include substantial and distinctive references to labour standards. The eight with substantial references can be distinguished along the lines of: (1) the *content*, i.e. the kind of labour standards they refer to and the strength of the wording, and (2) the *procedures* (or implementation mechanisms) in place to ensure or stimulate compliance (see part 4).

3.1. EU–Korea FTA as an Example

With respect to the content, one can usually make a difference between references to the principles or rights enshrined in the core labour standards (CLS)[6] of the ILO as a baseline (ILO, 2012, pp. 1–2), or to references to an alternative package.

The FTA of Korea with the EU,[7] effectuated in July

[3] In this article, South Korea will be referred to as Korea.

[4] "enabling rights make it possible to promote and realize decent conditions at work" (ILO, 2017a).

[5] However, the study of Giumelli and Van Roozendaal (2016, p. 19), which equated political will with democracy, did not see an effect of being a democratic country on the level of respect for labour rights. Given the fact that others found other results, this variable should not be ruled out.

[6] CLS refer to the *rights and principles* being part of Conventions 29 and 105 (on forced labour), 87 and 98 (on freedom of association and right to organise), 100 and 111 (non-discrimination) and child labour (138 and 182) (ILO, 2012, p. 1).

[7] The full text of the FTAs referred to in this article can be found on the website of the Korean Ministry of Trade, Industry and Energy: http://english.motie.go.kr/en/if/ftanetwork/ftanetwork.jsp

2011, is in terms of content the most comprehensive one and will, therefore, be used as an example. It specifically refers to Article 13.4.3 to CLS. Its *international commitments* includes "respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights" and reaffirms "the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the EU have ratified respectively" (Article 13.4.3), and to "make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO"(Article 13.4.3).

With a *national focus*, the FTA specifies that "(a) Party shall not fail to effectively enforce its…labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties" (Article 13.7.1). At the same time, the FTA instructs that "the Parties shall not weaken or reduce the…labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogate from…its laws, regulations or standards, in a manner affecting trade or investment between the Parties" (Article 13.7.2).

3.2. Other FTAs

With respect to *international efforts* on the content, the FTAs with the US, Canada and Turkey all commit to CLS in a similar fashion as the EU–Korea FTA does, while others make use of a weaker formulation such as "shall endeavour to adopt and maintain" (FTA with Peru and Australia) or "shall strive to adopt and maintain" (FTAs with Colombia and New Zealand).

With the exception of the FTA with the EU, none of the FTAs oblige the parties to ratify the ILO Conventions related to CLS, nor do they discuss the up-to-date Conventions. However, the Canada-Korea agreement has a longer list of internationally recognised labour rights, extending it to employment standards in terms of wages, occupation injuries and payments, and non-discrimination of migrant workers (Article 8.2).

Just like the EU FTA, the FTA with Turkey also specifically urges the Parties to effectively implement the ratified ILO Conventions. However, without an appeal to also ratify these ILO Conventions, this FTA should be considered weaker than the EU–Korea FTA.

With respect to the references to *domestic laws*, all FTAs include: (1) a commitment to enforce domestic labour laws that have an effect on trade and investment, and (2) a commitment not to weaken domestic labour laws that have an effect on trade and investment.

Of the two, the first is formulated in the US–Korea FTA as "neither Party shall fail to effectively enforce its labor laws, including those it adopts or maintains in accordance with Article 19.2.1, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the parties" (Article 19.3.1[a] of the US–Korea FTA).[8] However, in the case of this FTA, Article 19.8 explicitly limits the phrase "labour laws" to those laws covering CLS plus acceptable conditions of work.

A phrase on not to weaken labour law in so far it affects trade or investment is included in all FTAs. However, here one can also find different formulations. Again, in the Korean FTAs with Canada, the US, Australia, New Zealand and Peru references are made to those laws in the area of the CLS. Canada refers to the extended list here. To illustrate, in Article 18.2.2 of the Peru-Korea maintains that "the Parties shall not waive or otherwise derogate from…their laws or regulations implementing Article 18.1, in a manner substantially affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with the principles as stated in the ILO Declaration". This suggests that the laws already in place but not related to the CLS could indeed be weakened. However, the FTA with Turkey includes a more comprehensive formulation, i.e. "each Party shall not weaken or reduce the…labour protections afforded in its laws to encourage trade and investment, by waiving or otherwise derogating from…regulations or standards, in a manner affecting trade or investment between the Parties" (Article 5.7.2). Here, the point of reference concerns the domestic legislation and not only CLS-related principles and therefore offers more potential than the Peru-Korea FTA, but is still potentially weaker than the EU–Korea FTA, as there is nothing in the Turkey–Korea agreement on ratifying the Conventions related to CLS. A ratified Convention entails stronger commitments than a CLS, which makes the EU–Korea FTA with its incentive to ratify stronger than the Turkey–Korean one. A similar observation regarding the Turkey–Korea FTA can be made concerning the Colombia–Korea FTA.

In sum, the references on enforcement and derogation can be broad and restricted at the same time. Broad because in some cases domestic labour law is included, and not only the laws connected to CLS. This avoids the limitation of some of the FTAs in their reference on "waive and derogate" that all other—non-CLS related domestic law affecting trade—can be weakened.[9] Another limitation is the connection made to trade in both references. In addition, with respect to CLS, the references can be limited in another way. In cases where CLS are not part of domestic law, both references only have meaning for CLS if the FTAs also contain a strong commitment to include CLS in domestic law.

3.3. Additional References on Protectionism

Additional references in the FTAs are at times made to not using labour standards for protectionist purposes, such as is done in the FTAs with the EU, New Zealand, Australia and Turkey. For example, the Australia–Korea agreement specifies that "each Party recognises that it

[8] Article 19.2.1 refers to CLS.

[9] A similar observation can be made with respect to the enforcement reference in the US–Korea FTA.

is inappropriate to use its labour laws, regulations, practices and policies for trade protectionist purposes" (Article 17.1.5). Article 13.2.2. of the EU–Korea FTA and article 5.2.1 of the Turkey–Korea FTA are even stronger with respect to this commitment; "The Parties stress that…labour standards should not be used for protectionist trade purposes". Article 15.2.5 of the New Zealand–Korea FTA is stronger as it specifies that "each Party shall ensure that its labour laws, regulations, policies and practices shall not be used for trade protectionist purposes". Especially in the cases of Australia and New Zealand, such references could also be viewed as a (in case of Australia—weak) substitute for restricting the "waive and derogate" formulation to CLS. However, as the New Zealand and Australia FTAs have only a weak commitment to including CLS in domestic laws, expectations are low regarding the obligations. The above is summarised in the table.

When taken together, the body of FTA commitments applying to Korea that include: (1) an appeal to Korea to ratify the ILO Conventions related to CLS, as well as the up-to-date Conventions, as well as commitments to (2) implementing ratified ILO Conventions; (3) realising additional internationally recognised labour rights; (4) not failing to enforce domestic labour laws, including those related to CLS when it is affecting trade and investment, and (5) not weakening domestic regulation (also covering CLS) in order to increase competitiveness.

Table 1. The content of the FTAs with Korea.

Agreements in order of date of enforcement	Strong commitment to CLS in domestic laws and regulations	Ratification of conventions promoted	Commitment to implement ratified Conventions	Not failing to enforce domestic labour laws*	Not to waive and derogate from domestic labour laws (general or related to CLS)**	Protectionism reference
EU–Korea (July 2011)	Yes (and up-to-date Conventions)	Yes	Yes	Yes	Domestic laws and CLS (through ratification reference)	Yes
Peru–Korea (August 2011)	No (weak formulation)	No	No	Yes	Limited to CLS	No
US–Korea (March 2012)	Yes	No	No	Yes, but limited to CLS and acceptable conditions of work	Limited to CLS	No
Turkey–Korea (May 2013)	Yes	No	Yes	Yes	Domestic laws and "protectionism reference"	Yes
Australia–Korea (December 2014)	No (weak formulation)	No	No	Yes	Limited to CLS	Yes (weak formulation)
Canada–Korea (January 2015)	Yes (extended list)	No	No	Yes, but limited to "mutually-recognized labour law"	Limited to CLS (but extended list)	No
Colombia–Korea (July 2015)	No (weak formulation)	No	No	Yes	Domestic laws	No
New Zealand–Korea (December 2015)	No (weak formulation)	No	No	Yes	Limited to CLS	Yes

* Those FTAs with a strong commitment to adopting CLS in domestic legislation will also cover, implicitly, CLS.

** See previous note.

4. The Output: Implementation Mechanisms of the Agreements

The agreements discussed above are to be implemented through a number of instruments, such as monitoring arrangements, and may provide for weaker or stronger dispute settlement procedures. They have established bodies concerned with the implementation of the agreement which serve as contact points for the parties and facilitate cooperation between them. However, the main differences between the FTAs are whether they allow, or even mandate, the involvement of the public, by for example accepting complaints and whether it is possible to use the agreement's dispute settlement, whether another kind of mechanism is devised, or whether disputes should be resolved through dialogue. Related to this is the question whether or not the bodies handling disputes have any sort of independence.

4.1. Institutions and Accessibility

In terms of the institutions and their accessibility, the US–Korea FTA combines individual communications (the option to file complaints by individuals or organizations) with the involvement of "the public" on a national and international level (van den Putte, 2015). Nationally, the US–Korea FTA specifically allows for —but does not require—the involvement of stakeholders to advise on the implementation (Article 19.5.4.). On the US side, this FTA is monitored by a national advisory committee (NAC), which advises the Department of Labor and the US Trade Representative. NAC includes representatives from the public (often experts from academia), business and labour (US DOL, 2017a). Internationally, article 19.5.1 provides for the establishment of the Labor Affairs Council (LAC), made up of representatives of the Ministries of the Parties. The LAC is concerned with discussing the implementation of the labour provisions, including discussing them with the public. In addition, under article 19.5.3 the Parties need to provide an opportunity for people to submit communications to be reviewed by the labour ministry of each country, which will decide whether it is willing to proceed with them. The FTA with Canada also allows for the submission of communications by the public to a governmental organisation (Article 18.10).

In terms of public involvement, the EU–Korea agreement has put more emphasis on collective approach than the US and Canadian agreements. This FTA requires that a Committee on Trade and Sustainable Development (consisting of government officials) be founded and requires each Party to "establish a Domestic Advisory Group(s) on sustainable development (environment and labour) with the task of advising on the implementation of this Chapter" (Article 13.12.4). Such a Group involves "independent representative organisations of civil society in a balanced representation of environment, labour and business organisations as well as other relevant stakeholders" (Article 13.12.5). It is required that the members of these groups will meet—in principle—once a year in the form of a civil society forum to discuss "encompassing sustainable development aspects of trade relations between the Parties" (Article 13.3.1). The Parties can inform the Forum on further developments concerning the implementation of the Chapter, and the opinion of the Forum can be brought to the attention of the Parties and the Domestic Advisory Groups. The New Zealand–Korea FTA allows specifically for its Labour Committee (comprising of government officials), established under the agreement, to consult with stakeholders (Article 15.4.5), but this is not a requirement. The FTAs with Colombia, Peru, Australia, and Turkey do not allow for the receipt of individual complaints; neither do they provide other opportunities for public involvement.

4.2. Dispute Settlement

In terms of the settlement of disputes, the US–Korea FTA is the most comprehensive. In the US–Korea FTA, disputes arising from the agreement may be settled in different ways. By means of Article 19.7, after consultations have failed, the dispute settlement chapter can be evoked. The Panel involved in this dispute settlement should be independent and can decide to evoke measures, including trade sanctions, that are similar to those used for other parts of the agreement, to enforce labour provision obligations (Grimmett, 2012).[10] Under the Canada-Korea FTA a procedure is available which allows for fines in the form of an "annual monetary assessment equivalent to the degree of adverse trade effects related to the non-compliance" (Annex 18-E). It does not allow the regular FTA dispute settlement procedure to be evoked for this article. The article further mandates this fine to be used to implement "the action plan or other appropriate measures" (Canada–Korea FTA). Both FTAs stipulate that violations can only be established in so far as these violations have an effect on trade and investment.

All the other agreements have weaker provisions, excluding sanctions. The EU–Korea FTA does not allow for the general dispute settlement mechanism to be applied to the labour chapter. Instead, it has devised a specific mechanism for this purpose. The Committee on Trade and Sustainable Development (CTSD) could be involved if Parties are unable to solve an issue and request the Committee to come up with a solution. The Committee may consult the Domestic Advisory Group(s), which may also provide their opinion without being consulted. In case of there being a dispute the Parties cannot resolve themselves; they may request the involvement of a Panel of Independent Experts. The Panel's conclusions are, how-

[10] However, a side letter exchange between the US and Korea shows that both Parties agree that when communications are requested on a certain topic not only should this be first handled domestically, but the matter should not be already under consideration by an international body and should not be already subject to another communication between the parties (United States Trade Representative, 2007).

ever, non-binding and there is no provision for sanctions (Durán, 2013, p. 138). The FTAs with Colombia, Peru, Australia, New Zealand and Turkey have also chosen to settle disputes through dialogue. In these cases, there is no independent mechanism available, and there are no enforcement mechanisms.

In sum, when all the FTAs' commitments on implementation are taken into account, they refer to a body of commitments applying to Korea that include: (1) the undertaking of cooperation activities;[11] (2) the involvement of civil society; (3) the opportunity to file complaints; (4) procedures to deal with disputes, which could involve independent experts, as well as (5) the application of sanctions. The question now is whether all these institutional arrangements have affected change in law or practice in Korea in the area of the right to organise and the right to freedom of association.

5. The Impact of the Agreements

The above shows that together the agreements containing labour references amount to a comprehensive body of language and implementation instruments. It will be analysed whether any of the instruments involving civil society, filing of complaints, enactment of dispute procedures, and the application of sanctions have been used. The first FTA with Korea containing labour standards, the one with the EU, came into force in mid-2011. That year will, therefore, be the starting point of the analysis.

5.1. Impact on Ratification

With respect to the ratification, there is no intermediate impact of the FTAs. Korea has not ratified Conventions 87 and 98 (covering the freedom of association, right to organise and the right to collective bargaining) (ILO, 2017b). In 2016 the Korean government made clear that it could not, due to "legal incompatibilities", ratify these two Conventions, nor Conventions 29 and 105 (ILO, 2017c, 3, 6, 10).[12]

5.2. Other Kinds of Impact

The assessment of the situation in Korea differs greatly. In 2011, a report of the US DOL concluded that "the ROK's labor laws and practices are largely consistent with international standards governing the internationally recognized labor rights articulated in Chapter 19 of the KORUS", to a great extent due to Korea's accession to the OECD (US DOL, 2011, p. 10). On the other hand, the ITUC (2016a) classifies Korea as a country where workers' enabling rights are not guaranteed by law. It rated the country with a five, meaning that it is amongst "the worst countries in the world to work in" (ITUC, 2016a, 2016b). As five is the second worst category,[13] it is safe to assume that the FTAs which have been signed did not improve the situation.

Whatever the general observation, it is clear that there are significant problems in the areas of freedom of association and the right to collective action, as well as with regards to the right to strike. While these rights are guaranteed for most workers, there are important exceptions and omissions in the law that have not been amended following the conclusion of the FTAs, and neither have the practices been changed; for this Korea received strong criticism.[14]

5.3. Specific Problems

5.3.1. Freedom of Association

National laws may deny, restrict or not acknowledge the freedom of association and collective bargaining of certain categories of workers, such as defence industry workers, teachers, particular categories of public officials, undocumented workers, those that have been dismissed or self-employed workers, and as the 2016 UN's Special Rapporteur's report illustrates, these limitations have not been lifted since the FTAs came into force (Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2016, pp. 12–13).

Some associations, such as of those who are self-employed, are not acknowledged under Korean law. Some transportation and construction workers are included in this category. Any agreement such organisation makes is therefore non-binding. Unions allowing membership to people who have been dismissed face denial of registration or the de-certification of the whole union. In the case of the Korean Teachers and Education Workers Union, this means that 60,000 people cannot organise because of the membership of nine fired workers, while the 10,000 public servants who are allowed to be members of the Korean Government Employees Union (KGEU) cannot be represented as the union's constitution does not rule out the membership of dismissed workers (Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2016, p. 13). Even when the KGEU amended its constitution, the Korean government denied registration of the union on grounds of "alleged lack of political neutrality" (Domestic Advisory Group-EU

[11] Cooperation activities will not be discussed in this article as cooperation is not exclusively part of trade agreements but can take place through multiple forms, which makes it difficult to understand the specific effects of cooperation under FTAs.

[12] Korea has also not ratified Conventions 29 and 105 (on forced labour) due to "inability" (ILO, 2017c, p. 10). The other fundamental Conventions, 138 and 182 (on child labour) and 110 and 111 (non-discrimination,) were ratified before 2004. The FTAs discussed in this article involve countries with different levels of ratification, from the EU countries, having signed Conventions 87 and 98, and the US failing to have signed both (ILO, 2017b).

[13] The categories range from 1 (the best protection) to 5+ (the worst protection). In the 5+ category are countries that do not guarantee workers' rights, as the rule of law is not respected. In category 5 countries "legislation may spell out certain rights workers have effectively no access to these rights and are therefore exposed to autocratic regimes and unfair labour practices" (ITUC, 2016b).

[14] The length of the article does not allow a detailed overview of all laws and practices related to the enabling rights. Such overview is provided by the 2016 report of the UN's Special Rapporteur on the rights to freedom of peaceful assembly and of association, and the 2011 report of the US DOL.

[DAG-EU], 2014). In general, teachers are granted the freedom of association, but only under certain conditions. The law permits the blocking of the teachers' union and public officials from engaging the political activities, providing a very broad interpretation of what political activities entail, which strongly limits the possibility of these groups to voice their concerns which has been heavily criticised by the ILO (Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2016, p. 12; US DOL, 2011, pp. 17–19). In addition, unions of teachers and public officials have restricted rights with respect to what is collectively bargained for (US DOS, 2010, p. 19, 2017, p. 28).

Certain categories of public officials are not permitted to join a union at all. In 2010 the Korean Federation of Trade Unions (KCTU) and its affiliated Korean Professors Trade Union filed a complaint to the ILO's CFA, as this subcategory of teachers is not granted the right to organise. The CFA concluded that revision of the law was needed to amend this restriction (CFA, 2010), a revision which still has yet to be made.

In 2011, undocumented immigrants were not granted the right to join a union.[15] The Migrants' Trade Union (MTU) was established in 2005 but was not recognised on grounds that there were undocumented workers among its members. It took the courts years to decide upon this case, which led the ILO's Committee on Freedom of Association to express its concerns about this and about the infringement of trade union activities of migrants in general (CFA, 2010, 2011, 2013; US DOL, 2011, p. 14). In 2015, the Supreme Court ruled that undocumented migrants also have a right to organise (ITUC, 2015), leading to the recognition of MTU.[16]

5.3.2. Right to Strike

The right to strike is also severely limited. All public servants, defence industry workers and teachers are denied the right to strike, as well as those working in essential public services, the latter category again being very broadly defined. Many of these limitations conflict with international law (Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2016, p. 15; US DOL, 2011, pp. 22–23, 27).

One of the most important problems facing Korean unions is the hostile environment in which they operate. The Korean criminal act allows for heavy fines for trade unionists who are engaged in activities that "obstruct business", even if these activities are non-violent. This basically limits the collective action of unions (Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2016, p. 15; US DOL, 2011, pp. 10–11). In fact, it is up to the authorities to affirm a strike's legality. This has created significant scope for the authorities to silence opposition. For example, a strike of the Korean Railway Workers not only resulted in the arrest of union members and leaders and the dismissal of workers, but also in lawsuits against the union and some of its officers by KORAIL, demanding about 8 million euro (DAG-EU, 2014; Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2016, p. 15). To quote the UN special rapporteur:

> industrial action, particularly strike action, by its nature is designed to interrupt the normal operations of a business or employer in order to press for certain interests; they are inherently disruptive. Strikes should thus be adopted with a great deal of circumspection, but that does not mean they can be arbitrarily suppressed. Criminal and civil liability for loss of revenue or other damages arising from work stoppage negates the very core of the right to strike. (Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2016, p. 15)

6. How to Understand the Lack of Impact?

The above leads to the conclusion that the FTAs have not made a difference in the area of enabling rights.[17] While the FTAs provide output, meaning that they include provisions that reaffirm regulation, and create an institutional infrastructure, this has not let to any impacts in Korea, compared to the pre-FTA situation, with the exception of the creation of institutions and, as Engen (2017, p. 52) argues, more disclosure of violations as a result of the EU DAG's activities. This may increase the empowerment of civil society. However, a causal ultimate impact could not be established.

This failure of the labour provisions in the FTAs to improve enabling rights in Korea could be understood as the result of both endogenous and exogenous factors, the first being those provided by the agreement provisions themselves, the latter being those which are part of the environment in which the agreements were executed.

6.1. Endogenous Factors

The total of commitments and procedures that can be derived from the FTAs with Korea are extensive, but underused or simply ineffective. While complaints procedures are included in the US–Korea and Canada–Korea FTAs, Korea has not yet received any complaints (International Cooperation Division, Ministry of Employment

[15] Migrant workers in general face discrimination and abuse. Even though the Korean government has undertaken some steps to improve their situation, this is not considered to be enough (Committee on the Application of Standards, 2013, p. 38, individual cases).

[16] This change, however, is not seen as an impact of the EU FTA (Soyeon Jeong, Korean labour law attorney, email correspondence, May 26, 2017) even though in 2013 the EU DAG demanded attention for this issue (Engen, 2017, p. 51). An interesting line of research would be to look into if and how the judicial system has responded to the agreements (see for example the article Riethof, 2017, in this issue).

[17] Also the other contribution in this thematic issue on the impact of FTAs, the article by Orbie, van den Putte and Martens (2017) on the EU FTA with Peru, shows a lack of positive effects.

and Labor, Government of Korea, personal communication, February 10, 2017; Trade Policy and Negotiations Branch, Foreign Affairs, Trade and Development Canada, Government of Canada, personal communication, April 28, 2017; US DOL, 2017b). Such complaints could make a difference in terms of putting violations on the political map (see Oehri, 2017; Van Roozendaal, 2015), even though they might not actually change the situation. Additionally, the fact that under the same two FTAs obligations with respect to labour can only be violated when they affect trade and investment is also a strong limitation to the application of sanctions, as many of the problems discussed do not necessarily involve sectors which are trade-related. And even if the application were wider, one should keep in mind that sanctions, or the threat of sanctions, do not necessarily lead to (big) improvements (Giumelli & Van Roozendaal, 2016, p. 19; Greenhill et al., 2009, p. 681; Hafner-Burton, 2005, p. 614).

While an official submissions process is not part of any of the other FTAs, this does not mean that civil society organisations do not undertake any activities. For example, the European DAG (which also includes European employers' representatives) did submit a letter of complaint to the European Commission in January 2014. This letter urged the Commission to invoke consultations with Korea regarding the implementation of the ratified Conventions, and of the ratification of some of the core Conventions and their subsequent implementation, stating that it was "deeply troubled by the Government's blatant disregard for international labour standards in practice" (DAG-EU, 2014). The EU does address labour issues in the Committee on Trade and Sustainable Development (CTSD) (see for example CTSD, 2015), but apparently without much success when it comes to enabling rights. In April 2017, the European Parliament requested that the Commission "take up formal consultations with the Government of Korea…and, if such consultations should fail, call on the panel or experts…to take action and to continue dialogue with regard to the failure of the Korean Government to comply with some of its commitments, and in particular to make continued and sustained efforts…towards ensuring the ratification by Korea of the fundamental ILO Conventions which this country has not ratified yet" (European Parliament [EP], 2017, p. 6).

Only the EU–Korea, New Zealand–Korea and US–Korea FTAs allow for the involvement of civil society in terms of monitoring the FTAs.[18] Such an option does not necessarily lead to success, as van den Putte (2015) shows in a comparison of the strength of the US–Korea and the EU–Korea FTAs in terms of civil society involvement. In the case of the US FTA with Korea, the problem is that the US' national mechanism has to deal with many FTAs' labour provisions while many of the members lack both interest and expertise in South Korea. Van den Putte also considers the US' international mechanism for public involvement to be weak and shows that the situation is only slightly better for the EU–Korea FTA. Similar ineffectiveness is confirmed by a 2016 study commissioned by the Korean branch of the Friedrich Ebert Stiftung (FES) which concludes that "Chapter 13 Trade and Sustainable Development of the Korea–EU FTA failed to be a means of pressure for the South Korean government to bring about substantial changes in the country's labour practices, but only worked to call attention to the matter" (FES, 2016, p. 3). Campling, Harrison, Richardson and Smith (2016) also suggest that the effectiveness in the labour area of the EU–Korea FTA suffers from "the combination of weak domestic advisory groups, a "trade and sustainable development" chapter that lacks any mechanism to arbitrate disputes or impose penalties, and the absence of political will on the part of the EU" (Campling et al., 2016, p. 370). In sum, there is little impact of the FTAs' provisions and procedures on the enabling rights' practices as some, such as sanctions, have not been used whereas other mechanisms have, such as the involvement of civil society, although this has not yet led to concrete effects regarding enabling rights.

6.2. Exogenous Factor

The above observation made by Campling et al. (2016), brings us to the main exogenous factor of importance in explaining the ineffectiveness of the FTAs; the lack of political interest, despite the fact that the EU and US, being particularly important export destinations for Korea could have some leverage.[19] The weak provisions in the labour chapters illustrate, not surprisingly, that the economic goals of FTAs trump normative ones (see for example on the EU–Korea FTA, Frankowski, 2015, p. 14; Gruni, 2017, p. 115).

On the Korean side, the political will to improve labour standards is also lacking, and trade unions operate in an adverse political climate, despite the fact that Korea is a democracy and a developed country. The willingness of the subsequent Korean governments (and especially the conservative ones) to initiate changes to the domestic laws in order to ratify the last four Conventions is lacking (FES, 2016, p. 3; Gruni, 2017, pp. 114–115).

7. Conclusion

Korea has signed multiple FTAs, which include labour provisions, even relatively strong ones. The empirical evi-

[18] While the New Zealand Labour Committee has met at the end of 2016, the records of this meeting are not made public (FTA Implementation Unit, Trade Negotiations Division, New Zealand Ministry of Foreign Affairs & Trade, email correspondence, February 15, 2017). The records of the two US NAC meetings show that the issues of the obstruction of business code, migrant workers and non-regular workers were only touched upon superficially (NAC, 2013, 2014). The involvement of civil society with respect to the EU-Korea FTA is more comprehensive. Until this date, the EU-DAG has had 13 meetings and the civil society forum five.

[19] For Australia, it might even work the other way around, as Korea is its third most important export destination (WTO, 2017b), which might make Australia cautious about making improvement of CLS in Korea to trade an important subject for dialogue.

dence in this research suggests that while there has been an intermediate impact in terms of institution building and the increased international attention for violations, this had no impact on practices in Korea itself. In other words, no relative improvement has taken place, leading to a situation in which the labour provisions serve, from the point of view of stimulating improvements, only a symbolic purpose.

The absence of an ultimate impact can best be explained by the lack of political will on the Korean side (as for example illustrated by the Korean government's references to the incompatibility of some of the ILO Conventions with national law) on the one hand, and an equal lack of readiness on the trade partners' sides to either include strong wording and a strong instrument to back up any commitment, or to actually use the available instruments in a way which would lead to improvement. This comes as no surprise, as the FTAs are first and foremost instruments designed to facilitate trade and investment.

This raises the serious question of whether the inclusion of labour provisions is helpful in improving labour rights when they are not backed up by political will. If one looks at them favourably, the contacts such agreements facilitate between governmental and non-governmental actors may help to increase the willingness and ability to act, even in areas that have no link with trade and investment. However, the current lack of effectiveness of labour provisions in FTAs shows that they should not be seen as a substitute for the other initiatives outlined in this thematic issue.

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Article

The International Labour Standards Debate in the Brazilian Labour Movement: Engagement with Mercosur and Opposition to the Free Trade Area of the Americas

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Abstract
The social dimensions of economic integration have become an increasingly significant feature of trade agreements, particularly those between developing countries. In the Brazilian case trade-related labour standards have not become a major feature outside of the regional organization Mercosur (Common Market of the South), yet we know relatively little about the reasons for this discrepancy. Paradoxically one of the main stakeholders in this debate, Brazilian trade unions, has broadly supported social and labour clauses in the regional context but union activists have opposed labour provisions in trade negotiations between asymmetric partners. A comparative analysis of the labour campaigns in Mercosur and the Free Trade Area of the Americas (FTAA) negotiations explains this ambiguity in terms of Brazilian labour strategies towards free trade negotiations and explores their implications for evaluations of labour attitudes to trade-related labour standards in developing countries. The labour movement's own conflicting perspectives on the trade–labour connection are a key explanation of these outcomes, reinforcing the need for a greater appreciation of the complexity of trade union views in the debate on labour standards.

Keywords
Brazil; Free Trade Area of the Americas; FTAA; globalization; international labour standards; labour unions; Latin America; Mercosur; regional integration; trade

Issue
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1. Introduction

Brazilian trade unions have viewed free trade agreements and trade-related labour standards with considerable suspicion based on what they perceive as the predominantly negative effects of free trade on jobs and working conditions. Their objections refer both to the perceived negative impact of trade liberalization on developing countries such as Brazil as well as suspicions about making free trade conditional on compliance with international labour standards. These criticisms do not imply that Brazilian unionists object to international labour standards; on the contrary, they have actively incorporated the international labour standards agenda in domestic campaigns since the late 1970s. However, their argument is that labour clauses in trade agreements can amount to veiled protectionism if they involve economic sanctions in the case of labour rights violations. In the eyes of many trade unionists in developing countries, such efforts can lead to job losses instead of an improvement of workers' rights. Despite these criticisms, unionists have in fact engaged with the debate about trade and labour standards in the context of free trade negotiations and regional integration since the early 1990s. Faced with the reality of trade agreements, unionists have participated in these negotiations so as to have a voice in what they have come to view as an inevitable process. Yet the dilemma of whether to participate in the

debate and the institutions associated with trade agreements, or to mobilize against them, is evident in their strategies and stance towards the negotiation process and its aftermath.

To explain how this dilemma affects labour strategies towards free trade agreements in developing countries, the article examines two case studies of labour engagement in trade negotiations in the Americas, namely Mercosur (Common Market of the South)[1] and the FTAA (Free Trade Area of the Americas). In the case of Mercosur, the Brazilian labour movement actively participated in institutional structures focused on the labour and social dimensions of the integration process since the early 1990s. In the case of the FTAA, Brazilian unions rejected the agreement, including the prospect of labour and environmental clauses. A comparative analysis of trade union strategies concerning two of Brazil's most important trade agreements between 1990 and 2005 explains why the trade union perspective on free trade has varied so significantly between Mercosur and the FTAA, which has subsequently also shaped the actual impact of labour standards in trade agreements in Brazil. In the case of Mercosur, while labour standards are part of the organization's institutional framework, they are neither binding—as trade unions had initially proposed—nor linked to trade. Nevertheless, Mercosur has facilitated regional collaboration among trade unionists, whose lobbying resulted in a declaration on social and labour rights. Although the FTAA never materialized the negotiations unified and solidified labour and civil society opposition to free trade, including trade-related labour standards, which continues to resonate in the region today.

The central argument is that the extent to which labour standards were included in these trade negotiations cannot be understood without reference to the complexity of trade union perspectives on trade-related labour standards. Although the social and labour outcomes of free trade agreements depend on a wide variety of factors, including government and business attitudes as well as the dynamics of regional trade negotiations in different parts of the world, trade union voices in developing countries should be considered a significant part of the story. These perspectives have also shaped how trade unionists dealt with the dilemma of engagement with, or opposition to, trade agreements, which have played out in different ways during the Mercosur and FTAA negotiations, underlining the significance of domestic agency in shaping the outcomes of the debate on the trade–labour linkage. The article shows that labour opposition to trade-related labour standards is not necessarily the norm in a developing country like Brazil since union strategies are shaped instead by perceptions of how engagement with free trade negotiations might harm or benefit the promotion of workers' interests. The comparative case studies also show that even though the outcomes of trade negotiations involving Brazil have remained limited in terms of labour clauses, the participatory structures in the case of Mercosur and civil society opposition to the FTAA created spaces for regional trade union collaboration. Despite the fact that the FTAA was never implemented, the negotiation process nevertheless had an impact on civil society debates on the social dimensions of free trade, solidifying the opposition to North–South trade agreements in much of Latin America. These outcomes reflect both the geopolitical characteristics of Mercosur and the FTAA, and the profound scepticism about trade-related labour standards commonly found in South America among trade union actors. Before examining Brazilian labour engagement with trade agreements in further detail, the article discusses how we can understand union perspectives on trade-related labour standards, emphasizing that these views are more complex than often suggested in the literature. Subsequently, it is necessary to turn to the Brazilian context to explain how ideas about the impact of globalization, free trade and development have informed Brazilian trade union strategies towards free trade agreements, followed by a comparison of labour campaigns in the cases of Mercosur and the FTAA.

2. Understanding Labour Movement Perspectives on Free Trade and Labour Standards.

Provisions to promote labour standards can be found in all South-South trade agreements, including in regional organizations in the Americas (International Labour Organization [ILO], 2015, p. 67). The underlying assumption of connecting trade to working conditions is that market access can be made conditional upon developing countries' compliance with the international labour standards agenda. Due to their "soft law" nature—the lack of regulation and sanctions attached to labour rights violations—international labour standards are notoriously hard to enforce (Pahle, 2014a, pp. 130–131), so the rationale for trade-related labour standards is that countries have to introduce labour reforms and continue to monitor progress to qualify for a trade agreement (ILO, 2015, p. 30). A more common practice is to incorporate positive incentives to respect labour rights, including mechanisms to improve working conditions by fostering cooperation between unions, monitoring of labour conditions, and in some cases complaint mechanisms (ILO, 2015, pp. 70–71). However, despite their growing importance in bilateral and multilateral trade agreements trade-related labour standards have had a limited impact in Brazil. In the most important trade negotiations for Brazil since the early 1990s, labour provisions either did not materialize or have been relatively limited. In the case of Mercosur, debates about the social dimensions of regional integration resulted in a declaration on labour rights and formal civil society consultation, while in the case of the FTAA, the proposed labour and environmen-

[1] Because the Spanish acronym for the *Mercado Común del Sur* is more widely used than the Portuguese Mercosul, I will use Mercosur throughout the article.

tal clauses were abandoned amidst widespread opposition to free trade. The outcomes of both cases should of course not be reduced to labour campaigns (Arashiro, 2011; Phillips, 2004) but an analysis of the trade union perspective illustrates the complex nature of the trade–labour debate in a Latin American context. In particular, trade union perceptions of the geopolitical differences between both trade agreements shaped the unions' ambiguous approach to labour standards, despite the existence of limited participatory structures for labour and civil society actors in both cases. To understand the reasons for these differing outcomes it is necessary to explore the debate about the advantages and disadvantages of labour provisions from the perspective of the labour movement.

A significant part of the explanation for the ambiguity in Brazilian trade union support for labour clauses can be found in ideas among Brazilian union activists about globalization, free trade and social conditions and how these have informed their strategies to influence trade negotiations. Analyses of trade–labour debate in developing countries are often based on the assumption that workers in countries such as Brazil oppose labour standards in trade agreements primarily due to wariness of unfair competition and protectionism (Bieler, Hilary, & Lindberg, 2014, p. 6; González Garibay, 2009). The idea that labour standards can be protectionist is based on the view that developing countries have a comparative advantage in lower labour costs and levels of regulation than developed countries. From this perspective, if developing countries are forced to match international labour standards workers can face negative outcomes if companies cut jobs or move to another part of the world in search of lower labour costs. However, given the different outcomes of the Mercosur and FTAA negotiations in terms of the trade–labour linkage, this assumption only tells us part of the story and fails to explain why trade unions approached both cases differently. As Griffin, Nyland and O'Rourke (2002, pp. 4–7) argue, to understand these differences we need to take into account that trade unionists in the developing world have not always rejected the trade–labour linkage, reflecting a more complex set of considerations than often assumed. This assumption also reflects a failure to take into account how developing countries such as Brazil—and particularly civil society and labour actors (Nadvi, 2014, p. 143)—engage with trade-related labour standards. Moreover, their position reflects what Orbie, Martens, Oehri and Van den Putte (2016, p. 527) call the "insider–outsider dilemma" of civil society engagement with free trade negotiations. Their study shows that in the case of the EU civil society actors have chosen to take part in participatory mechanisms so as not to lose a voice in the process, while also being aware that their participation may help legitimize free trade. The diversity of views about trade and labour among unionists therefore suggests the need to bring trade union views on, and strategies towards, trade agreements into the analysis.

To achieve a more nuanced understanding of the relationship between trade and labour standards in developing countries requires taking into account the interaction between labour politics, national political conjuncture, and the nature of the trade negotiations themselves. As recognized in the literature on the social dimensions of trade agreements, the effectiveness of trade-related labour standards depends on domestic political and legal contexts (ILO, 2015, p. 5). Similarly, the extent to which intensified trade deteriorates social and environmental conditions, and whether these effects can be mitigated is closely associated with the domestic regulatory context. To underline the importance of the domestic context in the case of Brazil, violations of fundamental labour rights have been particularly common in growing sectors of the economy, such as construction, export agriculture, infrastructure and natural resources. These violations have included forced labour, human trafficking, informality, poor working conditions as well as violations of the right to unionization and collective bargaining (International Trade Union Confederation, 2009). Not all of these cases have involved export-oriented sectors, which means that these violations reflect structural problems in Brazilian society, including high levels of informal labour associated with a lack of protection of workers' rights. In assessing the effectiveness of labour rights protection, Pahle (2014b) also emphasizes the importance of the domestic context, especially the structural and political conditions in which unions operate, including the relationship between labour's national and international agendas (Dobrusin, 2015, p. 280). Reflecting the growing attention to the role of political ideas in analyses of regional free trade debates (Arashiro, 2011; Nelson, 2015; Phillips, 2004), another layer of my analysis of the ambiguities in labour strategies therefore refers to the Brazilian union movement's own conflicting views on international labour standards, globalization and free trade.

3. Labour Movement Debates on the Trade–Labour Linkage: Global and Regional Dimensions

Brazilian trade unionists' perceptions of free trade reveal a paradox in how they understand the relevance of trade-related labour standards, which has informed labour strategies both in the case of Mercosur and the FTAA. As expressed in numerous union documents and in interviews I have conducted, Brazilian unionists have focused their diagnosis of labour market problems on the structural inequalities associated with the way capitalism operates in Brazil, a dynamic compounded by the country's asymmetrical relationship with the global economy. In their view, due to the unequal position of Brazilian workers within their own country and the globalized economy, the expansion of free trade could only lead to the deepening of these inequalities and the weakening of unions, meaning that trade agreements should be rejected altogether. From the union movement's perspective, trade-related labour standards could not address

these structural inequalities because they have viewed free trade as perpetuating developing countries' unequal position in the world economy. In turn, Brazilian unions' views on labour rights, globalization, development and trade have shaped their perceptions of how trade and labour provisions affect working conditions in developing countries. Thus, in their view Mercosur and the FTAA reflected different manifestations of globalization and free trade, with a differential impact on workers. The following discussion is based on an analysis of the debates within Brazil's largest national trade union organization, the *Central Única dos Trabalhadores* (Unified Workers' Central—or CUT). In 2016, the CUT's membership represented 3.8 million, or approximately one-third of Brazil's unionized workers across the industrial, public and rural sectors (Confederação Nacional de Profissionais Liberais, 2016).

Even before Brazil's trade balance tipped towards exports of natural resources and agricultural products in the early 2000s, unionists reached for the classic dependency explanation that expanding agricultural and mineral exports would make the Brazilian economy especially vulnerable to the volatility of international markets (CUT, 1994, p. 7). Not only would an export-focused development strategy promote products with low added value (such as agricultural goods), thereby creating poor working conditions rather than high-quality and well-paid jobs, the opening up of Brazil's markets would have immediate and negative consequences for workers due to global competition, leading to reduced wages and the erosion of labour rights (CUT, 1997, p. 7). From this perspective, the expansion of free trade as part of the globalization process would inevitably deepen social exclusion. According to the CUT's former president, Vicente Paulo da Silva (1994–1996), "workers from all over the world are under pressure to abandon their rights and legitimate demands in the name of international competition. At the same time, unemployment increases, and we see an enormous concentration of power and wealth" (Silva, n.d.).[2] In the CUT's analysis of globalization's impact on Brazil during the 1990s, multinational corporations and international financial institutions were the driving forces behind economic integration, underlining the point that trade was only part of the story, while their experience with multinationals showed that company strategies were focused on driving down wages and working conditions in their search for profits. This interpretation of globalization and its impact on Brazilian workers meant that union representatives have generally believed that trade agreements would deepen the country's social problems, which could not be remedied by a given social clause.

These considerations do not imply that the CUT has opposed all regional and global trade agreements, as they have recognized the potential for civil society to contribute to sustainable global and regional economic integration (Castro, 1999, p. 12). This distinction became particularly apparent in civil society attitudes to Mercosur in the 1990s and the FTAA from the late 1990s to the mid-2000s. While unionists viewed Mercosur as an organization with the potential to withstand the pressures of globalization, they saw the FTAA as dictated by the US in an attempt to expand its economic interests in the Americas, with Latin American workers exclusively bearing the negative consequences. Based on the labour movement's evaluation of free trade and Mexico's experiences with the North-American Free Trade Agreement (NAFTA), union activists in the industrial sector expected regional integration between asymmetrical partners to lead to the downward harmonization of social and labour rights (author's interviews with Maria S. Portela de Castro, adviser *Confederação Nacional dos Metalúrgicos*, October and December 1999; Castro, 1999, p. 13). Their knowledge of Mexican and trade union experiences with NAFTA also underlined for Brazilian unionists and their Latin American counterparts their lack of a voice in what they saw as FTAA's singular focus on trade liberalization and economic deregulation. In the case of Mercosur, unions ended up participating in the formal institutions of the regional organization, while in the case of the FTAA there was a successful campaign to derail hemispheric trade negotiations. What these differences tell us about Brazilian union attitudes to trade-related labour standards is that their perceptions of the geopolitical nature of the respective negotiations—one between developing countries and the other dominated by the US—were a key factor in the unions' willingness to engage with labour provisions.

3.1. Mercosur: Regional Integration as a Platform for Labour Campaigns

As the main regional platform for debates on the social and labour dimensions of regional integration in Latin America, Mercosur became a significant focus for transnational union action in the 1990s. Mercosur also represents the clearest example in South America of a regional trade agreement's impact on domestic labour standards, particularly the creation of spaces for increased dialogue, cooperation and formal participation in Mercosur-supported institutions involving union and other civil society actors in the member states. This begs the question why labour actors decided to use Mercosur's negotiation process and formal institutions as an opportunity to draw attention to the social dimensions of economic integration, despite the Brazilian unionists' pessimistic views of trade agreements. To answer this, it is necessary to analyse how trade unionists viewed Mercosur in the context of the worsening recession of the 1990s, the impact of Mercosur's labour provisions and the creation of spaces for transnational union action associated with the Mercosur process.

Mercosur emerged at a time when Brazil was experiencing hyperinflation rates reaching four digits in 1993. Successive governments introduced neoliberal reforms

[2] All translations from Portuguese are by the author.

such as privatization, budget cuts and trade liberalization to stabilize the economy. Part of this strategy to liberalize the economy was to create a regional common market on a regional scale before exposing Brazil to global competition (Phillips, 2004, p. 85). The labour movement experienced significant challenges during this period as the crisis led to job losses and unions increasingly struggled to develop an effective response (Riethof, in press, Chapter 4). Based on their experience of how labour issues were dealt with in NAFTA Brazilian unionists understood that a trade agreement between asymmetric partners could be detrimental to Latin American workers. They also understood the rationale for a Latin American trading bloc, which would allow governments to liberalize the economy in stages and to counter protectionism in developed countries by increasing trade with neighbouring countries (CUT, 2003, pp. 39–40). As Kjeld Jakobsen, CUT director of international relations between 1994 and 2003, explained:

> The CUT's priority vis-à-vis Mercosur is to ensure that it does not just turn into a trade agreement that only benefits large corporations, but that it becomes an agreement for "mutual integration". In other words, if Brazil sells something to Argentina that we have and they don't, and vice versa, we can increase production, create more jobs. (as cited in Barbiero & Chaloult, 2000, p. 65)

Thus despite their misgivings about the benefits of free trade for workers in developing countries, union activists viewed a Latin American trading bloc as having the potential to mediate the negative effects of globalization (CUT, 2003, p. 66; Phillips, 2004, p. 170), particularly if civil society activists managed to put pressure on their country's political leadership to create the necessary political will to do so. In effect, for unionists the geopolitical nature of Mercosur as a South-South agreement meant that fears that labour standards would lead to protectionism were less acute.[3]

Trade unionists also saw potential in Mercosur facilitating civil society participation in economic policy, in contrast to the government-dominated economic liberalization policies which were common in the 1990s. Mercosur created spaces for cross-border labour action as a regional "labour politics…emerged parallel to these regionalist negotiations and in important respects has acted to offset the ongoing marginalisation of labour" (Phillips, 2004, p. 170). Regional union activism focused on coordinating the union position vis-à-vis Mercosur's agenda and strengthening its social dimensions. Consequently, a major focus of union activism was to lobby for the democratic participation of civil society in the regional integration process (CUT, 1994, p. 6). The main union organization involved in this process was the *Coordinadora de Centrales Sindicales del Cono Sur* (Co-ordination of Union Centrals in the Cono Sur, or CCSCS), founded in 1986 (Castro, 2007; CUT, 2003, p. 17). Several institutional structures dealing with social issues were the result of union lobbying (Dabène, 2009, p. 164; Godio, 2004, pp. 101–102), which included a working group and consultative forum focused on labour issues, a declaration of labour and social rights, and a regional commission to monitor the state of labour rights in Mercosur member states.

Although Mercosur's Treaty of Asunción (1991) focused primarily on economic and trade issues, it also established a tripartite working group dealing with labour and employment issues (SGT11, later SGT10) in 1991 and the Socio-Economic Consultative Forum (FCES) in 1994 (Castro, 1999, pp. 46–49). Within these structures, union strategies emphasized the inclusion of the ILO core labour standards in the regional integration process. As a CUT document explained, "the international labour norms as defined by the ILO were an important…incentive for the creation and improvement of jobs and to foster an equilibrium in trade relations" (CUT, 2003, p. 63). Based on this view, unions lobbied for the adoption of a Mercosur Social Charter modelled on the EU's equivalent. The proposal specified a binding set of individual and collective labour rights, such as freedom of association, the right to strike and collective bargaining. The unions also proposed a tripartite body in charge of monitoring compliance with regional labour norms, including sanctions (CUT, 2003, pp. 68–69). Although such a far-reaching charter failed to materialize, mainly due to the proposed economic sanctions, Mercosur officially adopted the Declaration of Social and Labour Rights in 1998 and established the Social-Labour Commission to oversee social and labour rights in 1999. The Declaration was updated in 2015 to include a stronger focus on employment creation in times of crisis and the ILO's "decent work" agenda, following years of discussions among labour, business and government participants (CUT, 2015). As such, the Declaration moved beyond fundamental labour rights to include freedom of movement, social security and employment policy (Schaeffer, 2007, pp. 837–838). These examples show that despite the relatively limited scope of labour provisions in Mercosur, these outcomes are evidence of effective union engagement with Mercosur's participatory structures.

Unionists involved in the Mercosur process generally considered the Declaration a step forward for labour rights, despite the lack of sanctions. Reflecting the limitations of the original proposal, the CUT's Ericson Crivelli argued:

> We worked with the notion of sanctions, which would mean the possibility of penalizing those who did not

[3] Due to the size of its economy, its foreign policy ambitions and regional investments Brazil has dominated Mercosur since its inception, which means that the relationship between the Mercosur member states is unequal. Zibechi (2014, loc. 132) argues that under the Workers' Party governments (2003–2016) trade unions such as the CUT, as close government allies, effectively became complicit in the Brazilian government's strategy for regional dominance. In the political context of the 1990s, though, Brazilian unions were not as closely connected to government strategies so their strategies should not be equated to the government's negotiating position in regional trade agreements.

> comply [with the proposed Charter]. But this is a false idea because sanctions do not exist in international [labour] law as they do in domestic law. (as cited in Barbiero & Chaloult, 2003, p. 103)

Without powers to enforce the Declaration, the emerging regional labour rights framework has nevertheless had an impact on labour politics in the Mercosur member states. Unionists indicated that they appreciated the FCES as a forum to voice civil society demands while suggesting that they could send cases of labour rights violations to the Social-Labour Commission (Barbiero & Chaloult, 2003, p. 105; CUT, 2003, p. 99). Furthermore, Giuppone (2014, pp. 85–86) cites cases in Argentina and Brazil where national courts invoked the Social-Labour Declaration in labour conflicts, interpreting national law in relation to international labour rights instruments, including references to the right to decent work, job security, the protection of informal workers and freedom of association. Mercosur provisions have also led to joint labour inspections between Brazil, Argentina and Paraguay investigating child labour in the border regions (International Labour Office, 2009, pp. 444–445). These examples indicate that while the Mercosur provisions cannot guarantee compliance with labour rights, they have had an impact on the domestic context, not least as a reference point for labour campaigns.

Although transnational union strategies have been developed predominantly at the level of national union federations, Mercosur also facilitated cross-border collective bargaining and labour campaigns in the 1990s. The automobile sector is a rare example where regional integration, and a degree of policy co-ordination between the governments of Argentina and Brazil, was witnessed in the second half of the 1990s. The Brazilian government introduced the New Automobile Regime in 1995 within the context of the Mercosur negotiations (Gómez Mera, 2007), which included measures to promote exports, the use of national components, and state support for company restructuring (Castro, 1999, pp. 27–28). In contrast to World Trade Organization rules these policies represented a turn to state intervention to support a strategic sector of the Brazilian economy. This policy extended to the bilateral level, as the Argentinean and Brazilian governments harmonized their respective automobile sector policies within the Mercosur framework. Moreover, in March 1999 a supranational collective labour contract was agreed between Brazilian and Argentinian metalworkers' unions and Volkswagen in Brazil and Argentina, with a view of establishing Mercosur-level workers' committees for multinational enterprises operating across borders (Sindicato dos Metalúrgicos do ABC, 1999). The agreement (full text in Departamento Intersindical de Estatística e Estudos Socio-Econômicos, 2000) specified the fundamental right to unionization, information exchange between unions and management, and emphasized the importance of worker training programmes to cope with the economic crisis. Such initiatives have evolved in the automobile sector, where Brazilian unions have traditionally been strongest, but other examples of regional coordination emerged in the banking, transport, construction, textile, paper, and graphic sectors in the 1990s (Castro, 1999, pp. 14–16).

Although Mercosur created spaces for regional coordination of labour campaigns, social themes remained a secondary concern compared to trade and economic development (Dabène, 2009, p. 169; Godio, 2004, p. 23), a dynamic reinforced by the intergovernmental nature of decision-making (Doctor, 2013, pp. 529–530). Mercosur's participatory structures were organized on a tripartite basis but labour was of course not an equal partner; as union activists recognized: "despite the tripartite nature of SGT11, the decisions were made by governments" (CUT/Confédération des Sindicats Nationaux, 1996, p. 32). For the Brazilian labour movement these initiatives underlined the dual nature of the regional integration process, which reflected the insider–outsider dilemmas for civil society engagement (CUT, 2003, pp. 39–40; Orbie et al., 2016). Even if they were narrow in scope, Mercosur offered participatory structures but the dominant economic focus also reminded unionists that regional integration and trade liberalization without social safeguards could still weaken labour rights. Nevertheless, the nature of Mercosur as an agreement between developing countries, together with opportunities to discuss social dimensions meant that Brazilian trade unions decided to engage with rather than oppose regional integration, leading to several cross-border labour campaigns and initiatives intended to promote labour standards at a regional level.

3.2. Labour Opposition to the FTAA

If Mercosur offered trade unions several advantages to participate in debates about the social dimensions of regional integration, the proposal for a hemispheric free trade agreement became a focal point for civil society and labour opposition throughout the region. First proposed in 1994, the FTAA negotiations intensified towards the end of the 1990s in the midst of widespread opposition among Latin American social movements (Arashiro, 2011, pp. 31–35). The FTAA came to symbolize labour opposition to the growing dominance of neoliberal politics and the anticipated negative impact on jobs, wages and labour rights. Brazilian labour opposition focused not only on the negative effects of trade integration but also acquired an explicitly political dimension as the protestors merged their opposition to free trade with a rejection of neoliberal policies such as privatization, labour market flexibilization and economic liberalization. As a CUT document summarized the FTAA's wider political relevance: "the FTAA turned into a symbol of globalization and neoliberalism for the *cutista* labour movement" (CUT, 2003, p. 82). These ideological perspectives on globalization and free trade led to a symbolically pow-

erful rejection of the FTAA, which left little space to negotiate labour provisions. As a result, despite provisions for civil society participation in the FTAA talks and debates on the inclusion of labour standards, civil society and labour actors comprehensively rejected the free trade agreement, without contemplating the potential benefits of the trade–labour linkage. This standpoint meant that Brazilian unions, together with many other civil society actors in Latin America, resolved the participation dilemma in favour of disengagement and opposition. In this case, the perception that an asymmetrical trade agreement between developing and developed countries would inevitably damage jobs, wages and working conditions in Latin America shaped the Brazilian labour movement's strategies vis-à-vis the FTAA. Despite Latin American union support for a binding labour clause in Mercosur, they rejected a similar proposal for hemispheric free trade. To explain the rationale for this position, labour movement strategies need to be understood in the context of the growing opposition to neoliberalism and free trade in Latin America, symbolized in the view of labour activists by the FTAA.

The initial proposals for the FTAA negotiations included labour and environmental provisions, reflecting the NAFTA experience and commitments by the Clinton administration to social and political issues (Arashiro, 2011, pp. 33–34). However, most Latin American governments rejected the inclusion of labour and environmental clauses, arguing that such provisions would lead to protectionism and should be overseen by the ILO instead. This attitude to labour provisions did not just reflect a principled position but also informed Brazilian negotiating strategies. A Brazilian trade unionist involved in FTAA summits in the late 1990s explained to me that Brazilian negotiators sometimes raised the spectre of labour standards in an attempt to stall the negotiations, reflecting their awareness of the lack of support for labour clauses within Latin America and domestic pressure in the US to address social and environmental issues (author's interview with "Paulo", December 1999). The CUT itself not only rejected the inclusion of labour clauses in the FTAA negotiations as a form of protectionism against workers in developing countries, it argued that "there is no possibility whatsoever for progressive clauses in this treaty or for it to guarantee even the bare minimum of labour rights" (as cited in American Federation of Labor and Congress of Industrial Organizations, 2001, pp. 30–31). As a result of this stalemate, the debate on labour and environmental protection was removed from the negotiations in 1998, and in the meantime trade unions were merely invited to make their views known in the negotiation process (Nelson, 2015, pp. 85–91). The unions' decision to oppose rather than engage with the FTAA process solidified their rejection of this form of free trade, despite the existence of participatory structures. In addition, although the original proposal included labour and social clauses, they did not convince Latin American unions to support the agreement.

The purpose of the union campaigns towards the FTAA was not so much to push the negotiations towards a more socially acceptable direction but to mobilize a broad civil society network against the agreement in all its aspects. With the actual negotiations about trade and a potential labour clause taking place behind closed doors (Dobrusin, 2015, p. 276), the FTAA's institutional structure also included summit meetings, which involved debates between government, business and civil society actors (Nelson, 2015, pp. 81–82). Using the summit structure to their advantage, social and labour movements began to network to establish an alternative, "people-centred" debate on hemispheric integration, which proved to be critical to the mobilization of an anti-free trade campaign. From 1997 onwards, the CUT actively participated in alternative social summits to contest the FTAA, including key roles in the Hemispheric Social Alliance against free trade and in the World Social Forum as a platform for civil society actors to contest the economic focus of global trade talks. The growing perception in Latin American countries of the wider negative impact of the agreement on public services and local communities helped broaden the anti-free trade coalition, leading to popular referendums and mass protests (Dobrusin, 2015, p. 278). This difference in strategy towards Mercosur and the FTAA indicates that while labour activists saw the former's structures and social provisions as potentially beneficial for labour rights, in the case of the latter, cross-border labour and civil society cooperation led to opposition, even if this strategy contributed to labour provisions disappearing from the agenda.

The eventual failure of the FTAA in 2005 can be attributed to a mixture of civil society opposition and the changing ideological complexion of Latin American governments around the turn of the century, underlining not only geopolitical differences between the two cases but also the changing regional political conjuncture. Until 2003 the Brazilian government's negotiating position focused on ensuring that hemispheric trade liberalization would not damage its fragile economy, arguing that the country was not yet ready for full exposure to US competition (Arashiro, 2011, pp. 123–126; Burges, 2009, p. 40). The domestic protests against the trade agreement bolstered Brazilian president Luiz Inácio Lula da Silva's own scepticism about the benefits of free trade, while growing opposition among Latin American governments meant that Brazilian representatives managed to stall the negotiations by proposing two-track negotiations, which resulted in the watering down of the agreement and its permanent suspension in 2005. In conclusion, in the case of the FTAA, labour activists rejected the entire premise of the trade agreement, including the prospect of a labour clause, because they believed that the agreement would inevitably harm workers' interests. In contrast with Mercosur, its status as an agreement between highly asymmetrical countries was therefore an important consideration for the FTAA's opponents. While labour activists campaigned for binding labour standards

in Mercosur, they rejected this option in the case of the FTAA due to their negative perceptions of the impact a North–South trade agreement would have on Brazilian workers.

4. Conclusion: The Prospects for Labour Standards in the Americas

The failure of the FTAA in 2005 signalled the stagnation of multilateral trade talks involving Brazil, including those involving debates about labour standards. The cases of labour engagement with Mercosur and the FTAA underline the crucial importance of taking into account the political context in which trade negotiations take place as well as the complexity of the labour movement's perspectives and strategies in shaping the outcomes. The ambiguities evident in the Brazilian union movement's attitude towards free trade and labour provisions shows assumptions about union strategies in developing countries should be nuanced, taking into account unionists' ideas about free trade and labour as well as their interpretation of the costs and benefits of engagement with free trade negotiations. The implications of this article's findings are not limited to the cases of Mercosur and the FTAA but also inform debates and research on the impact of and prospects for improved labour standards in Latin America. The case of the FTAA underlines how the political conjuncture in which the trade talks took place shaped labour strategies towards free trade agreements, as the political climate turned increasingly hostile towards economic integration with the US at the end of the 1990s. This scepticism also explains why, despite bilateral agreements between the US and Latin American countries such as Chile, Colombia, Panama and Peru involving labour provisions (ILO, 2015, pp. 33–41), these agreements have not been expanded to other Latin American countries, such as Brazil. With the exception of sectoral agreements such as Brazil–US cooperation on biofuels, Brazil's bilateral trade negotiations have been conducted through Mercosur. Since 2000, Mercosur has negotiated a limited number of bilateral agreements with other developing countries in Latin America and the Middle East, none of which have included labour provisions. For example, Mercosur's bilateral agreements with Bolivia, Colombia, Ecuador and Peru have covered themes such as trade in goods and services, investments, intellectual property and competition policy, but not the issue of labour rights (Sanchez Badin, de Carvalho, & Ribeiro Roriz, 2014, pp. 66, 91–92). The potential for an EU–Mercosur trade agreement to address labour issues is also low due to the EU's reluctance to move beyond a "soft" rather than a conditional approach to social and environmental standards (Adriaensen & González Garibay, 2013) and because interregional negotiations stalled between 2004 and 2016. As negotiations resumed in 2016 Mercosur trade unions have called for civil society participation in the negotiations while simultaneously remaining sceptical about the benefits of free trade and the impact of an asymmetrical agreement on workers, echoing their position towards the FTAA (Exame, 2014; Jakobsen, 2015).

This article has analysed the variations in Brazilian union strategies towards labour standards in regional integration in the Americas, with a particular focus on Mercosur and the FTAA. The comparative discussion of the two case studies found that in the case of Mercosur, Brazilian trade unionists were willing to participate actively in debates about the regional regulation of labour standards, whereas in the case of FTAA, labour opposition contributed to the failure of the negotiations. The findings indicate that the decision to engage with free trade negotiations cannot be reduced to the existence of participatory structures or the inclusion of labour provisions in the negotiation process, which existed in both cases. The Brazilian labour movement's approach to Mercosur and the FTAA indicate a complex debate, involving the geopolitical aspects of the trade agreements, the nature of civil society participation in trade negotiations and the union movement's own ambivalence about labour and trade. To understand the reasons for these ambiguous perspectives we need to take into account the complexity of labour movement attitudes to trade-related labour standards, moving beyond the assumption that unionists in developing countries always reject them, in favour of examining the ideas that inform labour strategies. In both cases, labour activists were sceptical about the benefits of economic integration, particularly regional trade agreements without social safeguards. What makes the case of Mercosur different from the FTAA was that the labour movement's perception of the latter was overwhelmingly negative due to the asymmetric nature of the agreement. In particular, the idea that the FTAA implied a fundamentally unequal political and economic relationship between the US and Latin America sparked opposition and a refusal among Latin American labour activists to engage with its labour provisions. In the case of Mercosur, unionists were equally sceptical about free trade but nevertheless saw potential for a Latin American trading bloc to improve social conditions as long as the integration process involved strong civil society participation. These differences bring us back to the dilemma outlined at the start of this article: where trade-related labour standards were concerned, labour movements faced the dilemma whether to oppose the implementation of labour standards or use the opportunity to participate in consultations and negotiations, even if they are limited and narrow in scope. How labour activists attempted to resolve this dilemma has shaped their strategies towards trade agreements and ultimately influenced the outcomes of regional integration processes in terms of labour standards.

Conflict of Interests

The author declares no conflict of interests.

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Article

Civil Society Activism under US Free Trade Agreements: The Effects of Actorness on Decent Work

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Abstract
US free trade agreements comprise unique provisions that enable civil society to present public complaints against labor rights violations occurring in the US or its trade partners. To date, a variety of complainants have used these mechanisms, including (inter)national trade unions, human rights organizations, and a priest. And yet, little is known about the submissions' nature of agency and the effects it has on the procedural continuations to address illicit labor practices. To fill this research lacuna, this article employs a multidisciplinary framework of 'actorness' that measures the submitters' diversity (professionalism/non-professionalism, collectivism/individualism, transnationalism/nationalism) and their effectiveness (rejection/acceptance of submissions and further procedural follow-ups). Combining quantitative examination with in-depth analysis of two diverse cases of actorness, and drawing on expert interviews, public reports, and minutes of meetings, the study reveals that the majority of public submissions were of professional, collective, and transnational nature. However, contrary to what extant literature suggests, this is not a guarantee that they achieve more far-reaching procedural steps in the protection of workers. Non-professional, individual, and national actorness can compensate for the advantages of professionalism, collectivism, and transnationalism.

Keywords
civil society; decent work; free trade agreements; labor standards; public complaints

Issue
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1. Introduction

Since the end of World War II in particular, an inclusive international system has emerged. It comprises international institutions such as tribunals that provide direct access and influence to civil society actors and organizations (Hall, Jacoby, Levy, & Meunier, 2014, p. 14; Keohane, Moravcsik, & Slaughter, 2000, p. 465).

With the entry into force of the North American Free Trade Agreement (NAFTA) and its side agreement, the North American Agreement on Labor Cooperation (NAALC), in 1994, a new era of labor advocacy has begun. It was the first international trade accord which enabled civil society actors to present complaints with respect to workers' rights violations. Since the NAALC, all US-signed trade agreements have included similar inclusive complaint procedures: Chronologically, these are US bilateral trade agreements with Jordan, Chile, Singapore, Australia, Morocco, Bahrain, and Oman; the regional Central American–Dominican Republic Free Trade Agreement (CAFTA–DR) with Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua; and bilateral trade agreements with Peru, Columbia, Panama, and South Korea. They entered into force between 2001 and 2012. The opportunity for civil society actors to present a labor rights complaint in the context of the NAALC and subsequently concluded US FTAs is defined in a Federal Register Note that reads as follows: 'Any person may file a submission with the OTLA [Office of Trade and Labor Affairs, US Department of Labor] regarding another Party's commitments or obligations arising under a labor chapter [of US FTAs] or Part Two of the NAALC'.[1]

[1] A submission has to meet certain criteria. See US Federal Register, available at https://www.dol.gov/ilab/media/pdf/2006021837.pdf

When determining the conditions for effective functioning and impact of labor rights promotion through US trade instruments, extant literature has mainly focused on structural and political shortcomings of the enforcement procedure (Nolan García, 2011a, pp. 104–105; Van Roozendaal, 2015, pp. 26–27; Weiss, 2003). The nature of the actors who submit these complaints, however, has hardly gained attention as potential influencing factor.[2] Such a view becomes all the more relevant since the complaint procedure is 'a flexible, accessible instrument that labor rights advocates can creatively exploit' (Compa, 2002, p. 156). The comparatively low restriction for admittance provides opportunities for civil society actors of various professional, social, and national backgrounds, characteristics that are likely to influence the success of their engagement (see also Freeman & Hersch, 2005; Keck & Sikkink, 1999; Risse, 2000).

This study is the first to systematically and comprehensively assess the nature of labor rights complainants in the context of US FTAs. Drawing on an original multidisciplinary theoretical framework of actorness, characterized by professionalism, collectivism, and transnationalism, I provide a differentiated assessment of the complaining parties of the 31 labor submissions presented at the OTLA, US Department of Labor (USDOL). I discuss two diverse cases with regard to their actorness and how they affected the submissions' continuations towards better working conditions: They are the 2011 submission against the Mexican Government under the NAALC and the 2011 submission against the Government of the Dominican Republic under the CAFTA–DR. Data is derived from qualitative, semi-structured expert interviews, and official public reports and minutes of meetings.

The quantitative assessment reveals that labor rights submissions directed at the US in the context of US FTAs are largely dominated by professional (trade unions and/or their confederations), collective (more than one complaining party), and transnational (multi- and/or international origin) complainants. In light of further insights from the qualitative case study, it is argued that these particularities of actorness, unlike extant research suggests, do not automatically lead to the acceptance of a public submission and further procedural steps. Complaints of non-professional, individual, and national nature can be likewise effective if they compensate for the lack of professionalism's, collectivism's, and transnationalism's advantages (e.g., expertise, experience, legitimacy, and international attention).

2. Actorness in International Labor Politics

In order to bring structure into the mosaic of various actors presenting labor rights complaints in the framework of US FTAs, a multidisciplinary theoretical framework is developed in this section. It comprises three dichotomous dimensions of actorness (i.e., *professionalism*/*non-professionalism*; *collectivism*/*individualism*; *transnationalism*/*nationalism*) which are influential in international policy making in general and labor rights advocacy in particular. *Effectiveness* in the context of this study reflects whether US authorities accepted a public submission to be reviewed. In so doing, a case is granted legal validity, which again makes further political and quasi-judicial steps in the enforcement procedure possible.[3] It is this procedural stage where the submitters' range of influence normally ends. In the qualitative case study, further follow-ups (e.g., public reports of review, recommendations, monitoring) are considered as well.

2.1. Professionalism/Non-Professionalism

Today's modern societies are shaped by a variety of professions with unique expertise and interests. In the struggle between labor and capital, trade unions and their confederations have traditionally been considered the major actors transferring the claims of workers. As in many other states, US trade unions have gained important status since the 1930s: 'The labor giants—the AFL-CIO (American Federation of Labor and Congress of Industrial Organizations), the Teamsters, the United Mine Workers, and historic ones like the Industrial Workers of the World or the Knights of Labor—these were venerable institutions, part of our nation's heritage' (Dray, 2010, pp. 5–6). It was in the mid-1950s, when unions in the US reached their highest density, measured by the proportion of workers of the total workforce who were union members. Thereafter, their growth slowed down. Since the mid-1970s, trade unions' density has steadily declined, leading to a weakening of their strength and influence (Freeman & Hersch, 2005, p. 1). As far as the role of professions in modern life is concerned, it is assumed that limited efficacy makes a jurisdiction, understood as the link between occupation and its work, vulnerable (Abbott, 1988, p. 46). This can also be observed in the domain of labor: With the decline of trade unionism, new labor rights institutions have emerged. They comprise legal service centers, professional organizations, and human rights vigilances, including Amnesty International USA, Oxfam America group, Human Rights Watch, Americans for Democratic Action, and American Rights at Work (Compa, 2008, pp. 230–234, 245; Freeman & Hersch, 2005, p. 6).

Accordingly, there is little doubt that trade unions do not enjoy full jurisdiction, that is the complete, legally established control over the fight for decent work. However, as the ability of a profession to sustain a jurisdiction lies partly in the power and prestige of its knowledge (Abbott, 1988, pp. 53–54), trade unions seem to have advantages over other labor rights advocates who cannot fully substitute for them (Freeman & Hersch, 2005, p. 4). As far as expertise is concerned, trade union leaders can increase their skills in the realm of labor activism by

[2] For exceptions see for instance Nolan García (2011b).

[3] The procedural guidelines include ministerial consultations, arbitral panels, and economic sanctions.

participating in executive training programs.[4] Moreover, being the voice of labor, trade unions have immediate contact to workers who they represent and thus access to relevant information from the ground (Freeman, 1976, p. 364). In terms of experience, they have had greater chances to navigate through (and potentially undergo learning processes regarding) international complaint systems than other civil society actors. To illustrate, the International Labor Organization (ILO), the UN specialized agency for labor rights matters, allows worker and employer organizations to present complaints regarding labor rights violations. Several US trade unions such as the AFL-CIO and the United Electrical, Radio, and Machine Workers of America have made use of it by (co-)filing complaints in the ILO system (Compa, 2008, pp. 239–240).

Given trade unions' lifetime mandate of labor protection, their expertise and experience, it can be assumed that labor rights submissions of professional actors (i.e., [co-]presented by trade unions or their confederations) in the context of US FTAs are more likely to be accepted for review than those presented by non-professional ones (i.e., other than trade unions).[5]

2.2. Collectivism/Individualism

States no longer have the monopoly over domestic and international politics. Instead, in recent decades, a more inclusive international system has emerged, providing access and influence to a variety of civil society actors and organizations (Hall et al., 2014, p. 14). In international law, the right of individuals to present a complaint before an international tribunal is institutionalized in various international court systems (Keohane et al., 2000, p. 465).

In addition to the proliferating opportunities for individual voice in international politics, collective actors such as non-governmental organizations (NGOs), multinational corporations, and foundations have gained increased access to international organization bodies (Tallberg, Sommerer, Squatrito, & Jönsson, 2014, p. 747). Collective forms of organization which feature voluntary, reciprocal, and horizontal patterns of communication and exchange are also referred to as advocacy networks as 'advocates plead the causes of others or defend a cause or proposition: they are stand-ins for persons of ideas' (Keck & Sikkink, 1999, p. 91). Such collective entities can include NGOs, research and advocacy organizations; local social movements; foundations; the media; churches, trade unions, consumer organizations, intellectuals; and state actors such as parts of the executive and parliamentary branches of governments (Keck & Sikkink, 1999, pp. 91–92). Networks not only transfer knowledge and know-how, but they can also contribute to the better coordination of financial resources (Kidder, 2002, p. 290). Moreover, civil society coalitions are more representative than individuals and hence increase legitimacy (Florini, 2000, p. 233) and cultivate a reputation for credibility with the press (Keck & Sikkink, 1999, p. 96).

In the world of labor, Freeman (1976) presents several reasons why collective rather than individual activity is necessary to effectively claim workers' rights. First, individuals expressing discontent in the workplace face negative consequences, such as being fired. Retaliation against the entire work force, however, is less likely. Second, as working conditions have a communal nature, their violations create a public goods problem which individuals can hardly solve on their own but rather through collective action. Finally, labor rules require constant monitoring by an entity which has expertise on employment contracts and represents workers. This is traditionally the work of trade unions; individuals can hardly fulfill this task on their own. In a nutshell, 'the marginal costs of exercising rights are likely to be lower for a group of workers than for a single individual. This combination implies that the outcome of individual actions is likely to be inferior to the socially optimal level' (Freeman & Hersch, 2005, p. 5).

Accordingly, it can be assumed that labor rights submissions presented in the context of US FTAs collectively (i.e., by more than one complaining party) are more likely to be accepted for review than those presented individually (i.e., one complaining party).

2.3. Nationalism/Transnationalism

In addition to the increasing integration of domestic civil society actors and organizations in advocacy groups, there is also a tendency of growing cross-border relations. 'Transnational advocacy networks', as Keck and Sikkink (1999) call them, operate across national boundaries on behalf of shared principles, ideas, and values. Such alliances emerge as domestic groups often do not have resources within domestic political or judicial systems. International coalitions may help in expressing their concerns. Moreover, it increases the pressure on states from outside, which is also called the 'boomerang' pattern of influence (Keck & Sikkink, 1999, p. 93). According to Risse (2000, p. 196), 'transnational pressure turns out to be the single most important cause of change toward initial concessions by the norm-violating government, even more important than pressure from other governments'. In sensitive arenas in particular, transnational advocacy also helps to protect the lives of domestic civil society groups. In contrast to purely national actors and organizations, transnational coalitions have the advantage to exchange funds and services, as well as to generate relevant information quickly and accurately, and to exchange it reciprocally and deploy it effectively (Keck & Sikkink, 1999, pp. 92–93). Moreover, combining civil society actors from different nationalities, the media coverage is likely to transcend borders and attract global attention (see also Johnson, 2000, p. 62).

[4] See for instance the Harvard Trade Union Program established in 1942, available at http://www.law.harvard.edu/programs/lwp/HTUPapply.html
[5] This does not mean that organizations engaging in labor affairs other than trade unions do not work professionally.

With the emergence of international labor rules at the latest, transnational advocacy can also be found in the domain of labor. It includes trade unions, NGOs, and other labor rights advocates. As an illustration, telecommunication unions in the US, Mexico, and Canada built an alliance to coordinate actions and mutually assist each other. In the automobile industry, as another example, trade unions in the US, Germany, and Brazil jointly engaged in the formulation of similar, non-discriminatory contracts among the countries. In addition to transnational alliances of national groups, transnational advocacy in the field of labor also occurs through regional groups such as the European Trade Union Confederation and international groups such as Human Rights Watch and the International Confederation of Free Trade Unions (Trubek, Mosher, & Rothstein, 2000, pp. 1192–1193, 1196–1197). According to Tilly (1995, p. 21), in a globalizing world with powerful international capital, 'only collective action at an international scale has much prospect of providing gains for labor, or even of stemming labor's losses'. At the more regional level, transnational advocacy is a significant factor for labor rights complaints under the NAALC to be accepted for review (Nolan García, 2011b, pp. 49–50).

Due to pressure from the outside, accurate information collection, exchange of funds and services, as well as international media attention, transnational networks enjoy advantages that national networks do not have. Accordingly, it can be assumed that labor rights submissions presented in the context of US FTAs by a transnational complaining party (i.e., of multi- or international origin) are more likely to be accepted for review than those presented by a purely national complaining party (i.e., of national origin).

3. Labor Rights Protection in US FTAs: Does Actorness Matter?

Since the entry into force of the US FTAs, more than 40 labor rights complaints have been submitted to one of the signing parties. A majority of these complaints, namely 31, were presented before the US OTLA, which is authorized in the US to decide whether a submission is accepted for review. Figure 1 illustrates the number of submissions and the accused governments presented at the US OTLA between 1994 and 2016.

Regarding the nature of complainants, 'submissions come from a variety of sources'.[6] As summarized in Figure 2, more than three quarters of the complaints were (co-)filed by trade unions (or confederations thereof) who traditionally enjoy the jurisdiction of workers' rights promotion. They cover sector-specific unions such as the United Steelworkers and sector-transcending associations such as the AFL-CIO. Those complaints presented without the involvement of trade union actors were designed by new labor advocates, including Human Rights Watch, the International Labor Rights Fund, United Students Against Sweatshops, the National Association of Democratic Lawyers, and legal service centers.

A grand part of the labor cases was not presented by a single complaining entity but as a result of collective advocacy. They range from submissions filed by two groups up to a network of over 90 signatory organizations. Those submissions filed by an individual entity—with the exception of one case whose submitter was a single person—are presented by one organization such as the United Electrical, Radio, and Machine Workers of America. Interestingly, with the exception of one submission presented by the International Brotherhood of

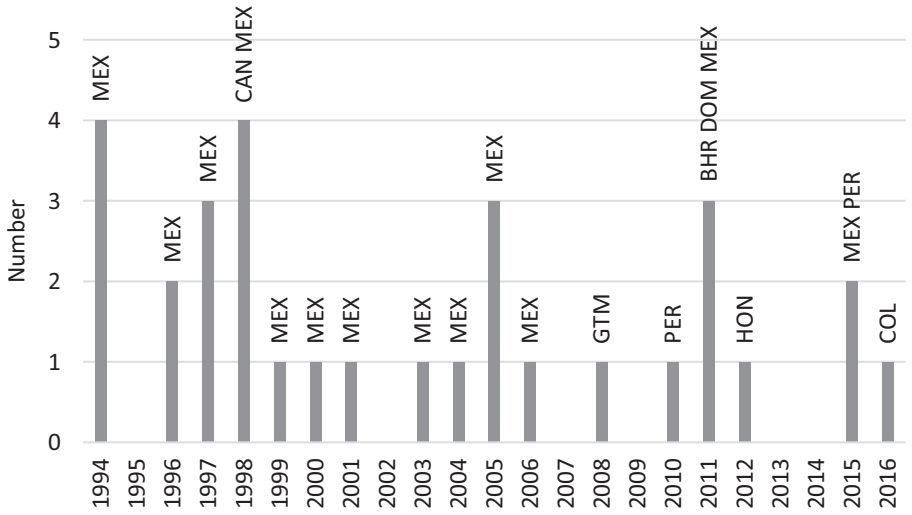

Figure 1. Public submissions to US OTLA.

[6] Interview, Director, OTLA, USDOL, June 12, 2013.

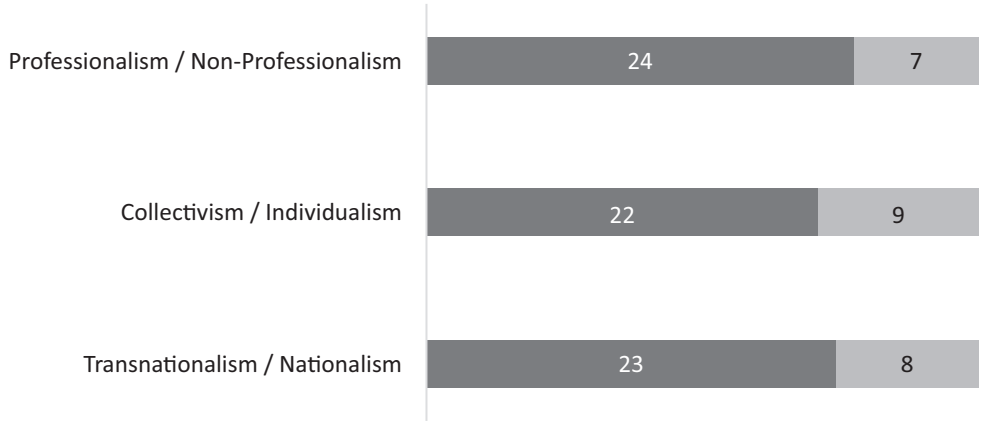

Figure 2. Actorness in public submissions to US OTLA.

Teamsters, all of the individually submitted complaints have a national source.

Overall, slightly more than three quarters of the submissions have a multi-national origin. Either do they combine groups of at least two different nationalities, such as a joint complaint by the Association of Flight Attendants of the US and the Association of Flight Attendants of Mexico, or they involve organizations with an international base, such as the International Trade Union Confederation (ITUC), the International Labor Rights Education and Research Fund, and Human Rights Watch.

In sum, it can be concluded that public labor rights submissions to the US OTLA in the context of US FTAs are largely filed by professional, collective, and transnational complainants. To put it differently, the inclusive complaint mechanism is not merely used by national umbrella trade unions, such as the AFL-CIO: 'often times people think this [complaint mechanism in US FTAs] is really only an AFL-CIO vehicle….I think the longer that these things are out there, the more creative…smaller NGOs and…smaller unions will [use] them'.[7] Even more, the Director of the International Department at the AFL-CIO claims that 'it's a mechanism that should be used by others….We [AFL-CIO] don't have a monopoly on the labor mechanism'.[8]

Regarding the follow up of the public submissions, four of the 31 complaints were withdrawn by the submitters themselves. The US OTLA declined seven and accepted 20 public submissions for review.[9] Figure 3 illustrates the OTLA's decisions with regard to the actorness of the submissions in relative terms. The assessment reveals that submissions of professional nature, in contrast to the theoretical assumptions, were accepted for review less often than those of non-professional nature. In line with the theoretical arguments, most of the collectively filed submissions were approved by the OTLA whereas only half of the individual submissions did. Finally, most submissions with a transnational base and slightly less than half of the submissions with a national nature were accepted for review, corroborating theoretical suggestions.

In order to substantiate whether the nature of complainants has an effect on the procedural follow-ups, I conduct an in-depth case study with two diverse cases with extreme values (Seawright & Gerring, 2008, p. 300) regarding the three-dimensional conceptualization of actorness. They are the 2011 submissions against Mexico and against the Dominican Republic, which differ strongly in terms of complainants. While the submission against Mexico was filed by the Mexican Electrical Workers Union (SME) together with 93 signatories, including the AFL-CIO, the ITUC, and many grassroots organizations (*collectivism*), it was an individual complainant who accused the Dominican Republic of violating labor rights (*individualism*). Moreover, the former comprises many sector-transcendent and sector-specific trade unions, among other labor advocates (*professionalism*), whereas the latter came to the Dominican Republic as a catholic priest from Europe, lacking professional labor rights authority (*non-professionalism*): The clergy's central jurisdictions comprise salvation, meaning, and ultimate concern. Only since the end of the last century has it taken its treatments such as pastoral care, and supervised church attendance and aimed them at other kinds of problems, the first of which were social problems (Abbott, 1988, p. 100). The NAALC submission, furthermore, was the result of a transnational alliance comprising several national and international organizations (*transnationalism*), in contrast to the CAFTA–DR submission with its national origin (*nationalism*).

Despite differences in the complainants' actorness, the two cases feature similarities which are important for a comparative assessment. First, both labor complaints were submitted in the same year, which is a necessary

[7] Interview, Trade and Globalization Policy Specialist, AFL-CIO, June 14, 2013.
[8] Interview, Director of the International Department, AFL-CIO, June 17, 2013.
[9] Reasons for declining submissions included the lack of information substantiating allegations and the consideration that the review would not further the objectives of the corresponding FTA. Available at https://www.dol.gov/ilab/trade/agreements/naalc.htm

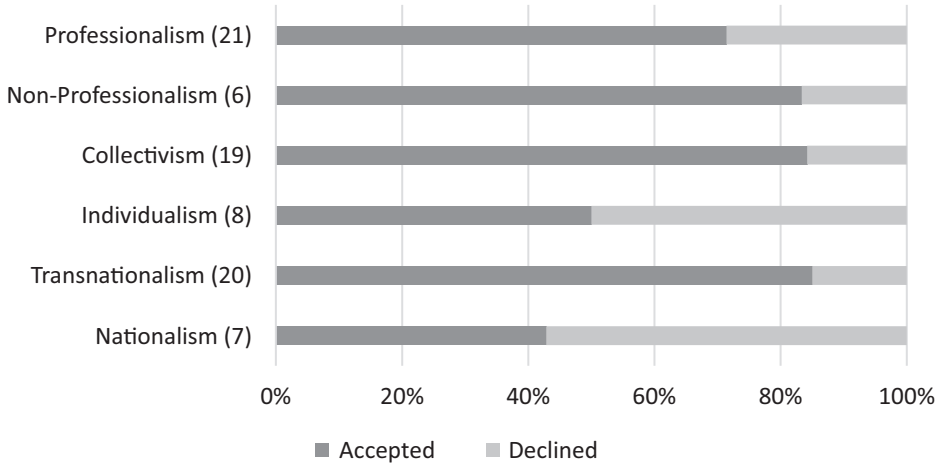

Figure 3. Actorness in public submissions and OTLA decisions.

precondition as different US administrations might react more or less favorable to international labor rights.[10] Also, being filed more than 15 years after the first complaints and six years ago, they provide the same time period for potential learning effects from preceding submissions and leave enough room for procedural follow-ups, respectively. Second, both address similar labor rights concerns, which is a relevant precondition as certain labor rights violations might be resolved easier than others, thus influencing the complaints' effectiveness.[11]

3.1. The NAALC and the CAFTA–DR Experience

The submission against Mexico presented to the OTLA on November 14, 2011 consists of 71 pages, in which the 94 complainants demonstrate how the Government of Mexico has failed to uphold is commitments under the NAALC by not taking action following the issuance of a Presidential decree on October 2009, dissolving the state-owned electrical power company, Central Light and Power, and terminating the employment of over 44,000 SME members. In accordance with its Procedural Guidelines, the OTLA accepted the public submission for review on January 13, 2012. On June 25, 2012 (and noticed in the Federal Register notice on July 2, 2012), the OTLA determined that an extension of time was necessary for its review and issuing of a public report,[12] normally due within a 180-day review period. The extension of time was mainly owing to a supplemental submission from the complainants on May 25, 2012, which contained new allegations and required a thorough consideration of the supplemental submission and of information obtained after an OTLA fact-finding visit to Mexico in March 2012.[13] According to the Acting Associate Deputy Undersecretary, USDOL, the case is 'extremely complicated, with a myriad of claims and documents involved'.[14] On February 1, 2013, after Supreme Court rulings in Mexico against the SME, the submitters notified the OTLA that they would submit additional information based on recent developments.[15] The OTLA still lists the case as 'currently under review'.[16]

In contrast to the very comprehensive Mexico submission under the NAALC, the complaint against the Dominican Government presented to the OTLA on December 22, 2011 by a priest features four pages only. The OTLA accepted the submission for review on February 22, 2012. It was noted by the Acting Associate Deputy Undersecretary, USDOL, that the Dominican submission was—in contrast to the Mexican submission—'sparsely detailed'.[17] In order to verify information on the ground, the OTLA took two review trips (April and July) to the Dominican Republic, in which the US delegation met with government, business, and worker representatives. As the OTLA received many comments on the case, it decided to formalize the process by issuing a Federal Register Note soliciting public comments. On August 20, 2012, the OTLA extended the review process due to the amount of information it received.[18] According to the Acting Deputy Undersecretary, the delays were also due to the complicated nature of the submission.[19]

[10] Interview Trade and Globalization Policy Specialist, AFL-CIO, June 14, 2013.
[11] Both labor rights complaints cite violations of core labor standards as defined by the ILO such as freedom of association and the right to organize.
[12] See also https://www.dol.gov/ilab/submissions/pdf/MexicoSubmission2011.pdf
[13] See also https://www.federalregister.gov/documents/2012/07/02/2012-16140/north-american-agreement-on-labor-cooperation-notice-of-extension-of-the-period-of-review-for
[14] Acting Deputy Undersecretary, USDOL, as cited in Minutes of NAC Meeting, September 27, 2012, p. 13, available at https://www.dol.gov/ilab/trade/agreements/nac.htm
[15] Minutes of NAC meeting, March 19, 2013, p. 10, available at https://www.dol.gov/ilab/trade/agreements/nac.htm
[16] See also https://www.dol.gov/ilab/trade/agreements/naalc.htm
[17] Minutes of NAC meeting, September 27, 2012, p. 16, available at https://www.dol.gov/ilab/trade/agreements/nac.htm
[18] Minutes of NAC meeting, September 27, 2012, p. 16, available at https://www.dol.gov/ilab/trade/agreements/nac.htm
[19] Minutes of NAC meetings, September 27, 2012, p. 16; March 19, 2013, p. 9, available at https://www.dol.gov/ilab/trade/agreements/nac.htm

The public report of review was finally released on September 27, 2013. It finds evidence of apparent and potential violations of labor law in the Dominican sugar sector. They relate to acceptable conditions of work, child labor, and forced labor. Moreover, the report documents concern with respect to Dominican labor law on freedom of association, the right to organize, and collective bargaining, and with respect to shortcomings in labor inspections. To address these limitations, the report offers eleven recommendations, the implementation of which will be reviewed six and twelve months after publication. In fact, since issuing the public report, the OTLA has published five periodic reviews between April 2014 and October 2016 concerning the recommendations' implementation. While these reports reveal improvements for decent work, the US still deems certain issues not fully addressed by the Dominican Government.[20]

3.2. David Against Goliath? Influence of Actorness on Decent Work

Comparing the public submissions against the Mexican Government under the NAALC and against the Dominican Government under the CAFTA–DR, it can be said that the latter is more far-reaching in terms of the procedural steps taken by the US so far, as it has been accepted for review and produced a public report with precise recommendations that have been regularly monitored. This is in contrast to the formulated hypotheses which expect professionalism, collectivism, and transnationalism to be more conducive to successful labor advocacy than non-professionalism, individualism, and nationalism. This section will provide a discussion on how the nature of the complainants contributed to this rather surprising outcome.

In contrast to the NAALC submission, the CAFTA–DR submission was not backed by trade unions or their confederations with professional expertise and experience on labor rights enforcement. In fact, Father Hartley did not seek support by Dominican trade unions as he perceived of unions in the sugar sector as being reluctant to fight for rights of workers with Haitian ethnic background. Instead, he collected relevant information on the working conditions of laborers from the *bateyes* himself. His engagement and expertise in the field of worker protection was also confirmed by the Director of the OTLA to whom the case was addressed: 'He [Father Christopher Hartley] is a very dedicated person who worked a number of years in the Dominican Republic….I would characterize him as a person with a humanitarian concern about rights of particularly Haitian workers, living conditions. So, I [imagine] his motivation of helping the poor, helping those who are disadvantaged, [seeking justice in] bringing the case forward. I see that passion in his interactions with us'.[21] In addition to his expertise from the ground, Father Hartley was able to acquire experience with international systems of labor protection by dealing with enforcement procedures in alternative venues beforehand. He expressed concerns to EU authorities in the context of the EU-CARIFORUM Economic Partnership Agreement in 2009 and later in 2013, who took the issues seriously and reached out to Dominican authorities, among other measures (Oehri, 2017, pp. 138–139). Father Hartley also presented a formal complaint to Bonsucro—a non-profit multi-stakeholder organization for sustainable sugar cane production—as a result of which three major sugar cane producers in the Dominican Republic were forced to abandon their membership. Moreover, Father Hartley has been surrounded and supported by experts of international affairs and the US complaint procedure, including former deputy assistant of the USDOL and former ambassador of the EU in the Dominican Republic.[22]

This engagement, even if 'not necessarily…linked to the labor movement',[23] resulted in a public submission that was able to meet the criteria as requested by the US OTLA to be accepted for review. The missing evidence for the public review was gathered by OTLA officials themselves, including fact finding visits and public information procedures. While the AFL-CIO was not a party to the case, it nevertheless submitted confirming information on the labor rights allegations through the possibility for public comments.[24]

As he could compensate for the lack of trade unions' professionalism, Father Hartley also managed to gain from the non-collective nature of his submission: 'The fact that I was an individual', as Father Hartley claims, 'was not necessarily detrimental. Of course, being an individual, it became a very attractive story to the media. And the media, much more than trade unions or human rights organization, have been my most powerful allies in advancing the course of Haitian migrant workers of the sugar cane fields of the Dominican Republic'. He further believes that the case 'wouldn't be so attractive as a media story if this was Amnesty International or some unknown organization…defending the labor of the Haitian migrant workers. So it has not been entirely to my disadvantage. From the media standpoint, newspapers, documentaries, you name it, it's a very effective story, it's a bit like David against Goliath'. As far as the follow-up procedure of the public submission to the US is concerned, Father Hartley comments that the USDOL was experiencing an enormous pressure from the media to do the right thing.

The limited legitimacy an individual submitter faces could be compensated by Father Hartley as he functioned as a mouthpiece for a work force who lacked a voice itself. However, what Father Hartley could not es-

[20] See also https://www.dol.gov/agencies/ilab/our-work/trade/fta-submissions
[21] Interview, Director, OTLA, USDOL, June 12, 2013.
[22] Interview, Christopher Hartley, April 11, 2013; see also https://clarkson-montesinos.org/our-team-2
[23] Interview, Director of the International Department, AFL-CIO, June 17, 2013.
[24] Interview, Trade and Globalization Policy Specialist, AFL-CIO, June 14, 2013.

cape from were negative personal consequences for his engagement in the fight for workers' rights. His longtime campaign to end illicit labor conditions in the Dominican Republic ended with his expulsion from the country in October 2006.[25]

In contrast to the Mexican submission, the Dominican submission was not presented by a transnational advocacy network. Father Hartley did not seek assistance in the development of a formal complaint by US organizations such as the AFL-CIO. He had the impression that they had not shown any interest in the story.[26] The AFL-CIO became aware of this initiative only a few days before the submission.[27] However, the Dominican case suggests that a lack of transnational advocacy does not necessarily mean a lack of transnational awareness and pressure. In fact, given that the priest had presented a similar concern to EU authorities beforehand, officials from the EU and the US have been familiar with each other's cases and observed each other's reactions.[28] Moreover, international human rights organizations such as Amnesty International and Human Rights Watch became aware of the story and published corresponding reports, thereby reaching out to a global audience.[29] Besides, the public report resulting from the formal complaint prompted awareness of multinational companies of the illicit labor conditions of sugar producers in the Dominican Republic. The Director of the Global Workplace Rights at The Coca-Cola Company, for instance, reiterated that the public report was useful for their work in remediating the Dominican sugar industry.[30] Also, the same day in September 2013 the USDOL presented its public report, it announced a USD 10 million project in the Dominican agriculture sector as part of its commitment to engage with the Government of the Dominican Republic to address the concerns raised in the public submission (Oehri, 2017, p. 75). It remains unclear whether this cooperation project would have been initiated without a public submission and following investigations in the Dominican Republic under the aegis of the CAFTA–DR.

4. Conclusions

In a recent assessment of labor standards in trade and investment agreements, the ILO (2016) concluded that 'the impact of labour provisions depends crucially on…the extent to which they involve stakeholders, notably social partners', among other factors. This study is designed to better understand the nature of civil society actors as a potential influencing variable to decent work. Drawing on a multidisciplinary framework of actorness, it reveals that the majority of submissions presented at the US in the context of FTAs are signed by professional, collective, and transnational parties. Interestingly, non-professional submissions were accepted as legal cases more often than professional ones in relative terms whereas collective and transnational submissions were comparatively more successful than individual and national ones. These findings are partly substantiated by the insights of two most different cases, in which the submission of an individual priest was more far-reaching in terms of procedural steps than the submission signed by a collective of over 90 national and international trade unions and other organizations. Thereby, and in addition to further developing extant literature on non-state actors' access (Keohane et al., 2000; Tallberg et al., 2014) by investigating their practical participation, this study's emphasis on the risks and potentials the nature of actorness entails for successful labor rights advocacy gives confidence and guidance to civil society actors who witness illicit labor practices in signatory countries to US FTAs.

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Conflict of Interests

The author declares no conflict of interests.

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[25] See also https://clarkson-montesinos.org/press-info

[26] Interview, Christopher Hartley, April 11, 2013.

[27] Interview, Trade and Globalization Policy Specialist, AFL-CIO, June 14, 2013.

[28] Interview, Director, OTLA, USDOL, June 12, 2013; Interview, Civil Servant, OTLA, USDOL, June 12, 2013; Civil Servant, DG Trade, European Commission, April 29, 2014.

[29] Interview, Christopher Hartley, April 11, 2013.

[30] Minutes of NAC meeting, February 5, 2013, available at https://www.dol.gov/ilab/trade/agreements/nac.htm

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Article

Dispute Settlement for Labour Provisions in EU Free Trade Agreements: Rethinking Current Approaches

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Abstract
While labour provisions have been inserted in a number of EU free trade agreements (FTAs), extant clauses are widely perceived as ineffective. This article argues that there is a need to rethink the dispute settlement mechanisms related to labour provisions if their effectiveness is to be increased. It proceeds in three steps. First, we look at the current state of the art of labour provisions in EU FTAs in terms of legal design and practice and argue that the current arrangements are ill-equipped to foster compliance with labour standards. Second, we explore avenues to enhance the design of FTA labour provisions by reconsidering basic elements of the dispute settlement structure. Examining US FTA labour provisions, we highlight the importance of a formal complaint mechanism, on the one hand, and the availability of economic sanctions, on the other. Based on a review of existing practice, we contend, however, that these elements alone are not sufficient to effectively enforce FTA labour provisions. We argue that for FTA labour provisions to be effective, the current state-to-state model of dispute settlement needs to be complemented by a third-party-state dimension and that, additionally, there are good reasons to consider a third party–third party dispute settlement component. We ground these reflections in experiences with already existing instruments in other areas, namely investor-state dispute settlement and voluntary sustainability standards. Thirdly, we discuss options to better connect the dispute settlement mechanisms of FTA labour provisions to other international instruments for labour standards protection with a view to creating synergies and avoiding fragmentation between the different regimes. The focus here is on the International Labour Organization's supervisory mechanism and the framework of the OECD Guidelines for Multinational Enterprises.

Keywords
EU; labour rights; trade agreements; trade policy

Issue
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1. Introduction

The protection of labour standards has become a fixture in free trade agreements (FTAs) concluded by the EU. This corresponds to a more general trend which has seen a steady increase in the number of FTAs including labour provisions since the 1990s (International Labour Organization [ILO], 2009, 2013), counting more than 70 such agreements in 2016 (ILO, 2016, p. 22). However, the provisions concerning labour rights are often regarded as ineffective in terms of actually enforcing labour rights (see e.g. Campling, Harrison, Richardson, & Smith, 2016; Marx, Lein, & Brando, 2016; Scheuerman, 2001; Van Roozendaal, 2015; Vogt, 2015). In particular, there is concern that the implementation devices regarding FTA labour provisions might be insufficient to address

non-compliance in practice (Harrison, Barbu, Campling, Richardson, & Smith, 2017; Marx & Soares, 2015; Marx et al., 2016; Orbie & Van den Putte, 2016). While it is recognized that FTA labour provisions may entail other positive effects, such as increasing labour-related capacity building (Cheong & Ebert, 2016; Ebert, 2016), there is a growing consensus that the relevant enforcement mechanisms, notably the arrangements for dispute settlement, are unsuitable to significantly foster compliance with labour rights (see e.g. Ebert, 2017; Scheuerman, 2001; Vogt, 2015).

In this article, we investigate how the institutional design relating to labour provisions in FTAs can be improved to foster better compliance, focusing on the role of dispute settlement mechanisms. This focus emerges in a wider academic debate in which the empowerment of stakeholders to enforce compliance with international rules is emphasized. We assume that the integration of viable dispute settlement mechanisms into the labour provisions of FTAs can strengthen enforcement and compliance. This can occur either through the threat of a possible dispute and the consequences that may come with it (anticipatory effect) or through the dispute settlement process proper, which may generate dynamics inducing compliance, for example through the application of economic sanctions or political pressure. This assumption is grounded in theoretical and empirical literature in institutional economics, political science, and public policy (see e.g. Ostrom, 2005). This literature suggests that robust monitoring and sanctioning systems are necessary conditions for ensuring compliance with rules. In addition, international law scholarship refers to the importance of establishing a well-developed set of rules and procedures to foster compliance with international rules, although with less emphasis on disputes and sanctioning. This scholarship stresses that enforcement of international rules requires a set of procedures and mechanisms which implement (see e.g. the managerial approach put forward by Chayes & Handler Chayes, 1995) or internalize international legal rules in the domestic legal system (see e.g. Koh, 1997). Both theories stress the importance of interactions between actors and mechanisms which allow for interaction, for complying with international rules.

Against this background, this article contributes to the wider theoretical ambitions of this thematic issue by focusing on an additional element of effectiveness, namely institutional design effectiveness. As Niemann and Bretherton (2013, p. 267) note, the concept of effectiveness is notoriously difficult to define and measure. The editors of this thematic issue start from a traditional conceptualization of impact and effectiveness which is more aligned with a focus on goal-attainment effectiveness (Conceição-Heldt & Meunier, 2014). Goal-attainment effectiveness in the context of FTAs can be seen as an actor's 'ability to realise the goals they set for themselves' (Acharya & Johnston, 2007, p. 13) or the EU's ability to reach its objectives by influencing other actors (Van Schaik, 2013). However, before goals can be achieved one needs to build institutions which facilitate the achievement of these goals. In this way, institutional effectiveness presupposes goal-attainment effectiveness. Institutional effectiveness builds on the work of Elinor Ostrom (2005) and assesses whether the design of FTAs is effective. For example, FTAs with extensive rules and procedures (that is, institutions) on enforcement, monitoring, dispute settlement, and sanctioning are hypothesised to be more effective in achieving their objectives. In this light, we seek to explore how the institutional design of FTAs can be strengthened by analysing the deficiencies of the current approaches.

The article proceeds in three steps. First, we look at the current state of the art of labour provisions in EU FTAs in terms of legal design and practice. We show that the existing mechanisms are subject to significant deficits that limit their potential to foster labour rights implementation. Second, we explore avenues to enhance the design of FTA labour provisions by reconsidering basic elements of the dispute settlement structure. Examining US FTA labour provisions, we highlight the importance of a formal complaint mechanism and the availability of economic sanctions. Based on existing practice, we contend, however, that these elements alone are not sufficient to effectively enforce FTA labour provisions. We argue that for FTA labour provisions to be effective the current state-to-state model of dispute settlement needs to be complemented by a third-party-state dimension and that, additionally, there are good reasons to consider a third party-third party dispute settlement component. We ground these reflections in experiences with already existing instruments in other areas, namely investor-state dispute settlement and voluntary sustainability standards (VSS). Third, we ponder options to better connect FTA labour provisions to other instruments for labour rights protection with a view to creating synergies and avoiding fragmentation between the different regimes. The focus here is on the ILO supervisory mechanism, on the one hand, and the framework of the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs), on the other hand. We close by briefly discussing the various alternatives.

2. The Need to Rethink Extant EU FTA Dispute Settlement Mechanisms for Labour Provisions

Recent EU FTAs contain various types of commitments.[1] This typically includes commitments regarding the observance of the ILO Fundamental Conventions,[2] a commitment to enforce domestic labour laws alongside a com-

[1] For an overview see Bartels (2013, pp. 306–308), and ILO (2016, pp. 39–41). Many EU FTAs contain certain additional commitments, e.g. to 'consider the ratification' of other ILO conventions and exchange information in this regard; see e.g. art. 229 (4) of the EU–Georgia Agreement.

[2] See, e.g. art. 269(3) of the EU–Colombia and Peru Agreement; art. 365(2) of the EU–Moldova Agreement.

mitment not to lower domestic labour rights in order to increase levels of trade and investment.[3] There is also an obligation to monitor and assess the impact of the agreement on sustainable development issues including compliance with labour rights.[4] EU FTAs furthermore emphasize institutional inter-party dialogue and cooperation and the participation of civil society actors in the monitoring of the parties' compliance with the relevant labour requirements (Postnikov & Bastiaens, 2014, p. 925).

The monitoring processes agreed upon in the Trade and Sustainable Chapters of EU FTAs (TSD chapters) are twofold. First of all, the general joint committees and councils in charge of overseeing the agreement as a whole, which are typically competent to discuss any matter in relation to the agreement, are also entitled to discuss sustainable development issues. Second, the main innovation of TSD chapters resides in their monitoring by institutions representing civil society actors which are created by the agreement such as 'Domestic Advisory Groups' (DAGs) for each party. Composed of NGOs, business, trade unions, and other experts from relevant stakeholder groups, these groups are supposed to meet on a regular, typically annual basis.[5] Dialogue at the official level is therefore central, and civil society is an essential actor in the implementation and monitoring of TSD chapters.

Furthermore, EU FTAs provide for a special procedure for labour provisions, including amicable consultations and, subsequently, the review of the issue at stake by an ad-hoc expert body[6] which can adopt findings and recommendations on the subject matter.[7] As a follow-up, the expert body's report is presented to the parties, and the party concerned is typically required to indicate the measures it envisions undertaking with a view to addressing the findings and recommendations of the expert panel.[8] The implementation of the relevant measures is then monitored by the competent committee or body, as established under the relevant agreement.[9]

The experiences made thus far with dispute settlement mechanisms pertaining to the labour provisions in EU FTAs indicate at best limited potential for enforcing labour rights (see also Marx et al., 2016). A key factor limiting the enforcement leverage of these provisions is the absence of sanctions which makes their implementation to a large extent dependent on the parties' political goodwill.[10] Furthermore, no case is apparent where the relevant formal consultation mechanisms—let alone the non-sanction-based dispute settlement mechanisms—have been activated (see e.g. Ebert, 2017, p. 308). In addition, the absence of a formal complaint mechanism has allowed the European Commission to refrain from an in-depth assessment of labour rights violations raised by civil society actors (see Vogt, 2015, pp. 857–858).[11] This is not compensated by the dialogue activities conducted under the EU FTAs, either among the state parties or with civil society. Arguably, this can, in part, be attributed to the failure of the European Commission to use political influence to bring about changes regarding labour rights in partner countries (see also Campling et al., 2016, pp. 370–371). As a result, EU partner countries appear to have been rather indifferent to the allegations of relevant civil society actors (Vogt, 2015).

3. Rethinking the Dispute Settlement Process for Labour Provisions in EU FTAs: Insights from Other Approaches and Instruments

3.1. Increasing Enforcement Leverage: The Case of US FTA Labour Provisions

The approach, notably used by the US and Canada, combines cooperation and enforcement mechanisms, involving, as a last resort, economic sanctions. Under most US FTAs there is a formal procedure under which civil society actors can submit complaints against one country to a designated national office with the Government of another party.[12] This national office subsequently examines the complaint following an internal procedure and can, where appropriate, make recommendations on how to resolve the problems at hand. The complaints procedure under US FTAs is, hence, significantly more formalized than under those concluded by the EU.

Furthermore, any state party can subsequently initiate ministerial consultations on the matter with the other party[13] and seek the establishment of an arbitral panel for parts or the entirety of the agreement's labour chapter (ILO, 2009, 2013). The dispute settlement mechanisms for labour provisions under US FTAs have evolved considerably over time. In particular, the scope of the arbitration-based dispute settlement mechanism has been widened from applying only to certain labour provisions[14] to covering the entire labour chapter.[15]

[3] See, e.g. art. 23.4 of the CETA.
[4] See, e.g. art. 293 of the EU–Central America Agreement.
[5] See, e.g. arts. 294–295 of the EU–Central America Agreement.
[6] These are typically referred to as 'panel of experts' or 'group of experts'.
[7] See, e.g. art. 13.14 and 13.15 of the EU–Republic of Korea Agreement; art. 283–285 of the EU–Peru and Colombia Agreement.
[8] See, e.g. art. 301(3) of the EU–Central America Agreement.
[9] See, e.g. art. 285(4) of the EU–Peru and Colombia Agreement.
[10] Evidence suggests that to have some positive effects sanction regimes do not necessarily need to be applied; rather it is often already the credible threat of trade sanctions that can induce compliance (Charnovitz, 2001, p. 809; see also Davey, 2009, p. 124; Lacy & Niou, 2004).
[11] For a case in point regarding the EU–Korea FTA, see Van den Putte (2015, p. 229).
[12] See, e.g. art. 16(3) of the NAALC.
[13] See, e.g. art. 22 of the NAALC and of the NAAEC, respectively.
[14] See, e.g. arts. 16.6(7) and 17.10(7) of CAFTA-DR.
[15] Cf. arts. 17.7, 18.12 and 21.2 of the US–Colombia Trade Agreement.

Also, while most of the earlier US FTAs involve only limited fines which are to be used for remedying the compliance issue at hand,[16] more recent US FTAs allow for inflicting trade sanctions under the general dispute settlement mechanism.[17] The enforcement mechanism for labour provisions in US FTAs can thus be considered considerably more vigorous than that of their EU counterparts.

However, the labour provisions contained in US FTAs have so far not proven to be a highly effective enforcement device. In fact, there has been only one labour rights-related case where a dispute settlement procedure under an FTA was set in motion. This dispute, which arose under CAFTA-DR between the US and Guatemala, deals with severe violations of trade union rights in Guatemala.[18] The scarcity of labour-related disputes in dispute settlement contrasts with the number of complaints that have been filed under some of the agreements. In the area of labour rights, most complaints have been brought under the NAALC, amounting to about 40 complaints between its entry into force in 1994 and 2015. Under other US agreements, eight labour-related complaints were filed with the US Government prior to November 2017.[19] The bulk of the complaints have so far been terminated or resolved by the competent national offices without even reaching ministerial consultations, let alone dispute settlement stage, and with no evidence that the often-serious alleged violations of the relevant labour provisions were sufficiently addressed.[20]

A key factor accounting for this situation relates to the institutional design of the relevant enforcement mechanisms. First, civil society actors can only file complaints but not activate the dispute settlement procedure against the party complained against, a prerogative that remains reserved for the state parties to the FTAs. Second, US FTAs accord the state parties full discretion as to whether or not to activate the dispute settlement mechanism, to solve the dispute through other means, or to remain inactive. Even if the national office of the party receiving the complaints identifies severe violations of labour provisions of the relevant agreement, that state party is by no means legally compelled to take further action. As a result, the relevant FTA parties have been able to refrain from taking appropriate action even in the face of allegations of serious breaches of the relevant labour provisions. While recent US FTAs provide the same dispute settlement mechanism for labour provisions as for the agreements' trade-specific provisions, it turns out that this approach is unsuitable for labour concerns given the parties' widespread disinclination to utilize these arrangements to tackle these matters (Sagar, 2004, p. 948).

3.2. Providing Direct Access to Dispute Settlement for Third Parties: The Case of Investment Arbitration

Investment treaties usually allow a foreign investor to sue the host state before an international arbitral tribunal in order to seek remedy for the breach of its treaty-protected rights, such as those regarding non-discrimination, fair and equitable treatment, or protection against expropriation. Traditionally, investment arbitration is realized through a private and *ad hoc* tribunal whereby the parties freely choose the arbitrators and the rules of procedure according to a defined model such as that of the International Centre for the Settlement of Disputes (ICSID) or of the UN Conference on International Trade Law (UNCITRAL). These mechanisms are modelled on commercial arbitration and typically do not provide for the possibility of appealing the award. EU investment chapters in the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) and the EU–Vietnam Free Trade Agreement (EUVFTA) contain a more elaborate 'investment court system' (ICS),[21] which sets up a permanent tribunal composed of international trade and investment law experts from the EU, the partner country, and third countries, as well as appellate tribunals. Each case is normally heard by three members, one from each category, drawn by lot.[22]

Only investors can file a claim to the ICS.[23] Concerning access to the proceedings by third parties, both CETA and the EU–Vietnam FTA include the UNCITRAL transparency rules and provide for the publicity of procedural documents and hearings.[24] Submission of *amici curiae* briefs is possible.[25] The other State party may receive the procedural documents and make observations.[26] ICS is governed by ICSID or UNCITRAL procedural rules or other rules if the parties agree.[27] The submission of a claim to the tribunal must be preceded by consultations aim-

[16] See, e.g. art. 20.17 of CAFTA-DR.
[17] See, e.g. art. 21.16 of the US–Colombia Trade Agreement.
[18] See Final Report of the Panel in the Matter of Guatemala—Issues Relating to the Obligations under Article 16.2.1(a) of the CAFTA-DR of June 14, 2017. In this case, the Panel found that the US had not demonstrated that Guatemala had breached the relevant labour provisions.
[19] For an overview of relevant complaints visit the webpage of the US Department of Labor (Office on Trade and Labor Affairs) at https://www.dol.gov/agencies/ilab/our-work/trade/fta-submissions. One complaint concerning Costa Rica had been withdrawn after the subject matter at hand had been addressed at the domestic level (ILO, 2013, pp. 51, 55).
[20] For examples regarding cases under the NAALC see Schurtman (2005, pp. 332–333); Compa and Brooks (2015, pp. 63–64). See also Oehri (2017) in this issue.
[21] These FTAs are not yet in force or not yet fully in force and the ICS is therefore not yet in operation.
[22] See arts. 18.27 and 18.28. CETA; art. 13 EUVFTA.
[23] Art. 8.23 (1) CETA, and art. 2 EUVFTA.
[24] Art. 8.35 CETA; art. 20 EUVFTA.
[25] Art. 4 UNCITRAL Transparency Rules.
[26] Art. 8.38 CETA; art. 25 EUVFTA.
[27] Art. 8.23 (2) CETA; art. 7 2 EUVFTA.

ing to amicably settle the dispute.[28] None of the agreements requires exhaustion of domestic remedies.[29] The *material jurisdiction* of ICS is strictly limited to breaches of rights granted to investors by the treaty.[30] When a breach is found, the only possible outcomes are monetary damages or restitution of property,[31] but to preserve state sovereignty, in no case may the tribunal annul a state measure or order a positive measure. Costs are normally borne by the unsuccessful party, unless circumstances warrant otherwise.[32]

An ICS-like mechanism may carry some advantages with respect to the enforcement of labour provisions. First, the possibility of offering a binding outcome to private parties and of holding defaulting governments to account may increase the focus on compliance and thereby reduce the politicization of the application of labour provisions (see Gött, in press). Second, investment arbitration is typically more expeditious than judicial remedies, even though the addition of an appeals mechanism may lengthen the proceedings. Third, such a mechanism would also avoid giving the impression that the protection of labour standards is considered by the EU to be less important than investor protection and might contribute to increasing the legitimacy of the EU's trade policy as a whole.

A number of obstacles would, however, have to be overcome if a mechanism modelled on ICS as it currently stands (hereinafter 'ICS-like mechanism'), were to be effectively employed as a way to enforce labour provisions. First, the material jurisdiction of investment tribunals is strictly limited to a few well-defined treaty provisions (see above). Subjecting the more wide-ranging commitments contained in labour provisions to an ICS-like mechanism would significantly expand its scope, thereby increasing the potential number of cases, and requiring the tribunal's breadth of expertise to be more extensive than what is now required of arbitrators.

Second, ICS standing is strictly limited to foreign investors, but labour provisions concern a wider group of third parties, which would require making determinations as to which interests deserve to be granted access. Host states typically grant direct access to an arbitral mechanism because they hope to attract capital and related benefits such as tax revenue, jobs, transfers of technology, knowhow, etc. (Choi, 2007, pp. 732–733). This kind of governmental incentive to provide investors access to an ICS-like mechanism is not as clear in the labour context. Also, potentially affected stakeholders are much more numerous, and ways to limit standing in a fair and non-discriminatory manner would have to be carefully elaborated, for instance by limiting it to representative organisations such as trade unions, employers' organizations, particularly interested civil society organizations, or to a minimal number of claimants grouped together. Additionally, if standing were still to be granted to individuals, it could be limited through the customary requirement of exhausting domestic remedies, which is generally waived in investment arbitration (see also Stoll, Gött, & Abel, 2017, pp. 39, 41).

Relatedly, standing implies that the claimant may rely on litigable rights, whereas currently TSD chapters partly tend to restate general state commitments, in particular towards ILO Conventions, which may require some rewriting in order to be read, e.g., as standards of treatment, or as commitments to attaining well-defined goals, which would be effectively litigable by third parties. Likewise, state measures lowering social standards for the purpose of attracting trade or investment might be opened to direct challenge.[33] This, while arguably pursuing the desirable goal of putting labour concerns on an equal footing with economic objectives, would radically alter the balance of the entire agreement, since trade commitments would be matched with directly enforceable social provisions. States would therefore have to consider whether they are willing, in the context of an agreement on trade, to complement labour provisions obligations with such a strong dispute settlement mechanism, whereas they were not willing to do so when they undertook the initial commitment in, e.g., the ILO Conventions linked to the TSD chapters. One way to address this issue could be to limit the scope of enforceable provisions concerning labour rights to a relatively small number of litigable commitments.

Fifth, in terms of remedies sought, ICS can only award monetary damages or order restitution of property. These types of remedies indexed on a commercial logic are less suitable to compensating the breach of labour rights obligations, which often require putting in place long-term strategies and implementing them through a series of measures. Ensuring that these strategies and measures are adopted and implemented is in all likelihood what the claimant in such cases would want to seek, not necessarily monetary damages. Adapting this aspect in an ICS-like mechanism to include the possibility for the tribunal to order measures would, as indicated above, represent another significant inroad into state sovereignty, as it would limit the states' freedom to determine their own levels of domestic protection in the social area,[34] which they have so far been careful to preserve. The threat of such monetary sanction might, however, be one incentive to foster compliance and change.

A final obstacle which can be identified in relation to ICS, concerns the costs involved in litigating through such a dispute settlement system. The costs are typically

[28] Art 8.21 (1) CETA; art. 6 (1) EUVFTA.
[29] Art. 8.22 (1) (f) and (g) CETA; art. 8.1 and 4 (b) EUVFTA.
[30] Art. 8.18 CETA; art. 1 EUVFTA.
[31] Art 8.39 (a) CETA; art. 27 EUVFTA.
[32] Art 8.39 (5) CETA; art. 27.4 EUVFTA.
[33] See Chapter 16, art. 10 EUVFTA.
[34] See Chapter 16, art. 2 EUVFTA.

high (OECD, 2012) and may not be affordable for private parties unless measures are taken to limit them.[35] This could be done in a number of ways, for instance by capping arbitrator fees; by ensuring that the place of arbitration does not involve excessive travel for the parties (or by working at a distance or through electronic means as much as possible); by setting up a legal aid fund or by waiving the cost of proceedings for vulnerable claimants.

In sum, the main advantage of an ICS-like mechanism would be to enhance the enforcement potential of labour chapters by allowing non-state actors to sue state parties for breaches of their treaty-based rights. However, our examination evidences significant obstacles related to scope, standing, remedies and costs. At the very least—and without pre-judging the political feasibility of such adaptations—in order for an ICS-like mechanism to work in this context, the following aspects would need to be carefully designed: (i) management of the potential number of claims by limiting standing to groups of individuals or by requiring exhaustion of domestic remedies; (ii) precise identification of the kinds of claims which would be admissible before the ICS-like mechanisms, in respect of the labour rights covered and the types of violations alleged; (iii) redress mechanisms that would be compatible with the nature of labour rights; (iv) a cost-model that remains accessible to private individuals or not-for-profit organizations representing labour rights interests.

3.3. Integrating a Third Party Versus Third Party Dimension into the Dispute Settlement Mechanism: The Example of Voluntary Sustainability Standards

Another existing initiative that might be considered for the purpose of strengthening enforcement of FTA labour provisions through dispute settlement concerns VSS, also known as sustainability certification schemes and eco-labels (United Nations Forum on Sustainability Standards, 2013). Examples of such VSS include the standards adopted by the Fair Labour Association, the Fair Wear Foundation, and the Forest Stewardship Council (FSC). They involve a collection of organisations that certify producers that adhere to a set of sustainability standards. These standards are developed on the basis of broad principles and commitments which are often also referred to in the context of FTAs and refer *inter alia* to the protection of labour rights such as the protection of freedom of association and collective bargaining. How do they do this? First, they base the sustainability standards they develop on existing international law by including references to international legal commitments in the foundational principles of VSS. Many of them refer explicitly to different ILO Conventions. Second, and importantly for the purpose of assessing compliance, they translate these principles in measurable indicators and action. In a third step, they develop a comprehensive institutional framework to monitor compliance with these standards including the provision of complaint mechanisms. These complaint mechanisms allow 'internal' participants (members of VSS organizations, VSS certificate holders, etc.) and 'external' stakeholders to raise issues relevant to the functioning of VSS including non-compliance with standards. Dispute settlement mechanisms provide a necessary complement to conformity assessment and auditing in order to foster compliance. Recently, one can observe the emergence of dispute settlement mechanisms in many VSS such as the Fair Wear Foundation and the Fair Labour Association. They take a variety of forms but several VSS allow external stakeholders (NGOs, citizens, etc.) to file a dispute if they believe that a violation of standards occurs. In order to enable stakeholders to raise a dispute, several VSS have also installed transparency measures through information disclosure procedures. Information disclosure procedures can inform different stakeholders on compliance with standards. Publicly available information in this context includes specific information about certification procedures, auditing reports, reports on violations, and reports on corrective action plans. This allows stakeholders to assess whether the reported information mirrors real conditions (Marx, 2014).

As noted above, some VSS have a complaint mechanism that allows for initiating a dispute in case of non-compliance with sustainable development provisions. This approach, which is a third-party to third-party system, could inspire the development of a dispute settlement mechanism for FTAs. The model of VSS targets companies more directly. If non-compliance is proven, a significant sanction is available in the form of annulation or suspension of a certificate which would influence market access in the importing country (Marx, 2014). Companies are key actors in the context of an FTA as well as for ensuring the implementation of labour standards, but they are not currently parties to the agreement. However, most violations with regard to the provisions contained in the TSD chapters are the result of companies' behaviour. Involving companies more directly in a FTA would imply a shared responsibility of states and firms to comply with the provisions in FTA labour chapters. Under this model, a dispute can be initiated by a range of third parties, sometimes including individual citizens. An equivalent in the context of FTAs would be to have a ban for specific products of specific companies in cases of repeated non-compliance by companies exporting products to the EU.

4. Connecting the Dispute Settlement Mechanism of EU FTAs More Effectively to Existing Instruments

4.1. Connecting the Dispute Settlement Mechanism to the International Labour Rights System: The Case of the ILO Supervisory Mechanisms

The inclusion of labour provisions in FTAs raises the question of how their coherence with the ILO's international

[35] See e.g. art. 8.39 (6) CETA and art. 27 EUVFTA.

labour rights system can be ensured. This question is all the more relevant given that most EU FTA labour provisions expressly refer to ILO instruments. Especially in recent EU FTAs, references are, unlike in their US counterparts, typically to the ILO's Fundamental Conventions rather than to only the ILO's Declaration on Fundamental Principles and Rights Work of 1998 (see ILO, 2013, p. 72, 2016, pp. 50–51). The interpretation and application of the relevant provisions can therefore directly rely on a body of guidelines elaborated by the relevant ILO quasi-judicial bodies, which is not available for the ILO's 1998 Declaration.[36] This opens several avenues for connecting the labour provisions of EU FTAs to the ILO's labour rights system.

The input by the ILO can, first and foremost, concern factual information on the situation of a particular country. In addition, legal guidance can be provided on the meaning of a particular convention as well as findings as to whether a given country is in compliance with the conventions it has ratified. This could, among others, be based on the reports of the ILO Committee of Experts on the Application of Conventions and Recommendations, which regularly reviews ILO member states' compliance with the conventions ratified by them, or the ILO's various submission-based procedures (Agusti-Panareda, Ebert, & Clercq, 2015, pp. 370, 372–373).[37]

Arguably, the most effective way to ensure consistency between the application of FTA labour provisions and the relevant ILO instruments would be to require the parties to a dispute or the panel itself to request the ILO's input, especially with regard to the interpretation of the provisions referencing ILO instruments.[38] Such guidance could be sought by the parties at the consultation level as well as by the panel prior to delivering its report on the merits. Seeking such guidance by the panel should be mandatory rather than optional where labour provisions referring to ILO instruments are at stake. In the absence of a legally binding ruling of the International Court of Justice or of a specific (so far non-existent) ILO Tribunal on the matter at issue,[39] the panel should consider the guidance emanating from the ILO as an authoritative treatment of the subject and only divert therefrom in exceptional circumstances and with justification.

One question arises as to which specific body of the ILO could provide such guidance. Given the specific mandate of existing supervisory bodies, their respective mandates may have to be extended if they were to provide the relevant guidance directly. Alternatively, the International Labour Office, the ILO's Secretariat, could compile relevant legal information, including, as the case may be, in consultation with relevant bodies. The Office could also offer technical assistance as well as carrying out advisory services to support the implementation of labour standards. Prospectively, the establishment of *ad hoc* committees by the ILO's Governing Body for the purpose of providing relevant interpretations could also be considered (Agusti-Panareda et al., 2015, pp. 370–371, 377). Putting in place a robust procedure regarding consultations with the ILO would not only be an important step towards avoiding further fragmentation of the international labour regime but could also increase the quality and legitimacy of the panel's reports.

4.2. Connecting the Dispute Settlement Mechanism to Third Party Versus Third Party Mechanism: The Case of the OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (Guidelines) provide institutional mechanisms for holding actors accountable in case of non-compliance with international standards, also referred to in FTA TSD chapters. The Guidelines are a set of recommendations addressed by participating governments to MNEs operating in or from their territory, on conduct relating, *inter alia*, to labour rights, environmental protection and human rights. As of November 2017, they were subscribed to by 48 states (all 35 OECD member states and 13 non-OECD members). All adhering states must establish a National Contact Point (NCP) at the domestic level to enhance the effectiveness of the Guidelines by promotional activities, the handling of enquiries and by 'contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances' (OECD, 2011, p. 68, § 1).

Under this dispute resolution mechanism, any interested party may raise a 'specific instance' with an NCP when the party has evidence that an MNE is in non-compliance (domestically or abroad) with the Guidelines (OECD, 2011, p. 72, section C). The NCP deals with specific instances in three phases.[40] In the first phase, the NCP conducts 'an initial assessment of whether the issues raised merit further examination', or should be dismissed (OECD, 2011, p. 72, section C §1). Where a specific instance deserves 'further examination', the NCP is required, in a second phase, to 'discuss the issue further with the parties involved and offer 'good offices' with a view to facilitating the resolution of the problem' (OECD, 2011, pp. 72–73, §2, 83–84, §28). In the concluding third phase, the NCP makes the results of the mediation publicly available. If consensus is reached, it will issue a report stating that the parties have reached an agreement (OECD, 2011, p. 73, §3b). If consensus is not attained or if a party refuses to participate, the NCP has the authority to 'make recommendations on the implementation of the Guidelines as appropriate' (OECD, 2011, p. 73, §3c). A statement declaring that a given MNE has breached

[36] The 1998 Declaration is only subject to a promotional follow-up (La Hovary, 2009, pp. 254–256).
[37] The latter include representations to an *ad hoc* tripartite committee, complaints to be examined by an *ad hoc* commission of inquiry as well as a special procedure for freedom of association under which representations are examined by a standing tripartite committee (ILO, 2014, pp. 106–111).
[38] In addition, the parties and the panel could of course consult the publicly available information made available on the ILO's website.
[39] Cf. art. 37 of the ILO Constitution.
[40] In some cases, NCPs can also conduct research on their own motion without a specific complaint being filed.

the Guidelines is, however, rarely issued in practice. The statement of conclusion constitutes the only 'sanctioning' mechanism that NCPs have at their disposal, as they lack authority to impose sanctions in the form of financial penalties, the suspension of licenses or the like (Davarnejad, 2011, p. 364). This mechanism is accordingly considered by some to be relatively weak (Fick Vendzules, 2010, p. 480), as it relies on MNEs to take voluntary corrective action, which does not always materialise in significant changes (Ruggie & Nelson, 2015, p. 122).

The Guidelines and the NCPs could be connected to FTA labour provisions in various ways. First, the substance of the Guidelines could be linked to the FTA at issue. The most straightforward way to do this would consist of incorporating the content of the Guidelines into the FTA. This is possible since the adoption of the Guidelines is not restricted to OECD members, but is open to all states. Such incorporation of the Guidelines, in turn, would imply both a deepening and widening of the substantive provisions in the FTAs since the Guidelines cover substantive issues that are currently not covered in most FTA labour provisions, such as the obligation to provide certain information to employee representatives.

Second, and more importantly from a procedural perspective, wording could be included in the TSD chapter which requires the dispute settlement bodies established under the FTA (state-to-state or otherwise) to take into account the findings of the NCPs. This could provide additional leverage to the NCPs' determinations in case of established non-compliance with the Guidelines. At the same time, this would also help to ensure that the FTA labour provisions are applied in coherence with these Guidelines. Where the parties are not already adhering to the Guidelines, a provision could be inserted into the FTA to require the parties to adopt the Guidelines.

5. Discussion

This article started from the observation that most recent EU FTAs contain labour standards-related commitments whose enforcement mechanisms are, however, insufficient to have a significant impact in practice. This concerns especially the extant dispute settlement mechanisms. One way to think about how to address this concern is to look at existing mechanisms. While the instruments discussed in this article are not a panacea for labour standards protection, they may provide inspiration for rethinking existing approaches. In this regard, the article looked at five arrangements to identify key components for improving the current dispute settlement mechanism of EU FTA labour provisions.

The case of US FTAs provided insights into the value of complaint and sanction mechanisms. We argued, however, that to be effective such mechanisms need to come with direct access of stakeholders to dispute settlement, and we drew on the ICS to reflect on possible avenues for achieving this. Such a mechanism could also be complemented with a third party-third party dispute settlement component, as it exists under certain labour-related VSS. In a further step, we then examined options to better link dispute settlement mechanisms in EU FTA labour provisions to other related international arrangements of relevance to labour standards, namely the ILO supervisory mechanisms and the NCPs related to the OECD MNE Guidelines.

Integrating features of these different approaches, possibly in an entirely new model, arguably holds significant potential for enhancing the enforcement mechanisms of FTA labour provisions and, thereby, for ensuring that the relevant labour standards commitments do not remain empty promises in the books. It goes without saying that the mechanisms discussed above could not be harnessed for EU FTA labour provisions without the necessary adjustments. For example, the monetary compensation designed to compensate for individual economic damages under the investment court system may not be appropriate for labour standards violations where damages are much harder to quantify.

In the process of adapting these components, a few choices would need to be made, including the following. A first choice would be to decide who the target of a complaint should be: the state, an individual company or both. The case of the VSS discussed above offer ways to think about how companies might be targeted more directly. A second choice pertains to who has access to the complaint mechanisms. Does this remain a state-to-state affair, which is only accessible to the EU and other parties to the agreement, or will it provide access to a range of stakeholders who can pursue alleged breaches of the obligations contained in TSD chapters. A third choice concerns the use of sanctions as a measure of last resort, which could involve trade sanctions or other economic sanctions, such as fines. There is a need to reflect upon how these sanctions can be designed in a way that avoids disproportionate or otherwise undesirable effects, including relating to harm of vulnerable parts of the population or trade diversion.

Clearly, the implementation of a new model based on the components set out above would require significant political will by the trading partners concerned. It is worth highlighting, though, that all the elements discussed have already been tested in other fora. Given the current legitimacy crisis of economic globalization, the timing may be apposite for experimenting with innovative arrangements to ensure that FTAs are also socially beneficial.

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Conflict of Interests

The authors declare no conflict of interests.

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Article

A Supply Chain Approach to Trade and Labor Provisions

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Abstract
As labor provisions in trade agreements have become increasingly ubiquitous, there remain questions about whether or not these provisions have been effective in improving working conditions in trading partner countries. Through an analysis of sample labor provisions in United States and European Union free trade agreements, this paper shows that both approaches, albeit using different methods, aim primarily to improve *de jure* labor law and *de facto* enforcement of that law by government regulatory institutions. This paper argues that instead, labor provisions ought to be grounded in a supply chain approach. A supply chain approach shifts the focus from impacting *de jure* and *de facto* labor law as administered by the state though sanctions or dialogue, and towards context specific, experimental, and coordinated private and public regulatory interventions that operate in key export industries that are implicated in trading partners' supply chains. It does so in part by recognizing the potential regulatory power of consumer citizenship.

Keywords
consumer citizenship; governance; labor provisions; supply chains; trade

Issue
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1. Introduction

Labor provisions have become increasingly common in bilateral and regional free trade agreements (FTAs) across the globe. Utilizing varying mechanisms, these provisions seek to ensure that labor conditions in workplaces connected to global trade adequately respect international core labor rights and domestic labor law. Indeed, according to the International Labor Organization (ILO), it is now more unusual *not* to include labor provisions than to include them. The ILO (2016) states that as of December 2015 there were 76 trade agreements, covering 135 countries, that included labor provisions. Over half of these agreements were concluded post-2008, and over 80% of all FTAs that came into force since 2013 contain labor provisions (ILO, 2016, p. 1). This growth in labor rights conditionality and promotion has been paralleled in investment agreements, where 12 out of the 31 International Investment Agreements concluded in 2014 refer to the protection of labor rights, including ILO instruments (ILO, 2016, p. 2).

The United States (US) has been a pioneer in these efforts. Labor provisions have been a core element of its trade agenda since the 1980s, with the incorporation of labor conditionality in its Generalized System of Preferences scheme.[1] In the European Union (EU), labor provisions have been part of trade policy since 1995, playing a significantly greater role in 2008 with the CARIFORUM agreement (De Ville, Orbie, & Van den Putte, 2016, p. 22). The two approaches differ. The US approach is grounded in a state action-state sanctions model that requires a) *de jure* changes in labor law, and b) *de facto* enforcement of those laws, violation of which is subject to dispute settlement and sanctions. The EU's model, on the other hand, is grounded in a promotional or cooperative approach (De Ville et al., 2016, pp. 16–17), that aims to

[1] In 1987, Congress included labor conditionality in the Generalized Systems of Preferences program, requiring that the president determine that a recipient country has "taken steps" towards "affording internationally recognized workers rights" to its citizens. In its regional and bilateral free trade agreements, it first included a side agreement on labor in NAFTA, its free trade agreement with Mexico and Canada.

export norms, primarily through incentives and dialogic institutions (Orbie, 2011, p. 180). Its primary tools are thus not threat of sanctions, but rather social dialogue. Both of these models have come under intense scrutiny, however, by a number of scholars who argue that as a whole, they have been either ineffective at improving working conditions in trading partner countries, or are effective in only limited ways (Brown, 2015; Giumelli & Van Roozendaal, 2016; Orbie & Van den Putte, 2016; Van Roozendaal, 2015; Vogt, 2015). The proposed solutions to this problem vary, and some scholars recognize that there is no one size fits all solution and that converting labor provisions into real improvements in labor rights and standards is complex and dependent on a number of factors (Giumelli & Van Roozendaal, 2016). But many of the critiques, particularly from trade union activists, argue that the key to improving the effectiveness of these agreements is to strengthen the dispute settlement procedures and arm them with bigger and better sticks that are used with greater frequency, i.e. applying harsher sanctions.

This paper takes a different approach. It argues that both the US and the EU models as currently designed are limited in their ability to achieve sustainable *de jure* and *de facto* improvements in labor standards in their trading partner countries, but not primarily because of their weak sanctioning power. Instead, this paper argues that trade and labor chapters ought to adopt a supply chain governance approach. A supply chain governance approach shifts the current focus of labor chapters from broadly affecting *de jure* and *de facto* labor law through the use of sanctions or dialogue, towards context specific and coordinated private and public regulatory interventions that focus on improving labor rights and standards in key export industries. Such experimental regulatory tools are rooted in what some scholars describe as governance, or sometimes "new governance" approaches to regulation (Van Den Putte & Orbie, 2015). Just as firms have increasingly responded to consumer and civil society pressure to supplement inadequate state labor regulation through private supply chain governance, labor provisions should build on these social and market dynamics. That means developing governance based institutions that draw on tools of consumer citizenship to achieve their stated goals of improving labor conditions and respecting labor rights. In other words, to solve a supply chain problem, we need supply chain solutions.

2. The EU and US Legal Frameworks

Before proposing a new framework, we must first describe the extant models that it would replace, focusing on the examples of the US and EU. The EU and US use different tools to achieve their stated goals, reflecting in part differing philosophies. Both of these models are primarily rooted in a traditional approach to international relations and law that seeks to influence the *de jure* and *de facto* conduct of state actors, through means that Oehri (2015, pp. 734–735) describes as both "hierarchical", i.e. political and judicial enforcement, and "networked", i.e. assistance and collaboration.

2.1. The US Approach

The US approach to its labor chapters can be described as a state action-state sanctions model (Kolben, 2007). The primary aim and tools of such a model is to change a trading partner country's *de jure* labor laws, and to improve their *de facto* enforcement (Vogt, 2015). The US model has gone through several iterations over time, beginning with the NAFTA side agreement on labor cooperation, and evolving into a model adopted as per an agreement between the Bush administration and Congress on May 10, 2007, known generally as the May 10 agreement (Bolle, 2016). Each new generation of labor chapter has iteratively strengthened its requirements and enforcement provisions.

Here, we will use the Trans-Pacific Partnership agreement[2] (TPP) as our primary object of analysis to illustrate the US model. This is because it was the latest labor chapter that was negotiated, and even though the Trump administration subsequently withdrew from the TPP, it a) still serves as a model for what might come ahead, and b) reflects the policy assumptions that have informed US labor chapters heretofore. However, it also increasingly utilized dialogue and other non-sanctions methods that have been more typically associated with the EU model.

Labor provisions function in two stages: Pre-ratification, and post-ratification. During the pre-ratification stage, states will agree formally or informally to make specific changes to their labor laws as a condition for signing the FTA. According to some scholars, it is at this stage that labor provisions have been most effective in fostering real reform (Kim, 2012; Vogt, 2015). The TPP effectively formalized the pre-ratification improvement process by including three formal agreements, called Labour Consistency Plans (LCP). These were concluded with Vietnam, Malaysia, and Brunei. The Vietnam LCP focused on Vietnam's restrictions on independent grass roots unions, and required that Vietnam allow such unions to operate and self-govern. This would have brought Vietnam into compliance with ILO standards, as well as come closer into compliance with US expectations of how an industrial relations system should be organized. The Malaysia LCP called on Malaysia to ban the withholding of migrant worker passports, ban the payment of recruitment fees by workers, and reduce government discretion in registering trade unions. The Brunei LCP called on the country to, for example, implement nondiscrimination laws and enact a minimum wage.

The second way in which labor provisions function is during the post-ratification stage by utilizing the in-

[2] Trans-Pacific Partnership, signed on February 4, 2016, withdrawn by the US on January 23, 2017. Full text available at https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text

stitutions provided for in the labor provision. Here, the TPP adopted and slightly strengthened the labor chapters that came before it, requiring that the parties "adopt and maintain in its statutes and regulations the…[core labor] rights as stated in the ILO Declaration" (TPP, Art. 19.3.1),[3] and that "each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health" (TPP, Article 19.3.2).

The second leg of the US model is a non-derogation clause, which provides that, "no party shall fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement" (TPP, Art. 19.5.) This proviso attempts to incentivize adequate *de facto* enforcement of a party's labor laws, which of course are supposed to comply with the *de jure* requirements.

The third leg is the dispute settlement provision. While the labor chapter is subject to the general dispute settlement provisions of TPP, the parties must first engage in a consultative process, known as labor consultations (TPP, Art 19.15.2). If the parties cannot resolve the issue within sixty days through consultations or through other consultative mechanisms available to them, then the "requesting party" may begin general dispute settlement procedures (TPP, 19.15.8–10).

But the TPP also makes efforts to increase reliance on dialogue and cooperation that brings it closer to the EU model, which we will examine below, and that also opens the door to alternative and experimental mechanisms of supply chain governance. For example, as an effort to encourage dialogue over conflict, the TPP provides a mechanism outside of dispute settlement that is new for US FTA labor chapters known as "cooperative labour dialogue" (TPP, Art. 19.11). If a party chooses to initiate dialogue under this section on any matter arising out of the chapter, the parties *shall* commence dialogue within 30 days (TPP, 19.11.3) and the parties *shall* address all the issues in the request (TPP, Art. 19.11.5), "receiving and considering views of interested parties in the matter" (TPP, Art. 19.11.3). One way that the agreement provides that the parties may address the raised issues is through "independent verification of compliance or implementation by…entities, such as the ILO" (TPP, Art. 19.11.6(b)). This provision differs from earlier labor chapters in that the emphasis is on dialogue, and is not a necessary precursor to, or constituent element of, dispute settlement procedures.

The TPP also promotes and provides for various kinds of engagement and dialogue with the public. Article 19.14, for example, provides that the Labour Council shall "provide a means for receiving and considering the views of interested persons on matters related to this Chapter". It then also provides that each Party "shall establish or maintain, and consult, a national labor consultative or advisory or similar mechanism, for members of its public, including representatives of its labor and business organizations, to provide views on matters regarding this Chapter" (TPP, 19.14(2)).

The TPP also hints at an openness to methods beyond the traditional state action-state sanctions model in other ways. For example, one article calls for each party to "encourage enterprises to voluntarily adopt corporate social responsibility initiatives on labor issues that have been endorsed or are supported by that party" (TPP, Art. 19.7). This is a non-binding obligation that establishes a promotional framework for companies within each party's jurisdiction, whether it be lead firms or suppliers, to take action above and beyond what they might be legally obligated to do. Thus any pressure for companies to act or "self-regulate", would have to emanate from consumers and other stakeholders. We will return to that topic in Part 3, for it is key in developing a supply chain approach to trade and labor provisions.

2.2. The EU Approach

While the US model is primarily grounded in a state action-state sanctions approach with increasing reliance on dialogue, the EU approach might be termed at state action-social dialogue approach. That is, while the focus of the labor chapter is on the law and conduct of states, the means of improving labor standards in partner countries is through a "promotional" mechanism (Campling, Harrison, Richardson, & Smith, 2016). The EU is not alone in adopting a promotional strategy, for some 40% of trade agreements, according to the ILO use such an approach (Campling et al., 2016, p. 361).

The EU's model differs in several ways from the US model both in its general framework as well as its institutions. As we used the non-implemented TPP as an example of the US approach, we will use the implemented EU–Colombia and Peru Agreement,[4] to which Ecuador acceded in 2017, as our EU model (EU–Colombia).[5] One significant difference from the US model is that the labor provisions in EU agreements are found in a chapter entitled Trade and Sustainable Development that treats not just labor but also environmental issues. The agreement provides that, "each party commits to the promotion and effective implementation in its laws and practices" of the fundamental ILO conventions (EU–Colombia, Art. 269). To achieve this, the same article discusses the impor-

[3] Like in previous agreements, these rights are explicitly limited to those stated in the declaration, which is noted by a number of scholars to be an effort not to specifically link them to any requirements to adopt the correlated eight ILO conventions, of which the US has only ratified two (Brown, 2015, pp. 387–388).

[4] Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, EU–Colombia–Peru, on June 26, 2012, 2012 O.J. (L 354) 3.

[5] Although the EU has more variation in its agreements than does the US, most of the "new generation" FTAs follow a similar blueprint. (Campling et al., 2016, p. 363)

tance of "dialogue" (EU–Colombia, Art. 269.2), information exchange (EU–Colombia, Art. 269.4), and emphasizes that labor standards should not be used for protectionist ends (EU–Colombia, Art. 269.5).

Like the US model, the EU FTA has a non-derogation clause, whereby a) "no party shall encourage trade or investment by reducing the levels of protection afforded in its…labour laws" (EU–Colombia, Art. 277.1), and b) "a party shall not fail to effectively enforce…its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the parties" (EU–Colombia, Art. 277.2). This language is very similar to the US model. The main difference is that the US model as manifested in the TPP requires that the parties not derogate from enforcing ILO core labor rights or laws related to minimum wages, hours of work, and occupational health and safety (TPP, Art. 19.3-19.4), which the EU approach does not do.

While the substantive requirements are not very dissimilar, the institutional and enforcement mechanisms diverge quite a bit. The EU agreement provides for an institutional and monitoring mechanism that emphasizes dialogue and a collaborative relationship. First, it establishes a subcommittee on trade and sustainable development that oversees implementation of the trade and sustainability provision of the agreement (EU–Colombia, Art. 280.4). Its work is to be "based on dialogue, effective cooperation…and…mutually satisfactory solutions" (EU–Colombia, Art. 280.5). A primary aim of the subcommittee is to "promote transparency and public participation", and its output it to be shared publicly and be subject to public comment (EU–Colombia, Art. 280.7). Once a year, the subcommittee is mandated to meet and to hold a "dialogue with civil society organizations and the public at large" on matters related to trade and sustainability (EU–Colombia, Art. 282). To ensure representation and ongoing consultation and dialogue, a second cooperative and dialogue based institution is provided for, Domestic Advisory Groups (DAGs). These groups are meant to be mechanisms that provide ongoing input to their relevant governments (EU–Colombia, Art. 281). The DAGs are required to have a "balanced representation of representative organizations" (EU–Colombia, Art. 281), and all the stakeholders that are meant to constitute DAGs have a right to participate in the yearly public committee meeting (EU–Colombia, Art. 282.2). Like the US labor chapters, the EU promotes its cooperative approach in a separate section that "recognizes the importance of cooperation activities", delineates those areas, and explicitly notes the importance of certification schemes (EU–Colombia, Art. 286(g)) and of "good practices of corporate social responsibility" (EU–Colombia, Art. 286(j)).

The EU approach to disputes differs from the US approach primarily in that there is no resort to dispute settlement procedures at all. It is here that a number of commentators have been particularly critical of the EU (Bartels, 2017). Instead, if there is a conflict, as in the US model, there are to be consultations between the parties (EU–Colombia, Art. 283). If this does not resolve the matter, then the Committee may be convened (EU–Colombia, Art. 283.3), and the subcommittee "shall periodically publish reports" about the process and outcomes of the consultations (EU–Colombia, Art. 283.4). If the parties can't resolve the matter within 90 days (EU–Colombia, Art. 284.1), a group of experts is selected by the parties that after a delineated period of time issues a final report (EU–Colombia, Art. 285.2). A non-confidential version of this report must then be made public. Adherence and compliance basically relies on "naming and shaming", because the parties must be persuaded, educated, or perhaps pressured by the public after the report's release for there to be corrective action taken.

2.3. Comparison

As some scholars have argued, the differences between the US and EU models might be more in form than in substance (Van Den Putte & Orbie, 2015). Both, for the most part, rely on the ILO core labor standards as the benchmark standard, although the US in its TPP labor chapter created a minimalist requirement to enact laws related to non-core standards. Both the EU and US approaches emphasize dialogue and cooperation though various institutions and processes of stakeholder engagement, although the EU is more explicit in this regard, as shown above. While the US approach provides for sanctions in case a mutually agreeable solution cannot be achieved, the stick of sanctions can only be utilized after a consultative process. Finally, some have argued that while the US model does provide for the possibility of sanctions if there is found to be a violation of the labor chapter by an arbitration panel, the report issued by the group of experts in the EU model serves a similar function as the arbitration panel, but just without the big stick. (Van Den Putte & Orbie, 2015, pp. 269–270).

A number of commentators have argued that a core failure of both the EU and the US models is that the lack of sticks in the EU model (Bartels, 2017), and the lack of adequate utilization of those sticks in the US model has led to them being ineffective (Vogt, 2015). While the US has a more vigorous dispute settlement procedure on paper, it is argued, in fact it has been seldom used, and resolution of complaints has taken years (Van Roozendaal, 2015). Van Roozendaal (2015) notes that in Guatemala, for example, that despite the initiation of a complaints procedure against it and the risk of sanction, Guatemala has made little progress in reforming its labor laws to bring them into conformity with international law, or Guatemala's practices.[6] One reason for this, according to Van Roozendaal (2015, p. 21), is because of

[6] Guatemala was primarily accused in the complaint of violations of freedom of association rights under ILO Conventions 87 and 98, including violence against trade union leaders.

the weakness of the sanctions mechanism in the CAFTA–DR agreement, which capped fines at $15 million—not a sum that is likely to incentivize action on its own.

Other scholars, however, argue that the EU's dialogue based approach is in fact productive, leading to improved workers' rights outcomes in partner countries. Postnikov and Bastiaens (2014, pp. 927–928), for example, argue that civil society actors in trading partners learn from their EU counterparts how to pressure state actors to improve labor rights enforcement. The ILO has concluded that one of the more successful aspects of trade agreements has been the multi-stakeholder institutions, leading to increase public awareness of labor issues, enhanced social dialogue, and increased ability to put labor issues on the political agenda (ILO, 2016, pp. 39–40).

Another potential problem with both models is that they require the political will of governments to enforce them. Non-state actors do not have the right to bring complaints against, or start dialogue with, other governments; only the state parties themselves do.[7] Thus as Vogt (2015, p. 859) notes, given this fact, "the agreements will only be as useful as politicians desire them to be". Indeed, despite extreme abuses found in Jordan's garment industry, the US declined to trigger the dispute settlement process provided for in the US-Jordan FTA's labor chapter (Kolben, 2013). Adopting a similar rationalist argument, Van Roozendaal (2015) argues that enforcement is only likely to occur, not from a commitment to labor rights, but rather as a means of securing support for more FTAs in the future. To address this some scholars have argued that a third party complaint mechanism that eliminates government discretion might resolve this political will problem (Brown, 2015, p. 398). Indeed, according to the US Department of Labor, of the seven submissions that have been accepted for review under the trade and labor chapters since 2007, only one has gone to an arbitral panel, the Guatemala case, discussed above. And despite great hopes by trade unions and labor activists, the arbitral panel found in favor of Guatemala.[8]

3. A Supply Chain Approach to Trade and Labor Provisions

So given the somewhat grim and sometimes conflicting assessments of the effectiveness and achievements heretofore of labor provisions in FTAs, is there an alternative or perhaps complementary path forward? It is suggested here that there is. The argument is that trade and labor provisions should not focus uniquely on impacting *de jure* and *de facto* state action broadly construed, as they do now, but rather be tailored to ensure that the working conditions and core labor rights protections in each other's *supply chains* meet the expectations of each other's citizenry. As Campling et al. (2016, p. 366) have posed the question, should labor provisions "seek to promote overall improvements in labor standards in third countries, or focus only on key export industries"? The suggestion here is that they should emphasize the latter, drawing on the leverage of consumer citizens and the regulatory tools of governance and democratic experimentalism.

3.1. Consumer Citizenship

To understand how a supply chain approach to labor chapters could potentially be effective, we need to understand consumer citizenship. Consumer citizenship is the notion that consumers exercise and express political preferences through their consumptive choices (Johnston, 2008; Stolle & Micheletti, 2013) It is the "use of the market as an arena for politics in order to change institutional or market practices found to be ethically, environmentally, or politically objectionable" (Stolle & Micheletti, 2013, p. 39).[9] Consumer citizens make consumptive choices based on a set of ethical or other criteria that provides meaning for them. They can "buycott", meaning rewarding certain companies by favoring them in their purchases, and/or boycott, by punishing bad actors by refusing to buy from them and encouraging others to do the same (Stolle & Micheletti, 2013, p. 40).

According to Stolle and Michelleti (2013, p. 97), about 31% of all people report engaging in either buycotting, boycotting, or both. In Sweden, for example, approximately 60% of respondents report doing so, while by contrast in the US, some 28% report doing so (Stolle & Micheletti, 2013, p. 97). The dramatic rise in popularity of so called Fair Trade branded goods is one manifestation of this (Fairtrade International, 2016; Nicholls, 2010), and experimental research has suggested that in certain conditions, particularly for higher cost items, consumers are willing to pay more for clothing and grocery store items that are labeled as being made in better conditions (Hainmueller & Hiscox, 2015; Hainmueller, Hiscox, & Sequeira, 2015). Consumer demand for socially compliant goods is also reflected in the degree to which lead firms have implemented codes of conduct in their supply chains and have joined various multi-stakeholder initiatives (Locke, 2013). Over 9,000 companies have joined the Global Compact, for example, which requires a public commitment to its 10 principles, including a commitment to human rights and internationally recognized core labor rights and reporting on how those principles are embedded in their operations.[10] The recog-

[7] Instead, individuals may make submissions to the parties, which are then considered, and then may at the discretion of the parties be considered for review and then brought as a consultation or complaint against another party to the agreement.

[8] In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA–DR, final report of the panel, June 14, 2017.

[9] Scholars have alternatively termed this phenomenon political consumerism, (Stolle & Micheletti, 2013) ethical consumption (Eckhardt, Belk, & Devinney, 2010), and conscientious consumerism (Bartley, Koos, Samel, Setrini, & Summers, 2015).

[10] *The Global Compact, the Ten Principles of the UN Global Compact*, available at https://www.unglobalcompact.org/what-is-gc/mission/principles; also, the *UN Global Compact, Communication on Progress: An Introduction (2015)*, available at https://www.unglobalcompact.org/docs/communication_on_progress/Intro_to_COP.pdf

nition of consumer citizenship's potential as a political and market factor could be better utilized in labor provisions design.

3.2. Experimental Labor Provisions

If global citizen consumers are increasingly interested in purchasing goods that they can be ensured were made in conditions that meet their social preferences, then to capitalize on this, labor provisions should create institutions that target the supply chains to which consumer citizens have a direct connection. Bolstering the quality of a country's labor regulatory regime is a worthy but very ambitious project. But we have seen that labor provisions have not been particularly successful in achieving that goal. The reasons for domestic regulatory weakness are highly complex, and are contingent on a broad set of factors, including democratic functioning, economic development, and complex dimensions of rule of law. A labor rights clause grounded in state to state dialogue or even sanctions is a poor tool to address these highly complex problems. The aims and goals of labor provisions as they are currently conceived might thus be too broadly targeted to achieve concrete improvements in actual workplaces that are directly connected to the economies and citizens of the trading partner countries. This squanders an opportunity.

Accordingly, it is argued here that a better way is a tailored supply chain approach that draws on the insights of governance theory and democratic experimentalism (Kolben, 2015; Sabel & Zeitlin, 2008). Broadly speaking, governance and democratic experimentalism recognize the limitations of centralized legal decision making, and look to alternative mechanisms of decentered governance that promote deliberation, experimentation, benchmarking, transparency, and best practice to build effective, bottom up systems of governance (Black, 2008). In some forms, legal interventions are used to spark reflexive systems of self-regulation (Rogowski, 2013). Governance based regulatory approaches can be particularly well suited to developing countries, where regulatory capacity is already weak, and can be complemented by non-state regulatory tools.

Some scholars have argued that the EU's use of dialogue and cooperation is already complementary to a governance model (Campling et al., 2016; Van Den Putte & Orbie, 2015). In fact, the same could be said of the US regime, as well. It, too, attempts to generate dialogue and cooperation between the parties and provides for stakeholder engagement. And there is nothing in the US model that excludes the addition of a provision that would specify a set of institutions that would be oriented towards an experimentalist and governance approach. Campling et al. (2016, p. 360) claim that, "we are currently witnessing a period of experimentation whereby different models of labor provisions are operating in bilateral trade agreements between different trading partners. These models differ greatly in terms of scope of trade, scope of labor provisions, methods of promotion and methods of enforcement".

But the extent to which this is occurring is arguable. While there might be variety in methods and processes utilized in different agreements, by and large they all draw upon the same toolkit, which include effective enforcement and implementation of laws, adherence to international labor standards, non-derogation from those standards, and some forms of stakeholder engagement (ILO, 2016, p. 10). Instead, a truly experimental approach would be more micro based, and build on the cooperative and dialogue based instruments that have been developing in the various labor provisions models. For example, in the TPP, Article 19.7 calls for each party to "encourage enterprises to voluntarily adopt corporate social responsibility initiatives on labour issues that have been endorsed or are supported by that party". In the EU–Colombia Agreement (Art. 271.3), "the Parties agree to promote best business practices related to corporate social responsibility", and to "exchange information…related to the promotion…of good practices of corporate social responsibility…" (EU–Colombia, Art. 286(j)).

Policymakers should use the principles of Corporate Social Responsibility (CSR), dialogue and cooperation that are thinly specified in the agreements, and make them thick through actual institutions that can draw on the dynamics of consumer citizenship described earlier. The test for their effectiveness should not be whether there will be wholesale change in the politics and enforcement of labor law in a regime in which there is general and wholesale weak rule of law, but rather if there has been specific, measurable labor standards and rights improvements in the relevant supply chains.

But this is hardly to say one should just forget about the state. On the contrary, by focusing more on the micro level than labor provisions currently do, the broader goals of macro level improvements in labor law enforcement could also be achieved. How might this be accomplished? While a longer discussion of how these dynamics might operate is beyond the scope of this paper, scholars have begun investigating the ways that private regulation can interact with and sometimes reinforce or bolster state regulation (Amengual & Chirot, 2016; Dupper, Fenwick, & Hardy, 2016; Kolben, 2015). Moreover, it is also important to emphasize that the experimental approaches argued for here are not the same as CSR, soft law, or other purely private mechanisms. Rather, they draw on public and private tools of regulation with the explicit goal of strengthening public regulatory capacity. The task then is to draw on the insights of regulatory scholars and re-orient labor provisions towards harnessing the potential of private monitoring initiatives, while consciously directing them towards dialoguing with and bolstering state capacity.

Trade agreements provide a central leverage point to create these programs because of opportunities pre and post-ratification to implement them. Trade agree-

ments should condition their passage and tariff benefits on the implementation of experimental programs that have been shown to improve working conditions at the factory level.[11] Over time, tariff benefits and perhaps other restrictive rules such as rules of origin can be liberalized depending on the degree of implementation or success of the supply chain labor institutions provided for. One could imagine granting the power to a third party, such as the ILO, to determine if the institutions have been implemented as required in the treaty.

A supply chain approach relies on governance based tools of monitoring, benchmarking, transparency, and competition. Institutional design should be variable and context contingent. One proposed model is an integrative approach (Kolben, 2007). In contrast to some governance based models, it prioritizes regulatory capacity building, and thus seeks to create and draw upon dialogic modes of interaction between private and public actors with the goal of mutual learning and improving the capacity of public regulatory institutions. A more complex iteration of a supply chain oriented labor chapter institution might require mechanisms of information gathering on factory labor conditions that would be made publicly available. The program would be directed by a master governance council at the top, and multiple local councils composed of various stakeholders. The local councils that would decide how to implement the labor provision's overall monitoring directives and remedial goals (Kolben, 2007, p. 248). Factory level compliance information would be collected and shared by competing private and public actors, who might use varying methodologies to collect information and address problems.[12] The quality of those methodologies, as well as the performance of subsidiary councils, would in turn be evaluated by the master council or another supervisory body (Kolben, 2007, p. 250). The labor provision, for example, might call for a panel of experts to evaluate and compare the quality of different local monitoring initiatives, or delegate this task to the ILO.

A more simplified, and probably feasible, approach would be to require the implementation and funding of programs that already have strong track records, such as the Better Work program. Better Work found its start in a trade agreement between the US and Cambodia that required the implementation of an ILO-run program called Better Factories. Better Factories generated public information about conditions in Cambodian factories and made that information public, initially both to lead firms as well as to consumers and other stakeholders (Arnold & Shih, 2010; Kolben, 2004; Oka, 2009, 2010; Polaski, 2009; Rossi & Robertson, 2011). This transparency created an incentive for factories to improve regardless of state enforcement. Better Work has evolved to combine active consulting and advising of factories on labor practices, while also continuing its auditing and industry-wide transparency. It also brings multiple stakeholders into its governance, including governments, unions, and employers. (Kolben, 2015, p. 456) A number of scholars have found noted improvements in working conditions where Better Work has been implemented, including in Cambodia (Berik & Rodgers, 2010, pp. 74–75; Rossi, 2015). Better Work has also been innovative in interacting with the state with the aim of improving enforcement of labor law by labor ministries, as has been demonstrated in case studies of its programs in Jordan and Indonesia (Dupper et al., 2016; Kolben, 2015).

The benefit of building a program like Better Work into a trade agreement, as it was in Cambodia, and potentially into its tariff and rule structure, is that it creates incentives for trading partners to fund and implement the programs sufficiently and sustainably. By linking programs, like Better Work, or other iterations, to actual rewards and benefits in the trade agreement context, it ensures that the parties take the obligations seriously, and it provides more leverage to build in opportunities for dialogue and cooperation with labor ministries and the state. For example, one could create a graduated tariff and non-tariff barrier reduction scheme, which would grant benefits to partner countries in a graduated manner only if they implement in good faith the supply chain improvement institutions described earlier.

Some might argue that a more tailored approach, such as the one suggested here, might be too limited. But as I have tried to suggest, extant labor chapter approaches have been too broadly targeted with mixed results. A tailored and governance centered approach would potentially have more leverage by drawing on the power of consumer citizens, and improving labor conditions in supply chains could then have positive spillover effects on other factories and industries not implicated in those chains, although how this occurs requires more examination (Weil & Mallo, 2007). Further, a targeted approach might be considered to be more legitimate by trading partners. Rather than the labor chapter being viewed as a normative imposition by one state upon another, it would be seen as motivated by the demands and desires of consumer citizens grounded in the market, and facilitated by their governments. Others might also argue that given the mixed, if not poor, track record of private monitoring (Locke, 2013), that the approach proposed here might have no better prospects than the state oriented one that has been suggested to underperform, as well. But what is most novel about this approach is that it aims to integrate both public and private tools of enforcement that harness the influence of consumer citizens on lead firms. It is not a catchall solution, but rather part of the "mosaic" that constitutes transnational labor regulation (Trubek, Mosher, & Rothstein, 2000, p. 1189). Finally, given the limited willingness by states to trigger dispute settlement processes, what makes this solution

[11] Vogt (2015) has raised the question in his critiques of FTA labor provisions if they make concrete improvements at the workplace level.

[12] Alternatively, there could be one "super monitor" whose track record is well proven, such as the ILO. Although this has its own limitations (Kolben, 2007, p. 249).

any more useful? For one, dispute settlement would be diminished in importance, and thus states would have a smaller hand in the effective implementation of labor provisions. Second, power would be delegated to a neutral body such as the ILO to act as a super monitor, which would also decide if the labor chapter is being properly implemented, thus triggering tariff reductions.

4. Conclusion

This article has argued that the state action–state sanctions, and state action–social dialogue based models of the US and EU are limited in their ability to effect change in the labor conditions of trading partner countries. This has been true in practice, and I have suggested is a consequence of their design. Rather than aiming to change labor law enforcement in isolation from the factors that cause poor rule of law, this article has argued that labor provisions ought to be embedded in a supply chain approach that is informed by the legitimate drivers of trade and labor chapters, such as consumer citizenship, and that would satisfy expectations of fairness by domestic constituencies that would oppose trade liberalization where trading partners had low labor standards. Such an approach focuses not on exporting norms to trading partners by dialoguing or sanctioning poor labor law enforcement, nor on using sanctions, but instead on tailored and context specific interventions to improve labor standards in supply chains that are involved in international trade flows. In particular, it draws on regulatory innovations grounded in consumer citizenship and experimentalism that I have argued wield the potential to improve labor chapter effectiveness and improve the lives of workers in global supply chains.

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Conflict of Interests

The author declares no conflict of interests.

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Article

Advancing Respect for Labour Rights Globally through Public Procurement

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Abstract
Governments are mega-consumers of many manufactured products and services. As such they should in principle be able to influence workers' rights abroad via the terms of purchase contracts. Yet to date little attention has been paid to the potential of public procurement to promote respect for labour rights globally besides the international trade law framework. Building on a limited emerging scholarship and policy developments, this article addresses this gap. Section 2 considers legal definitions of public procurement and distinguishes primary and secondary aims of procurement under key international and regional procurement regimes. This highlights that, although historically used to advance labour rights domestically, these regimes have restricted public buyers' scope to advance labour rights beyond national borders. Section 3 explores new international policy frameworks on responsible global value chains and supply chains which by contrast appear to augur the greater use of public procurement to promote labour rights globally in future. Section 4 argues, supported by analysis of the limited examples available, that public buying has the potential to positively influence enjoyment of labour rights in practice. Concluding, Section 5 reflects on what the more specific impacts of public procurement in this context may be, and how public buying should complement other mechanisms for improving labour conditions across supply chains, such as social clauses in trade agreements. Finally, we outline issues for further research and the future policy agenda.

Keywords
European Union; labour rights; public procurement; social clauses; sustainable development goals; UNCITRAL; United Nations; United Nations Guiding Principles on Business and Human Rights; WTO

Issue
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1. Introduction

Over recent years a range of different tools and mechanisms to improve respect for labour rights in global supply chains have been considered. Much attention has been paid, for instance, to measures to encourage corporate social responsibility, especially by transnational corporations. Likewise social clauses in trade agreements have attracted increasing interest (International Labour Organization [ILO], 2015; Orbie, Gistelinck, & Kerremans, 2009).

Public purchasing worldwide has a value of approximately €1,000 billion per year and accounts for 12% of GDP, on average across OECD countries (OECD, 2017a). Governments are mega-consumers of many manufactured products and certain types of services. In principle, therefore, they should be able to influence working conditions by exercising leverage over their immediate suppliers and, through supply chain requirements, in turn over other companies involved in the production process. Yet to date little scholarly attention has been paid to the potential of public procurement to promote respect for labour rights globally.

In this article we continue to address this gap (Martin-Ortega, Outhwaite, & Rook, 2015; Methven O'Brien &

Martin-Ortega, 2017; Methven O'Brien, Mehra, & Vander Meulen, 2016; Outhwaite & Martin-Ortega, 2016; see also Barnard, 2013; De Schutter, 2014; Northern Ireland Human Rights Commission, 2013; Stumberg et al., 2014) with a focus on public procurement's place in the international trade regime and its potential role as a complement to social clauses in trade agreements. Section 2 considers legal definitions of public procurement and distinguishes primary and secondary aims of procurement under key international and regional procurement regimes, namely the WTO Plurilateral Agreement on Government Procurement (GPA), the Model Law on Public Procurement of the United Nations Commission on International Trade Law (UNCITRAL) and the European Union's procurement Directives. In doing so, it highlights that, whereas public procurement has often been used historically to advance labour rights domestically, these frameworks currently restrict public buyers' scope to advance labour rights within and beyond national borders.

Section 3 explores recent international policy developments relating to responsible supply chains. These, by contrast, appear to augur the greater use of public procurement to promote respect for labour rights, globally. Section 4 provides examples of cases that suggest that harnessing public buying towards this goal can be effective in practice. Based on this discussion, Section 5 reflects on what the various impacts of using public procurement as a mechanism for promoting labour rights globally may be, and how it may serve as a complement to other efforts to improve labour conditions across supply chains, such as labour clauses in trade agreements. Finally, we outline issues for further research and the future policy agenda.

Throughout this article we differentiate labour rights, being workers' rights as established in national and international law; labour or/working conditions, as the factual conditions under which goods are produced; and human rights, as defined by international human rights instruments and which include the rights recognised by the ILO's Declaration on Fundamental Principles and Rights at Work ("Core Labour Standards") but not all labour rights as just defined. Similarly, we refer to procurement and labour rights, rather than social clauses in procurement contracts, or the language of labour clauses used by ILO Convention No. 94 in order to distinguish between the use of procurement to advance domestic social policies and the use of public procurement to promote respect for labour rights beyond national borders.

2. Linking Public Procurement and Labour Rights: Opportunities and Limitations

2.1. Defining Procurement

Public procurement refers to the purchase by the public sector of the goods and services it needs to carry out its functions (Arrowsmith & Kunzlik, 2009, p. 9). Such goods and services range widely, from infrastructure projects and the acquisition of complex weapon systems, to the commissioning of essential public services in the health and social care sector and the purchase of common manufactured or processed goods such as stationery, furniture, uniforms, personal electronic items and foodstuffs.

In legal terms, procurement comprises three main phases: procurement planning; the procurement process; and contract administration or management. During procurement planning, the specific requirements of the public body in question are established and publicised, including via: technical specifications for the product or service; the award criteria which will be used to select the winning bid; and contract performance clauses which will be included in the future contract. In the second phase, the public buyer undertakes a tender procedure to solicit bids from potential suppliers to fulfil the given contract. One supplier is then selected following a comparative evaluation of bids received in line with the pre-established award criteria. After this, contractual terms and conditions are drafted, including specific performance conditions. The third step aims to secure effective contractual performance (Trepte, 2006).

Government purchases falling within the scope of domestic public procurement regimes may be subject, in addition, to relevant areas of general law (for example, administrative, contract, environmental and anti-corruption laws). Depending on their monetary value, subject matter and obligations entered into by the state, they may also be subject to international rules (for instance, under the WTO GPA), regional regimes (such as the European Union's procurement Directives) and international finance instruments (Trepte, 2006, p. 42).

2.2. Primary and Secondary Aims of Public Buying

Whether national, supranational or international, procurement rules generally define the principal policy objectives or "primary" aims of public buying as including: a) the achievement of value for money ("efficiency"); b) non-discrimination between tenderers; and c) open competition. However, governments have sometimes sought to use public purchasing to promote "secondary" policy aims, that is, social, environmental or other societal objectives that are not necessarily connected with the procurement's functional objective (Arrowsmith & Kunzlik, 2009, p. 9).

As early as 1936 the ILO considered establishing minimum standards for those directly employed in public works and producing goods and services for the public sector (ILO, 2008, p. 2). In 1949 it adopted the Labour Clauses (Public Contracts) Convention (No. 94), followed and supplemented by Recommendation No. 84. The stated rationale for these instruments has been that public buyers should seek to ensure the observance of socially acceptable labour conditions in relation to work performed on the public's account (ILO, 2008, p. 5). The temptation to economise on the cost of public works by reducing labour protections should be resisted and gov-

ernments "should not be seen as entering into contracts involving the employment of workers under conditions below a certain level of social protection, but on the contrary, as setting an example by acting as model employers" (ILO, 2008, p. 1). Under these ILO instruments the required level of labour protection is set by reference to pre-existing national standards, while the scope of government obligations under them is domestic. Their main goal is therefore to ensure consistent conditions for workers in a given country, whether labouring in the service of the public or private sector, albeit they may indirectly tend to promote labour rights elsewhere by discouraging "race to the bottom" dynamics.

Likewise, initiatives by individual governments linking public procurement and labour protections have traditionally focused on national constituencies, in particular marginalised or disadvantaged groups, aiming to secure their integration into the domestic labour market (McCrudden, 2007), typically through so-called social clauses. Such linkages have hence generally been referred to as social procurement. "Green" procurement, focused on reducing the environmental impacts of public buying, rose in prominence during the 1990s. The Agenda 21 plan resulting from the 1992 Rio Earth Summit, for example, called for governments to exercise environmental leadership through public purchasing (para. 4.23), giving rise to further green procurement initiatives by international organisations such as the OECD and United Nations (McCrudden, 2007, p. 390; Perera, Chowdhury, & Goswami, 2007).

In this context, the terminology of "social" and "green" procurement is gradually giving way to that of "sustainable procurement", encompassing both these dimensions (Steurer, Berger, Konrad, & Martinuzzi, 2007). D'Hollander and Marx (2014, p. 5) thus refer to sustainable public procurement "as a broad concept covering a variety of practices that aim to integrate social and environmental criteria in purchasing decisions of government actors". Such a notion is reflected, for instance, in the International Standards Organisation's [ISO] new Sustainable Procurement Guidance (ISO, 2017). This defines sustainable procurement as purchasing decisions that meet an organisation's needs in a way that benefits them, society and the environment and ensures that an organisation's suppliers behave ethically, that the products and services purchased are sustainable and that purchasing decisions help to address social, economic and environmental issues as well as any risks to human rights (ISO, 2017).

Yet while the beneficiaries of environmental measures integrated into public buying may be globally dispersed, "social" procurement as historically practiced has as noted focused on participants in local labour markets, marking a clear distinction from the scope and intention of social clauses in trade agreements. This indeed explains the more recent emergence of "socially responsible", "ethical" or "fair" public procurement initiatives seeking to address labour conditions beyond the borders of the purchasing country by integrating requirements addressing respect for the rights of workers in countries of production (European Fair Trade Association, 2010; Swedwatch, 2016, p. 9).

2.3. Procurement Law Regimes: Limitations and Opportunities

Given their market weight, public buyers should in principle be able to advance respect for labour rights globally through such initiatives. However, procurement law has often operated to curtail this influence in practice. In mediating between procurement law's primary aims—efficiency, non-discrimination and open competition, as earlier noted—and "secondary" policy objectives such as respect for labour rights, procurement law regimes traditionally have favoured the former. This is evident, for example, in the lack of interest states, have shown in applying the 1949 ILO Convention. "Modern" public procurement has rather prioritised competition even if "promoting competition at all costs among potential contractors, go[es] against the Convention's aim of requiring the application by all bidders of the best locally established working conditions" (ILO, 2008, p. xiii). Hence attempts to advance labour rights via public procurement beyond state borders have encountered challenges somewhat similar to those faced by social clauses in trade agreements, that is, legal resistance on grounds of market distortion and protectionism (Hanley, 2002; McCrudden, 2007, Chapters 4, 11; McCrudden & Gross, 2006). In one salient example, the European Union challenged 1996 State of Massachusetts (United States) legislation (Act Regulating State Contracts with Companies Doing Business with or in Burma [Myanmar]) which restricted the ability of public bodies to contract with companies doing business in Myanmar under the WTO GPA as discriminatory against non-United States companies (Fitzgerald, 2001; Martin-Ortega & Eroglu, 2008).

Over recent years, a trend towards greater accommodation of secondary objectives across procurement law regimes can be seen as emerging. As indicated by the following analysis, on the other hand, relevant legal developments have remained focused on social considerations within rather than beyond national borders.

The WTO GPA is a pluri-lateral agreement applying only to WTO members who have chosen to accede to it. At the time of writing this group comprised 19 parties covering 47 WTO members (the European Union and its member states constitute one party). Another 29 WTO members and four international organisations participate in the GPA Committee as observers, of which ten members are in the process of GPA accession (WTO, 2017). The GPA's stated objectives are greater liberalisation and expansion of international trade; non-discrimination (that is, measures prepared, adopted or applied to public procurement must not afford greater protection to domestic suppliers, goods or services, or discriminate against foreign suppliers, goods, or services); integrity and pre-

dictability, to ensure efficient and effective management of public resources; and transparency, impartiality, avoidance of conflicts of interest and corruption.

Because of these principles the original GPA was restrictive of states' ability to advance secondary objectives via public procurement (Arrowsmith & Anderson, 2011). A Revised GPA text adopted in 2012 exhibits greater tolerance of environmental and social policy linkages. First, it permits derogations from its general regime where "necessary to protect human, animal or plant life or health" (Art. III.2.b). Second, it allows measures intended to advance environmental protection (Art. X.6 authorises technical specifications which "promote the conservation of natural resources or protect the environment," while the indicative list of evaluation criteria in Art. X.9 includes environmental characteristics). Third, the scope of the revised Agreement excludes "procurement conducted for the specific purpose of providing international assistance, including development aid" (Art. II.3). While measures to advance respect for labour rights are not explicitly mentioned, it has been suggested that they may permitted so long as they accord with other provisions of the Agreement (Thrasher, 2014). This regime applies only to signatories of the GPA which are, for the most part, OECD countries. Accordingly, other countries would be free to put in place procurement regimes which are more flexible regarding the achievement of social goals (see De Schutter's argument regarding procurement schemes to further food security and the right to food in De Schutter, 2014, pp. 17, 19).

UNCITRAL is an organ of the United Nations General Assembly established to promote the harmonisation and unification of international trade. The UNCITRAL Model Law on Public Procurement aims to encourage the uniform development of national procurement laws globally in line with the principles of competition guiding the WTO (Arrowsmith & Nicholas, 2009; Nicholas, 2009, 2011) while also helping states to achieve "value for money" and avoid abuses in the procurement process (for instance, corruption). It informs the public procurement regimes of 23 states, the Organisation of Security and Cooperation in Europe, the World Bank, the African, Asian and Inter-American Development Banks and the European Bank for Reconstruction and Development.

In its Preamble, the Model Law sets out six main objectives: economy and efficiency; international trade; competition; fair and equitable treatment; integrity, fairness, and public confidence in the procurement process; and transparency. At the same time the Model Law allows for the integration of social and economic criteria, such as promoting accessibility of procurement to small and medium sized enterprises (SMEs) or disadvantaged groups, environmental criteria and ethical qualification requirements, into procurement processes (Art. 9.2.b). A recently issued Guide to Enactment accompanying the 2011 version of the Model Law, which superseded UNICTRAL's 1994 Model Law, notes that human rights can feature as social aspects of sustainable procurement, and can be addressed through socio-economic evaluation criteria (Art. 11 and United Nations Commission for International Trade, 2014, pp. 78–82, 85–89). It also provides that a Public Procurement Agency or similar body can be tasked to review procurement proceedings to ensure that procuring entities have respected applicable laws (United Nations Commission for International Trade, 2014, pp. 21–22). Though this provision was drafted with the intention of referring to procurement law, it might be given broader application so as to extend to human rights laws, especially where they are incorporated into domestic law or where human rights receive constitutional protection.

In the European Union, the award of public contracts above a certain monetary value by Member State authorities is required to comply with the principles of the Treaty on the Functioning of the European Union (TFEU) and the "four freedoms" guaranteed by the European Union's legal regime, namely, free movement of goods, services, capital, and people within European Union boundaries as well as principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Hence, public procurement may limit cross-border flows in these four areas only if restrictions are imposed in pursuit of the public interest while also meeting certain other conditions (Court of Justice of the European Union [CJEU], *Reyners v. Belgium*, 1974).

Relevant government purchases must also comply with the European Union's specialised procurement regime. Currently this includes Directive 2014/24 [the Public Sector Directive] and Directive 2014/25 which regulates procurement by entities operating in the water, energy, transport and postal services sector [the Utilities Directive]. The European Union's previous procurement Directives (Directives 2004/18 and 2004/17) were particularly restrictive of public buyers' freedom to refer to secondary considerations. Still, over the ten years leading up to adoption of the 2014 Directives, public buyers sought increased flexibility, while European Commission policy also evolved in this direction, as reflected in several rounds of interpretative guidance (European Commission, 2004, 2010). As regards the CJEU, though it had addressed secondary considerations already prior to the 2004 Directives (*Commission of the European Communities v. French Republic* [*Nord-Pas de Calais*], 2000; *Concordia Bus Finland v. Helsingin kaupunki & HKL-Bussiliikenne*, 2002; *Gebroeders Beentjes BV v. The Netherlands*, 1988), subsequent decisions reflect persisting tensions between primary and secondary (mainly environmental) criteria under the 2004 regime. In Wienstrom (*EVN AG and Wienstrom GmbH v. Republic of Austria*, 2003), for example, it was held lawful to use an ecological award criterion and to establish an award criterion that is related to the production method of the purchased product, as long as such a criterion is relevant for the contract and is expressly linked to its subject matter. *Evropaïki Dynamiki v. European Environment Agency*

(2010) considered whether a public purchaser could, under the 2004 Directive, refer to whether bidders had a general environmental policy as part of award criteria. While the court held that they could, it noted that a buying authority's discretion in assessing bids was restricted. Though a purchaser could refer to third party certifications as evidence of a supplier's environmental standards, it could not require certifications as such. In the Max Havelaar case (*European Commission v. The Netherlands*, 2012) it was held that award criteria may concern aspects of the production process that do not materially alter the final product, so that fair trade label requirements can constitute elements of contract performance under public contracts.

The 2014 Directives were intended to modernise public procurement in the European Union by increasing the efficiency of public spending, facilitating the participation of SMEs and enabling public bodies to use procurement to further common societal goals, including sustainability. Thus the 2014 Public Sector Directive draws links directly to sustainable development both in its recitals and provisions (Recitals 2, 41, 47, 91, 93, 95, 96, 123 and Arts. 2(22), 18(2), 42(3)(a), 43, 62, 68, 70). While public authorities must still ensure that they are linked to the subject matter of the procurement, there is now greater flexibility to integrate environmental and social criteria, for instance, with reference to fair trade labels (Outhwaite & Martin-Ortega, 2016). In addition, the Directive requires member states to take appropriate steps to ensure that in the performance of public contracts, economic operators comply with applicable social, environmental and labour law obligations (art. 18.2), the latter being defined with reference to the ILO's Core Labour Standards (Annex 10). It also provides for exclusion of economic operators from relevant tenders following convictions for offences including child labour or human trafficking (Art. 57(1)(f)). On the other hand, states are still forbidden from requiring economic operators to commit to corporate social responsibility or other sustainability measures that cannot be "linked" to the specific goods or services purchased (Outhwaite & Martin-Ortega, 2016). This would seem to exclude, for instance, the use of public buying to promote corporate non-financial reporting or companies' uptake of human rights due diligence as called for by the 2011 UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises (Methven O'Brien et al., 2016). As this analysis shows, even if the present European Union regime is becoming more enabling of social procurement, the scope it permits to use public tenders to advance respect for labour rights globally remains limited, as it does under the WTO GPA. Whilst tensions within the European Union procurement law regime, in particular between their primary and secondary aims, and between procurement laws and labour protections remain (*Bundesdruckerei GmbH v. Stadt Dortmund*, 2014; *Dirk Rüffert v. Land Niedersachsen*, 2008; *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, 2015), recent developments appear to suggest a policy shift is underway that may alter this position, as discussed in the following section.

3. Linking Public Procurement and Labour Rights Globally: New Policy Frameworks

A wave of initiatives by global actors have identified a transition to "responsible" or "sustainable" global value chains as critical to the achievement of sustainable development, inclusive global growth and decent work. Such initiatives strongly emphasise the need for "responsible business conduct" in achieving these goals, that is, business conduct "contributing positively to economic, environmental and social progress with a view to achieving sustainable development" and avoiding and addressing adverse impacts in value chains, be these produced by their own activities or through their business relationships (OECD, 2017b). In 2015, addressing "Responsible Supply Chains", the G7 Leaders' Declaration committed to strive "for better application of internationally recognized labour, social and environmental standards, principles and commitments (in particular UN, OECD, ILO and applicable environmental agreements) in global supply chains". It further recognised that governments and business have a joint responsibility "to foster sustainable supply chains and encourage best practices", calling for tools to support public procurers in meeting social and environmental commitments (White House, 2015). Referring to "Sustainable Global Supply Chains", the 2017 G20 Leaders' Declaration undertook to "work towards establishing adequate policy frameworks in our countries" to "foster…the implementation of labour, social and environmental standards and human rights in line with internationally recognised frameworks" (G20, 2017). The ILO recently approved its Revised Programme of Action 2017–21 regarding Decent Work in Global Supply Chains with the aim of assisting ILO member States to make "significant strides in reducing the governance gaps and decent work deficits in global supply chains, thereby strengthening the role of supply chains as engines of inclusive and sustainable growth" (ILO, 2017, para. 6). In the European context, the "responsible management of global supply chains" has been identified as essential "to align trade policy with European values" (European Union Trade for All (2015) strategy, 4.2.3.) There is a thus an increased focus on integrating respect for human rights, including ILO Core Labour Standards, into supply chain standards and management. For the OECD, "responsible business conduct" implies in particular that companies undertake human rights due diligence as defined by the UN Guiding Principles on Business and Human Rights (UNGPs). In turn, the UNGPs indicate that companies' responsibility to respect human rights extends beyond their own operations to the activities of business partners, including suppliers and subcontractors, wherever they are located (Martin-Ortega, 2014; Methven O'Brien & Dhanarajan, 2016).

Even if aimed primarily at business, at the same time new supply chain standards inevitably turn the spotlight on government consumption. Besides the corporate "responsibility to respect" human rights, the UNGPs affirm a "State duty to protect" that extends to interactions between states and businesses of a commercial nature. UNGP 1 provides that "States shall take appropriate steps to prevent, investigate, punish and redress [business-related human rights abuses] through effective policies, legislation, regulation and adjudication". As UNGP 6 notes, this entails that states should promote awareness and respect for human rights by businesses in the context of public procurement, while UNGP 5 recalls that, where states privatise or "contract out" public services, they retain their human rights obligations and must "exercise adequate oversight" to ensure these are met, including by ensuring that contracts or enabling legislation communicate the state's expectation that service providers will respect the human rights of service users. UNGP 4 meanwhile provides that states should, where appropriate, require state-owned or controlled enterprises to exercise human rights due diligence, implicitly encompassing their purchasing function, and UNGP 8 calls for "policy coherence" to be achieved by alignment of goals and practice across governmental departments, agencies and institutions.

Adopted by UN Member States in 2015, the 2030 Agenda for Sustainable Development also sets new objectives on public procurement as part of the drive towards sustainable production and consumption and more inclusive economies. Sustainable Development Goal 12.7 calls on all countries to promote sustainable public procurement practices and to implement sustainable public procurement policies and action plans. Most recently, following in the wake of analysis and advocacy by scholars and civil society practitioners (International Learning Lab on Public Procurement and Human Rights, n.d.; Martin-Ortega & Davies, 2017; Methven O'Brien et al., 2016), the OECD has also acknowledged links between public procurement, its responsible business agenda and sustainable development (OECD, 2017), while the ISO's Sustainable Procurement Guidance (ISO, 2017) as mentioned above urges the integration of human rights as well as green and other considerations across public and private supply chain management.

4. Linking Public Procurement and Labour Rights Globally: Emerging Practices

Beyond recognition of connections between public purchasing and labour rights globally at the level of high policy, examples are also emerging of links made by specific national regulatory initiatives as well as successes by individual public bodies in using procurement to advance respect for workers' rights in practice. This section analyses some of these examples. Full analysis of the extent of relevant practice and its impacts, on the other hand, is not yet possible given the shortage of accessible data relating to most public contracts (Open Contracting Partnership, 2017) and while survey data still scarcely touch on social, labour or human rights issues (United Nations Environment Programme, 2017).

In the United States, some measures intended to combat labour abuses abroad have been in place for some time. The 1936 Walsh-Healey Act for instance prohibits federal agencies from purchasing sweatshop goods for contracts of a value greater than $10,000. Sweatshop labour is defined with respect to compliance in the country of production with applicable rules regarding minimum wages, maximum working hours, child and convict labour, and health and safety. Yet, ironically, imported goods were exempt, so that the Act applied only to goods produced in the United States, Puerto Rico, and the Virgin Islands (Stumberg et al., 2014).

As a more contemporary initiative, provisions were introduced into the Federal Acquisitions Act (Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor) in 1999 to prohibit forced child labour in contracts sourced abroad beyond a "micro" purchase threshold. In support of this measure the U.S. Department of Labor is required to prepare a "List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor". In their turn contractors must certify that they either a) will not sell a product on the list or b) they have made a good-faith effort to determine whether forced child labour was used (Stumberg et al., 2014).

In 2015, in addition, by inserting the Combating Trafficking in Persons Section into the Federal Acquisition Regulation, a series of provisions were introduced to prohibit federal government contractors and subcontractors from supporting or engaging in human trafficking, which is defined to include, amongst other things, forced labour and fraudulent or coercive recruitment or employment practices. Contractors are required to report any credible allegations of trafficking to the contracting agency's Inspector General and must cooperate with government investigations. For contracts for goods (excluding commercially available off-the-shelf items) or services sourced outside of the United States that exceed $500,000, the Government also requires that contracting businesses prepare compliance plans detailing due diligence procedures to assess, prevent, mitigate, and remediate any suspected involvement (Methven O'Brien et al., 2016).

Several other initiatives pursue similar goals at state and local level in the United States by leveraging the collective purchasing power of government buyers (see Methven O'Brien et al., 2016). The Sweatfree Purchasing Consortium (SPC) comprises 14 U.S. cities and 3 U.S. states that seek to ensure that the apparel products they buy are made without sweatshop labour (Sweatfree Purchasing Consortium, 2017). The municipal government of San Francisco, for example, requires its apparel suppliers to comply with laws in the country of production as well as ILO Core Labour Standards (Sweatfree Purchasing Consortium, 2014a). San Francisco has, in the past, retained

the Worker Rights Consortium (an independent labour rights monitoring organisation) to survey its apparel supply chains and report on contractors' compliance with its code (Sweatfree Purchasing Consortium, 2014a). Another example is the City of Madison, Wisconsin, which released a request for proposals for uniforms for its police, fire, and metro workers in 2014 (Sweatfree Purchasing Consortium, 2014b). Madison required all bidders to disclose information on factory location, wages, and hours, for a minimum of 60% of factories to be used in production of goods for the contract. The awarded contractor was required to increase this disclosure by 10% each year and provide compliance action plans from all manufacturers producing goods for the contract above a certain value threshold. Finally, the SPC has created an online database (Sweatfree LinkUp!) where information about apparel vendors, manufacturers, and factories in government supply chains is publically available. The information is sourced from apparel vendors and manufacturers themselves, and in some cases government entities that require supply chain disclosures as part of the procurement process. A similar initiative in Europe addresses public purchasing of electronics hardware. Electronics Watch supports public bodies seeking to address human rights abuses in their ICT supply chains and provides model contract conditions for inclusion in procurement agreements. The Electronics Watch Contract conditions are designed to meet primary requirements under procurement laws while also including a Code of Labour Practices for suppliers containing human rights and labour safeguards, and encouraging suppliers to disclose factory locations to purchasers so that labour conditions can be monitored (Electronics Watch, n.d.).

Although it is not generally applicable to public authorities, the UK's Modern Slavery Act (2015) has nonetheless provided a strong impulse for public buyers to review forced labour and human trafficking risks in their supply chains. In particular, Higher Education Institutions are subject to the reporting obligation established by the Act in its Transparency in Supply Chains section. Hence UK universities have had to produce statements for the financial year 2015–2016 addressing their efforts to identify, prevent and mitigate modern slavery and human trafficking in their supply chains (Martin-Ortega, 2016; Martin-Ortega & Islam, 2017).

Also in the UK, individual contracting authorities, directly or through collaboration, are inserting contract clauses in their contracts to demand due diligence in supply chains from suppliers. For example, since 2016 all UK universities can also rely on a new agreement for the purchase of Apple devices using the iOS operating system. This agreement includes a contract clause allowing public buyers to demand respect for labour rights by suppliers (as defined in an attached Code of Labour Practices) and requiring suppliers to adopt transparent supply chain management practices and respond to reports of labour rights abuses. The agreement and clauses are devised with reference to templates provided by Electronics Watch. In 2016, too, the London Universities Purchasing Consortium included a similar set of contract clauses in its framework agreement on cleaning and security services. Transport for London (TfL) is another example of an individual public purchaser pursuing measures to extend respect for labour rights. It has adopted an Ethical Sourcing Policy, linked to the Ethical Trading Initiative's Base Code, according to which it aims to improve labour conditions in the supply chain of relevant product categories or specific products. Suppliers under contracts that include TfL's ethical sourcing provisions are also required to monitor conditions via third party audits and provide TfL with results, while TfL undertakes to collaborate with suppliers to remedy breaches (TfL, 2017).

According to the Netherlands' National Action Plan (NAP) to implement the UNGPs, its national sustainable procurement policy requires companies supplying goods and services to public bodies to respect human rights as part of the "social conditions" applicable to all central government European Union contract award procedures since 1 January 2013 (Dutch Ministry of Foreign Affairs, 2014). Suppliers may meet the social conditions by a variety of means, such as participating in a multi-stakeholder supply chain initiative or undertaking risk analysis. PIANOo, the government's tendering expertise centre, has published a step-by-step guide addressing how to meet the social conditions at each phase of the tender-procedure (PIANOo, 2017). In this context, the Dutch NAP commits to evaluate the social conditions for consistency with the OECD Guidelines for Multinational Enterprises and UNGPs, and their potential extension to municipal, provincial, and water authorities.

Sweden's County Councils are responsible for healthcare, public transportation and regional planning, together accounting for about €13 billion per year through procurement (Hemstrom, 2016). Since 2010, the County Councils have collaborated in efforts to promote respect for labour rights, including using a common code of conduct for suppliers, follow-up questions to review suppliers' compliance with the code, and targeted factory audits conducted either by the County Councils themselves or by an independent party. In 2012 the Councils established a formalised structure with a National Coordinator for social responsibility, Steering Committee, National Coordinator, Expert Group, and point of contact at each county council. The Councils have prioritised seven categories of goods for social criteria in public procurement, including surgical instruments worth approximately €267,000 annually.

As a final example, in Norway public authorities are obliged to advance contract clauses on wages and decent working conditions when purchasing services such as construction, facility management, and cleaning services. Public authorities are also required to follow up with suppliers on performance of such clauses, for instance, by requiring the supplier to make a self-declaration (Methven O'Brien et al., 2016, p. 25).

As regards the impacts of such measures, published evidence is limited. A 2015 report published by the NGO Swedwatch described an investigation into the effects on working conditions in factories producing surgical instruments in Pakistan of the above-mentioned measures introduced by Sweden's County Councils. This study found a substantial reduction in serious labour rights abuses, including child labour, in workshops producing for the County Councils while labour conditions in neighbouring workshops showed no such improvement over the same period (Swedwatch & British Medical Association, 2015). In 2016 Electronics Watch reported that conditions in factories producing for Dell had improved as a result of an intervention by the Swedish County Councils demanding action to eliminate labour abuses including forced student labour, earlier revealed to be taking place there (Electronics Watch, 2016). Similarly, the British Medical Association found in 2016 that its "naming and shaming" efforts had triggered changes in the procurement of surgical gloves and other items whose production had been documented as violating workers' basic labour rights in the British health sector (British Medical Association, 2016, 2017). On the other hand, two recent studies reviewing the impact of the policy requiring the application "social conditions" to public tenders in the Netherlands, mentioned above, reached less optimistic assessments. One found the conditions were, in practice, rarely applied to relevant tenders (SOMO, 2014) while the other found that, even if applied during this phase of the procurement, whether suppliers fulfilled the required terms during the performance of the contract was not monitored or verified (PIANOo, 2014).

These examples show how certain public buyers are developing practices which aim to improve respect for labour rights in the lower tiers of the supply chain and are driving suppliers to improve their practices. By passing labour clauses down the value chain, suppliers to governments have at least in some cases had a proven impact in improving "ultimate" conditions (Van den Putte, 2017).

5. Conclusion

The cases explored in the previous section offer some encouraging signs. They suggest that procurement regimes may be starting to exhibit a greater responsiveness to concerns to facilitate the use of public buying to advance labour rights protections globally. They demonstrate an appetite on the part of at least some governments and buyers at subsidiary levels of the state to drive respect for labour rights worldwide. If appropriately formulated and communicated, suppliers can respond positively to demands from public buyers for products and services whose supply chains respect Core Labour Standards, with positive impact on ultimate working conditions of those working in its lower tiers. In combination, these results suggest that public procurement should be viewed as a potentially important instrument to increase respect for labour standards worldwide. A small set of examples nonetheless remains an incomplete basis for firm conclusions about the scope for public procurement's systematic use to drive respect for labour rights globally. Indeed, a number of obstacles stand in the way of such an assessment. As discussed, accessible data is generally lacking as regards the content of public contracts in most countries and comprehensive public procurement surveys still generate scant information on social, labour or human rights issues. Almost no studies to date have attempted to document or measure the effects of socially responsible procurement practices, whether intermediate or ultimate, across jurisdictions. Many sustainable procurement practices have in any case been too recently adopted to permit full evaluation of their influence on labour conditions throughout global production processes. In addition, as analysed in Section 2, tensions within procurement law regimes remain, specifically regarding their primary and secondary aims, and between procurement laws and labour protections.

As this article has demonstrated there is also a significant gap in the literature regarding the scope of public buyers' human rights obligations in relation to domestic and foreign workers. How procurement laws should interact specifically with human rights norms under other specialised international and supranational legal regimes is just beginning to be explored (Methven O'Brien & Martin-Ortega, 2017; Outhwaite & Martin-Ortega, 2016, p. 61). Another gap we have identified relates to how the international human rights and international trade law regimes should interface in this context. Whilst the link between labour rights and trade has been on research and policy agendas for two decades, it is only recently that studies documenting and classifying the effectiveness of labour clauses in trade agreements are emerging (ILO, 2015; Van den Putte, 2017). We suggest that the use of public procurement to advance labour rights globally should now be integrated into this scheme, with public buying considered as a complementary tool to social clauses in trade agreements, and the development of theoretical and methodological instruments to analyse and measure its impact and effectiveness a priority.

At least rhetorically, supply chain sustainability has recently risen to the top of the international policy agenda. Given this, and the opportunities presented, for instance, by the Sustainable Development Goals, as well as increasing political pressures on higher income countries' development assistance budgets, this focus, we suggest, is an urgent one. If appropriately devised public procurement can be demonstrated to deliver progress towards decent work transnationally, a much greater share of government, scientific and social resources should be diverted towards supporting it.

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Article

The Bangladesh Sustainability Compact: An Effective Tool for Promoting Workers' Rights?

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Abstract
The impetus for the Bangladesh Sustainability Compact was the Rana Plaza industrial disaster, which took the lives of roughly 1,200 garment workers and injured twice. The Compact required the fulfilment of several time-bound commitments by the Bangladesh government in two key areas—labour law reform and protection of the right to freedom of association and ensuring fire and building safety. The EU heralded the Compact as an innovative, multilateral approach to encourage its trade partners to comply with ILO core labour rights. The editors of this issue of Politics and Governance asked the contributing authors to examine effectiveness of trade and labour standards and to consider alternative mechanisms to advance workers' rights. Specifically, they queried whether the Compact could be considered a new and effective alternative model. This hope appears misplaced.

Keywords
Bangladesh; Bangladesh Accord; EBA; EU; GSP; ILO; labour rights; Sustainability Compact; trade; trade union

Issue
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1. Introduction

On 8 July 2013, the European Union and the government of Bangladesh, with support from the International Labour Organisation (ILO), negotiated the Bangladesh Sustainability Compact (hereinafter the 'Compact'; Directorate General for Trade, 2013).[1] The impetus for the Compact was the Rana Plaza industrial disaster, which only three months earlier had killed nearly 1,200 garment workers and injured twice as many (Manik & Yardley, 2013). Built several stories taller than permitted, the poorly constructed building collapsed when vibrations from the generators on the rooftop shook the building. For the EU, this was a crisis as several flagship European brands, which had long touted social responsibility, had imported billions of euro worth of garments from factories in Bangladesh—from Rana Plaza and many other factories just as unsafe (Clean Clothes Campaign, 2015).[2]

The Compact required the government of Bangladesh to fulfil several time-bound commitments, including measures to ensure fire and building safety in the readymade garment (RMG) sector and measures to protect the right to freedom of association and to bargain collectively, including labour law reform. The lack of a trade union to stand up to management, who had forced workers into the Rana Plaza building even as cracks appeared on the interior walls, was an important factor in the high death toll (Human Rights Watch, 2016).[3] Further, the ILO had for years urged the government (unsuccessfully) to amend its labour laws and to enforce those already on the books. Parallel to the Compact, donor governments contributed millions of Euro for capacity building projects (ILO, 2017a).

The editors of this issue of *Politics and Governance* asked contributing authors to examine the effectiveness of trade and labour standards and consider alter-

[1] The US and Canada joined the Sustainability Compact later.
[2] It provides a list of brands linked to Rana Plaza.
[3] "Let's remember that none of the factories operating in Rana Plaza had trade unions" said Phil Robertson, deputy Asia director. "If their workers had more of a voice, they might have been able to resist managers who ordered them to work in the doomed building a day after large cracks appeared in it".

native mechanisms to advance workers' rights. Specifically, they queried whether the Compact could be considered a new and effective approach. As I argue below, the Compact has not been effective for much of its four years, though recent developments in mid-2017 might yet produce some results. For comparison, I examine another initiative which operated in Bangladesh at roughly the same time, namely the Bangladesh Accord for Fire and Building Safety (Accord), which is a private initiative between international trade unions and apparel brands. Though more limited in scope, namely to ensure fire and building safety in RMG factories sourcing to signatory brands, the Accord has produced positive results and has essentially eliminated work-related fatalities in covered factories.

2. What is the Compact?

Simply put, the Compact is a compliance plan negotiated under the auspices of the EU's Generalised System of Preferences' "Everything but Arms" (EBA) programme (European Parliament, 2012). The EBA is a unilateral scheme that eliminates tariffs and quotas on all goods (except arms) exported to the EU. To maintain these trade benefits, beneficiary countries must respect certain standards including not engaging in "serious and systematic" violations of the eight ILO fundamental conventions.[4] In the case of "serious and systematic" violations, the EU can initiate an investigation which can lead to the suspension or withdrawal of trade preferences (European Parliament, 2012).[5]

At the launch of the Compact, then-EU Trade Commissioner Karel De Gucht explicitly linked the Compact to the EBA (De Gucht, 2013).[6] In 2015, Trade Commissioner Cecilia Malmström indicated that the EU might reconsider its stand on the EBA if compliance with the terms of the Compact did not improve (Malmström, 2015).[7] This position was reinforced most recently in 2017 in a pair of strongly-worded letters from the European Commission to the government of Bangladesh (discussed below) threatening an imminent investigation and the loss of trade preferences.[8] In the end, the Compact is a specific plan as to how to comply with the EBA and draws its coercive power from the threat of EBA suspension. Governments have long used trade preference programs to seek improvement on labour rights—including through checklists like the Compact (US Department of Labor, 2013).[9]

The Compact is monitored through an intergovernmental process, the so-called "3+5 Group", (the Labour, Commerce and Foreign Affairs Ministries of Bangladesh + representatives of the EU, US, Canada and two rotating EU member states) and is supported by the ILO. The Group also holds a public summit on a roughly annual basis, alternating between Brussels and Dhaka, which also allows for the participation of stakeholders, including trade unions, in the monitoring process. The most recent summit was held on 18 May 2017 in Dhaka. At the same time, there have been frequent informal communications between the EU and international trade unions between formal summits. The EU has published three technical status reports, in 2014 (European Commission, 2014), 2015 (European Commission, 2015), and 2016 (European Commission, 2016a), evaluating the government's compliance. They draw on information provided by the government and social partners including the International Trade Union Confederation (2017). Following each summit, the 3+5 Group has issued Joint Conclusions in 2015, 2016 (European Commission, 2016b) and 2017 (European Commission, 2017a) reflecting the sense of the parties, including that of the government of Bangladesh, and setting forth agreed next steps.

In making its assessment, the EU also gives great deference to the ILO supervisory system. The ILO's Committee of Experts on the Application of Conventions and Recommendations has published increasingly critical reports related to the issues covered by the Compact, in particular ILO Conventions 87 (freedom of association) and 98 (collective bargaining) (ILO, 2017b). For several consecutive years, Bangladesh's compliance with ILO Convention 87 has also been the subject of supervision by the ILO's Conference Committee on the Application of Standards (CAS), a tripartite body which gives follow-up recommendations to the annual reports of the ILO Committee of Experts (ILO, 2017b). In 2016, the CAS was so concerned with the government's failure to apply Convention 87 that it put its conclusions on Bangladesh in a "special paragraph" of the Committee's report to the International Labour Conference (ILO, 2016a). This

[4] For a list of those conventions, see http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm

[5] Under Article 19, trade preferences can be withdrawn for "serious and systematic violation of principles laid down in the conventions listed in Part A of Annex VIII". These conventions include the eight ILO core conventions, including the right to freedom of association and to bargain collectively.

[6] "Bangladesh also enjoys an extremely favourable trade regime under the EU's 'Everything but Arms' initiative. This is of particular importance for ready-made garments, which represent about 90 percent of Bangladesh's exports to the EU. These enter the EU market with no restriction: duty-free and quota-free. These exports to the EU account for about 2.5 million jobs—mostly for women. 'Everything but Arms' is therefore a major contributor to job and income generation for millions of people in Bangladesh. I want to make it clear that Bangladesh—or for that matter any other Least Developed Country—cannot take for granted the trade preferences it currently enjoys" (De Gucht, 2013).

[7] "But the future of the garment industry depends not just on the price of its products but also on its reputation with consumers. And that reputation will simply not survive another disaster like this. Another tragedy, or even just a continuation of today's poor conditions for workers, could also force the European Union to revisit Everything but Arms. It remains, after all, conditional on respect for fundamental labour rights" (Malmström, 2015).

[8] Although other key market actors like the US and Canada participate in the Compact's supervisory process, the leverage is held entirely held by the EU and is derived from the potential loss of the EBA. The US already suspended GSP to Bangladesh in 2013 (described below), losing much of its economic leverage. Canada does not condition its GSP on compliance with labour rights and is in any case a very small consumer market compared to the EU and the US.

[9] See indeed, in 2013 the US developed a checklist for Bangladesh to regain GSP benefits, which it suspended after Rana Plaza.

is meant to signal a serious failure on the part of a government to apply a ratified convention (ILO, 2011). An ILO High Level Tripartite Mission also visited the country in April 2016, and issued a highly critical report on the violations of freedom of association, thus corroborating the allegations made by the trade unions (ILO, 2016b). These reports were incorporated into the EU's technical status reports to the extent that they touched on issues relevant to the Compact.

3. What Has the Compact Accomplished?

Respect for labour rights in Bangladesh has remained extremely low, except for an all-too-brief period immediately following the Rana Plaza disaster when global scrutiny on the country's labour practices was at its most intense. However, after the immediate shock wore off, global apparel brands purchased goods from their Bangladeshi suppliers at record rates (Matsangou, 2016). The government quickly came to realise that the industry would face no economic consequences for its bad behaviour and thus recommenced its repression of workers (by act or omission). Below, I highlight some of the key issues which the government of Bangladesh was required to address under the Compact. In every case, the government failed to deliver as required.

3.1. Implementation and Enforcement of Labour Law

The Compact required that the government implement and enforce its labour laws.[10] Two critical implementation issues have been consistently raised—the failure of the government to register unions and the failure of the government to investigate or sanction employers who engage in anti-union discrimination. These two areas were specifically identified elsewhere in the Compact as a prerequisite for establishing the ILO's Better Work programme.[11]

3.2. Refusal to Register Unions

For many years, the government had implemented a no-union policy in the RMG sector. Workers who sought to register unions often saw the founders sacked and the registration processes drag on without end. Immediately following the Rana Plaza disaster, the government felt significant pressure, from governments, unions and brands, to reverse its no-union policy. In late 2013 and 2014, new unions were formed and successfully registered, though collective bargaining was still opposed. However, by early 2015, the government again routinely rejected registration applications. From 2010–2017, *half* of all applications for union registration were denied. Of 860 total applications, 424 were granted and 417 were rejected—the bulk of the rejections coming in 2015–2016.[12] The number of registration applications also dropped precipitously from the peak in 2014 (392) to 2016 (130), as anti-union discrimination continued and intensified with impunity.[13] Some unions, namely those that had been the most successful in organising workers, have been told by the authorities not to bother applying as their applications would be rejected.[14]

The reasons for the rejections are often completely fabricated and have no basis in the regulations. In other cases, applications were rejected even after unions corrected them per the government's instructions. As explained in the section below, public officials are poorly resourced and are under considerable pressure from the garment industry, which has significant influence over the government, to keep the industry union-free. The 2016 ILO High Level Mission report noted that the procedure for registering unions "had the likelihood of discouraging trade union registration" (ILO, 2016b, para. 43). In 2017, the ILO Committee of Experts called on the government "to take any necessary measures to ensure that the registration process is a simple formality, which should not restrict the right of workers to establish organizations without previous authorization" (ILO, 2017c). The European Commission also noted that "that there has been a marked increase in rejections of registration requests and a decrease in registration of trade unions over the last months" (ILO, 2016a).

In 2017, the government adopted standard operating procedures (SOPs) for union registration. The SOPs do provide timelines for registration and indicate who is responsible at each step of the registration process. However, the SOPs fail to address the many barriers workers face in the registration process and, without effective mechanisms in place to sanction Joint Directorate of Labour staff when applications are arbitrarily denied, unions in Bangladesh expect this behaviour to continue.

For example, in March 2017, workers at Savar Factory and Orchid Garment, both owned by the powerful Azim Group, had their application for union registration rejected for the *third* time. The reasons given were vague, likely indicating the political influence of the Azim Group. Indeed, Mr. Azim was himself a member of Parliament. Workers at both factories had been organizing with the Bangladesh Independent Garment Union Federation (BIGUF) since early 2016. In May 2017, thugs attacked union leaders and nearly 70 workers from Orchid Sweaters outside of the factory gate (IndustriALL Global Union, 2017a).

3.3. Anti-Union Discrimination

The leaders of many of the unions registered post-2013 have suffered retaliation, sometimes violent, by manage-

[10] Compact, Section 1b.
[11] Compact, Section 1f.
[12] The data has been compiled by the Solidarity Centre and is available upon request.
[13] The data has been compiled by the Solidarity Centre and is available upon request.
[14] This information has been conveyed to the Solidarity Centre by affected unions.

ment or their agents. Some union leaders were brutally beaten and hospitalized (Human Rights Watch, 2015; see also Human Rights Watch, 2014). Entire executive boards have been sacked. In some cases, the police, at the apparent behest of factory management, have intimidated and harassed trade unionists (Human Rights Watch, 2015). The responses by the labour inspectorate have been very slow to date. Most union leaders or members illegally fired for trade union activity have not been reinstated and most employers have not been punished for these egregious violations. In cases of anti-union violence, police routinely fail to carry out credible investigations, if at all. In the few cases where workers have been reinstated, it was the result of an international campaign to pressure brands, not because of labour inspection and enforcement by the government (Greenhouse & Tabuchi, 2015). This of course is not a reliable or sustainable model to enforce the law.

The ILO High Level Tripartite Mission Report "noted with concern the numerous allegations of anti-union discrimination and harassment of workers" as well as "blacklisting, transfers, arrests, detention, threats and false criminal charges" (ILO, 2016b). In 2017, the Committee of Experts also expressed "concern" regarding the reports "alleging numerous instances of anti-union discrimination, slowness of the labour inspectorate in responding to such allegations and the lack of adequate sanctions in practice, as well as a serious lack of commitment to the rule of law" (ILO, 2017D). The EU also urged the government "to address these reports without delay and notably by taking the necessary steps to ensure the effective investigation and prosecution of these cases, by ensuring reinstatement of those illegally dismissed and by imposing fines or criminal sanctions according to the law" (European Commission, 2016a).

3.4. Implementing Rules

The Compact has required Bangladesh to pass implementing regulations to the Bangladesh Labour Act, which had just been amended in 2013 (Government of Bangladesh, EU, & ILO, 2013). In late 2015, two years past due, the government did issue the regulations. However, many of its provisions violate ILO Convention 87. For example, *employers* are given a role in the election committee of *worker* representatives to factory-level Worker Participation Committees. Where there is no union, which is the case in the vast majority of workplaces, Worker Participation Committees determine who is on the Safety Committees. If a worker vacancy opens on the Safety Committee, employers also have a role in determining who should replace the worker representative. The probability of management domination of these committees is high, and there does not appear to be a clear and dissuasive sanction for such acts of interference. Given the centrality of safety concerns in the post-Rana Plaza period, the failure of the new rules to ensure that Safety Committees are independent of management and thus free to identify and protest unsafe working conditions creates the potential for future safety and health disasters.

The ILO concurred, urging the government "to undertake any necessary measures to ensure that, under the Bangladesh Labour Rules, workers' organizations are neither restricted nor subject to interference in the exercise of their activities and internal affairs, that unfair labour practices are effectively prevented and that all workers, without distinction whatsoever, may participate in the election of representatives (ILO, 2016c). The EU also echoed these concerns (ILO, 2016a). As yet, the government has not taken any action to address this issue.

3.5. Labour Law Reform

The government of Bangladesh did pass modest reforms to the Bangladesh Labour Act in 2013, which were in motion well before the Compact was negotiated (Government of Bangladesh et al., 2013). However, the Compact also obligated Bangladesh to undertake further reforms (Government of Bangladesh et al., 2013); the government failed to address nearly all the observations of the ILO Committee of Experts in the 2013 reforms, and in some cases made the law even less compliant with ILO Conventions. As a result, the Committee of Experts stated that it "deeply regrets" the failure to amend the labour law and "urges the government, in consultation with the social partners, to review and amend the mentioned provisions to ensure that restrictions on the exercise of the right to freedom of association are in conformity with the Convention" (ILO, 2016c). The 2016 report of the EU reached the same conclusion (European Commission, 2016a).

3.6. Freedom of Association in Export Processing Zones (EPZs)

EPZs employ roughly 400,000 workers in Bangladesh, who produce garments and footwear as well as a variety of other manufactured goods (European Commission, 2016a). However, trade unions are banned in the EPZs by law and only Worker Welfare Associations may be established under the EPZ Workers' Association and Industrial Relations Act (EWWAIRA) of 2010. The Worker Welfare Associations do not have the same rights and privileges as trade unions. However, the government had steadfastly refused to change the law to allow unions, citing promises made to investors years ago to keep the zones union free.[15] In 2017, the ILO Committee of Experts called on the government "to ensure that any new legislation for the EPZs allows for full freedom of association, including the right to form free and independent trade unions and to associate with the organizations of their own choosing, and emphasizing the desirability of a harmonization of the labour law throughout the country"

[15] This assertion has been made on numerous occasions to the author by Bangladesh officials.

(ILO, 2016c). The European Commission similarly concluded that, "The Bangladesh EPZ Labour Act needs to be revised to provide rights and protections at least commensurate with the national labour law (BLA) and to be fully compliant with core labour rights" (European Commission, 2016a).

3.7. Upgrading Labour Inspection

The Compact required that the government significantly improves its labour inspection (Government of Bangladesh et al., 2013). While the government did upgrade the Department of the Chief Inspector of Factories and Establishments to a Directorate, it has still failed to ensure it has a cadre of 800 inspectors as agreed in the Compact. Beyond the numbers, labour inspectors have a profound lack of training and professionalism which severely weaken the effectiveness of factory inspections. This is further undermined by the power of the industry over the government, which does not want to see the law enforced. In a 2017 interview with ILO Dhaka staff, they indicated that they believed that the government was still several years away from having a factory inspection service that could ensure building safety as well as enforce fundamental labour rights. The EU concluded in its most recent report that "recruitment and training of inspectors need to continue in view of reaching the target of 800 inspectors….The recruitment and the development of a strategy for the retention of new labour inspectors needs to be taken as matter of urgency" (European Commission, 2016a).

3.8. Fire and Building Safety

Section 2 of the Compact sets forth the government's commitments on fire and building safety. Under Section 2(a), the government committed to make concrete and time-bound improvements under the National Tripartite Plan of Action focused on Occupational Health and Safety, specifically Fire and Building Safety. This included providing access to remedies for victims of workplace injuries. However, implementation of the plan has been very slow and most if not all milestones in the plan have been missed or substantially delayed. The absence of a consolidated public and transparent reporting of progress under the Plan contributes to the lack of accountability.

The inspection of export-oriented RMG factories under Section 2(b) was divided among the two private initiatives (the Bangladesh Accord and the Alliance for Bangladesh) and the national effort under the National Action Plan. While both private initiatives completed initial inspections in 2014, the National Initiative finished an initial inspection of the factories far behind schedule. In its last status report, the Department of Inspection for Factories and Establishments indicated that 300 Corrective Action Plans (CAP) have been developed in factories under the national initiative but only 5 CAPs have been approved. Of concern, this information has not been updated *in over a year*, as the information is from March 2016. There is no public database of the actual inspections or CAPs (Department of Inspection for Factories and Establishments, 2016). Therefore, progress on implementation is difficult to assess in the absence of a publicly available database for the CAPs under the National Initiative.

There is very little evidence that the crucial remediation efforts under the national initiative are in process, and the financing of the remediation measures of the factories under the national effort is unclear. Recently, the ILO highlighted the need for financing to support remediation in Bangladeshi factories, which underscored the absence of a strategy to ensure the factories under the national initiative have the necessary financial support for remediation.

4. Why Has the Compact Failed (2013–2016)?

There is no single explanation for the failure of the Compact. Below, I explore some of the contributing factors.

4.1. The Government of Bangladesh

The government of Bangladesh has and will likely continue to be hostile to labour rights. First and foremost, the garment industry is responsible for 82 percent of the country's export earnings (World Bank, 2017). Thus, anything that would in the government's view "jeopardize" the profitability and continuity of the industry, including trade unions, is perceived as an existential threat and dealt with accordingly. Of course, trade unions can contribute to a more productive and sustainable industry (Freeman & Medoff, 1984; see also OECD, 2000),[16] and respect for labour rights does not put countries at a competitive disadvantage in world trade (OECD, 1996).[17] Nevertheless, the government and domestic manufacturers have opted to avoid unions at all costs (except when forced to do so by union organising supported by global campaigns).

Another factor, Bangladesh has failed to upgrade the industry—unlike many of its competitors. Bangladesh's success in garment exports has been based on low-skill, low-wage competitiveness. The severe lack of adequate transportation and energy infrastructure has hampered the industry's growth. As the World Bank found, "Private investors are discouraged from investing in Bangladesh because of infrastructure deficits, scarcity and high prices of land, corruption, political uncertainty

[16] "Countries which strengthen their core labor standards can increase efficiency by raising skill levels in the workforce and by creating an environment which encourages innovation and higher productivity" (OECD, 2000).

[17] "Any fear on the part of developing countries that better core standards would negatively affect either their economic performance or their competitive position in world markets has no economic rationale" (OECD, 1996).

and, of late, concerns about security. Severe scarcity of gas and electricity is making the process of getting utility connections for new businesses difficult (World Bank, 2016)". Given these weaknesses, the government has not moved up the value chain to higher value added goods. As such, it continues to see its advantage in competing on the basis of low labour costs—which would be threatened if a truly robust labour movement were allowed to form.

Third, the government is plagued by high levels of public corruption and is subject to corporate capture by the garment industry (McDevitt, 2015).[18] As explained in the New York Times, "Business interests dominate Bangladesh's Parliament. Of its 300 members, an estimated 60 percent are involved in industry or business. Analysts say 31 members, or 10 percent of the country's national legislators, directly own garment factories, while others have indirect financial interests in the industry" (Yardley, 2013; see also Chalmers, 2013).[19] The Bangladesh Garment Manufacturer's Association (BGMEA) is extremely powerful, and is a key contributor to political campaigns (Yardley, 2013).[20] As a result, legislation consistent with international labour standards is unlikely to pass without overwhelming external pressure, and agencies charged with enforcement have no incentive to do so.

Finally, Bangladesh's garment industry has yet to experience an economic penalty from the Rana Plaza disaster. Only one buyer, Walt Disney, pulled out of Bangladesh following the collapse (Greenhouse, 2013). In fact, garment orders increased, ironically the likely result of the negotiation of the Bangladesh Accord for Workers' Safety, which required signatory brands to ensure that its suppliers provided safe working environments (Reuters, 2015). As discussed below, over 200 companies eventually supported the Accord (Accord on Fire and Building Safety in Bangladesh, 2017a). With the Accord in place, brands calculated that the risk of sourcing from Bangladesh had dropped to an acceptable level. Indeed, the success of the Accord has demonstrated that respect for workers' rights, or at least the avoidance of workplace injuries or fatalities, is good for business. With the manufacturers prospering, the government has had no incentive to change course.

Neither the government nor the industry has paid a penalty for its aggressive anti-unionism. Both understood that they could ignore the Compact without consequences for its trade relationship with the EU.

4.2. The EU

Despite growing concerns, the European Commission remained extremely reluctant through 2016 to commence an investigation (European Parliament, 2015, para. 25).[21] This is in part due to a deep-seated faith of the EU institutions in European social dialogue, which favours cajoling over measures to compel another party to act or to sanction that party for inaction. Even after years of broken promises, the EU was not moved to threaten an investigation leading to the withdrawal of preferences until early 2017 (as explained in Section 5).

Another basis for the reluctance is that the levy of duties on imports of Bangladesh-made garments would mean that EU-based companies would suddenly face substantially higher costs for its goods. As confirmed in informal conversations in Brussels, the EU's Trade Commissioner has been reminded of this fact by European brands.

At a more technical level, the European Commission's institutional reluctance is compounded by a misguided interpretation of its own GSP Regulation (Vogt, 2015). The Directorate General for Trade of the European Commission (DG Trade) has determined that the trigger for the commencement of an investigation is two consecutive "special paragraphs" in the reports of the CAS. This approach reflects a fundamental misunderstanding of the ILO supervisory system and all but guarantees EU inaction. The CAS is the more political body within the ILO supervisory system and a decision to issue a special paragraph requires the consent of both worker and employer representatives—the latter of whom are often very reluctant to do so. Bangladesh did receive a special paragraph from the CAS in 2016, aided by the fact that the employer spokesperson had participated in the High Level Tripartite Mission earlier that year and had seen how bad the situation was only weeks before the International Labour Conference. However, the employers group flatly refused to agree to a special paragraph in 2017, despite the lack of progress, because they knew it would trigger an investigation. Thus, in adopting this peculiar interpretation of the GSP regulation, the EU has essentially delegated decision-making to a small, unelected body of employers in a single supervisory committee of the ILO (Vogt, 2015). Though it is not certain that the government of Bangladesh would improve compliance with fundamental workers' rights were a GSP investigation to be commenced, the loss of preferential access to the EU

[18] "Politics in Bangladesh can be characterised as a battle between established elites over state resources. A culture of confrontational politics between the country's two main parties has weakened the rule of law and led to the politicisation of state institutions, including the judiciary and bureaucracy. At the same time, political parties and parliament are increasingly being taken over by powerful business interests. Thus, despite a relatively strong legal framework, weak implementation and political interference undermine anti-corruption efforts in Bangladesh. As a result, corruption is an endemic problem in Bangladesh at all levels of society" (McDevitt, 2015).

[19] "More than 30 garment industry bosses are members of parliament, accounting for about 10 percent of its lawmakers" (Chalmers, 2013).

[20] "'This organization [BGMEA] is extremely powerful', said one senior government official, who said much of its clout comes from political contributions. 'The political parties are running after money'" (Yardley, 2013).

[21] The European Parliament has been less circumspect and has called on the Commission to determine whether Bangladesh is complying with the GSP conditionality in 2015. In late 2016 and early 2017, members of the International Trade Committee of the European Parliament visited Bangladesh and warned the government that the EU is running out of patience.

garment market—14.8 billion euros in 2016 (European Commission, 2017b)—would seem to be a very considerable incentive.

4.3. The US

In 2013, immediately following the Rana Plaza collapse, the US suspended its GSP benefits to Bangladesh in response to a 2007 petition by the AFL-CIO concerning widespread labour violations, including violations of the right to freedom of association, to bargain collectively and to eliminate child labour (Greenhouse, 2016). An action plan based on an investigation into the complaint and seven years of dialogue failed to bring about meaningful reforms (US Department of Labor, 2013). For the US, the Rana Plaza disaster was the last straw, confirming years of indifference for workers' rights and well-being. The suspension did get the attention of the government of Bangladesh as it was a negative signal to the market. Bilateral engagement on labour issues did increase as a result. However, as Bangladesh's garment exports did not benefit under the US GSP scheme (unlike the EU), the impact of the suspension was minimal in economic terms. In the end, with the Bangladesh Accord in place, and a secure market in the EU, the suspension of the US GSP was not sufficient leverage for change and most violations continued apace after 2013. While the US does participate in the oversight of the Compact, its economic leverage over Bangladesh is reduced given that it has little more it can do to sanction poor performance on labour rights.

4.4. The Global Brands

The Rana Plaza disaster, and the continued failure of manufacturers in Bangladesh to respect fundamental workers' rights, is a structural feature of global supply chains as currently configured–particularly in the garment industry. Brands look to cut costs in their supply chains through several means, from negotiating down the costs of the goods they source to, maximizing efficiency and reducing tax and other expenses. At the same time, brands look to turn product orders around quickly to respond to expectations of consumers–so called fast fashion. This puts considerable pressure on manufacturers to drive down wages and benefits, push for excessive overtime, and cut corners on working conditions. This also creates a situation where unionization will cut into small margins, especially at lower tier manufacturers, and thus unions are opposed by any means (ILO, 2016d, paras. 60–64).

At the same time, Rana Plaza exposed the failure of the CSR initiatives and social auditing to detect and remedy violations of workers' rights in global supply chains. While these schemes have sometimes been able to identify workplace violations such as wage and hour and occupational safety and health issues, they have generally failed to detect violations that are not readily apparent, such as violations of the right to freedom of association and to bargain collectively (ILO, 2016d, para. 138; see also Locke, 2013, p. 20).[22] Social auditors are generally not adequately trained and do not spend adequate time to detect any but the most obvious violations (ILO, 2016d, para. 138). Brands have also failed to adopt sufficient measures to identify which companies are even producing goods in their supply chains, particularly beyond the Tier I suppliers. If steps are not taken to clearly map their suppliers, it will be impossible to ensure brands' compliance with human rights policies.

5. Potential for Progress in 2017?

On 16 March 2017, in a break with the typical diplomatic language, three senior European Commission officials sent a strongly worded letter to the Ambassador of Bangladesh to the EU. It explained:

> We will need to demonstrate to the European Parliament, Council of Ministers and to civil society that Bangladesh is taking concrete and lasting measures to ensure the respect of labour rights. This will be essential for Bangladesh to remain eligible for the EBA regime. Without such progress, our monitoring could eventually lead to the launching of a formal investigation, which could result in temporary withdrawal of preferences. (Newage, 2017)

The letter followed a staggering display of anti-union animus by the government of Bangladesh. Starting on 11 December 2016, garment workers launched a peaceful demonstration for higher wages in Ashulia, an area near the capital city of Dhaka (see Kaman, 2016).[23] The minimum wage for garment workers remains a mere 5,300 taka per month (roughly $67 USD), an amount below the World Bank poverty line (Fair Labor Association, 2016, p. 3).[24] and neighbouring garment-producing nations like Cambodia.[25] Police rounded up at least 34 union leaders and activists, many of whom were not even in Ashulia at the time. The government subsequently lodged criminal charges against them and manufacturers subsequently filed claims alleging property damage (Human Rights

[22] "Private compliance programs appear largely unable to deliver on their promise of sustained improvements in labor standards in the new centers of global production" (Locke, 2013).

[23] The epicentre of the strike was at *Windy Apparels Ltd* in Ashulia, where workers began to demand a rise in wages. The strike was ignited two months after a young woman worker died on the factory floor after repeatedly being denied medical leave by her supervisor. Her body was simply discarded by management on the street outside the factory gates for her family to pick up. An account of her tragic death at 23 years old was reported in Slate (Kaman, 2016).

[24] "The FLA found that for factories assessed in Bangladesh the purchasing power of average compensation—a measure that includes base pay, and some benefits and incentives, but excludes overtime—fell below the World Bank poverty line" (Fair Labor Association, 2016).

[25] Through strikes and demonstrations, the minimum wage in the garment industry in Cambodia rose in recent years from $60 USD in 2013 to $170 USD per month in 2018.

Watch, 2017). BGMEA organised factory managers to suspend, dismiss or force to resign well over 1,600 workers in a coordinated closure of roughly 60 garment factories (Human Rights Watch, 2017; see also Safi, 2016). Police raided the offices of several trade unions and labour rights NGOs, disrupting their activities and forcing their doors closed.

On 18 May 2017, the 3+5 Group convened in Dhaka to formally review the government's progress under the Compact and to raise concerns about the recent crackdown in Ashulia. Just prior to the summit, the government withdrew a 2016 draft EPZ labour law, which would have maintained the prohibition on trade unions in the zones (Bdnews24, 2017). The government also signalled a commitment to adopt a new EPZ labour law, though it has yet to follow through.

The "Joint Conclusions" of the summit committed the government to comply with the original terms of the Compact as well as to respect the post-Ashulia agreement (European Commission, 2017a). In another letter, issued on 31 May 2017 the European Commission again took a firm position.[26] It explained that:

> Much more needs to be done to address the ILO's recommendations on freedom of association and collective bargaining ahead of the 106th Session of the International Labour Conference on 7 June 2017. The EU is concerned that so far no reply has been given to its letter of 16 March and that no strategy with concrete and time bound actions has been presented at the Compact meeting, in order to address the ILO's recommendations, as was requested in the letter.

The EU gave the government a deadline of the end of August "to deliver tangible progress". The letter concluded by explaining that:

> With regard to the preferences granted to Bangladesh under the EU's GSP Regulation, we would like to recall that Bangladesh needs demonstrate as a matter of urgency concrete and lasting measures are taken to ensure respect of fundamental human and labour rights. This will be essential for Bangladesh to remain eligible for the Everything but Arms regime.

At the International Labour Conference, Bangladesh was again hauled before the CAS for its failure to comply with Convention 87 (ILO, 2016e). In that session, it announced its commitment to amend both the Bangladesh Labour Act and the EPZ Labour Act in 2017. It also reported on having adopted the new SOPs for union registration. For the first time, the government appears to perceive a measurable economic risk to maintaining the status quo. As of this writing, however, the government has initiated a process to review the Bangladesh Labour Act, but has not circulated any drafts for comment by the social partners. It is far too early to know whether the government intends to address the concerns of the ILO Committee of Experts and will expend the political capital to see them passed. Further, there is no data to ascertain whether the SOPs have made any difference concerning registration. As in the BIGUF case cited above, applications for union registration continue to be rejected arbitrarily despite the new procedures.

It remains to be seen whether the EU will overcome its institutional reluctance if there is still insufficient progress made in the coming months. As of this writing, DG Trade remains steadfast in its opposition to commencing an investigation.[27] If that position continues, one can expect that the government of Bangladesh will undertake the minimum to forestall the threat of a GSP investigation.

6. New Compliance Mechanisms

It was common knowledge among the global brands that most factories in Bangladesh were poorly constructed, had faulty wiring, lacked fire exits and that doors were often locked; however, the cost of providing a safe workplace was deemed too expensive for brands and thus no action was taken (Greenhouse, 2012).[28] The Rana Plaza disaster also exposed a deep crisis in the code of conduct and audit model, given that garment factories in Rana Plaza and elsewhere had been certified despite unsafe working conditions or repeated violations of fundamental worker rights (see Section 4 above). This crisis created the opportunity for a new model—the Bangladesh Accord for Fire and Building Safety and Better Work Bangladesh. Notably, a similar proposal had been presented to brands before the Rana Plaza disaster given the outbreak of deadly fires like Tazreen Fashions (Bajaj, 2012), but only two brands expressed any interest. The Accord was negotiated in the days immediately following Rana Plaza, as global brands panicked knowing that significant action needed to be taken if they were to be able to maintain their sourcing relationships in Bangladesh. In the end, over 200 brands, mostly European, signed on to the Accord.

The Accord signals an important break with past models in that it is a legally binding instrument among brands, retailers and trade unions to ensure the safety of the factories where the signatory brands source their goods (Anner, Bair, & Blasi, 2013). The Accord carries out independent inspections in which unions and workers are involved. All the inspection reports and corrective plans are publicly disclosed. Brands also had to commit that if a factory was unable to remediate based on the corrective plans, that the brand would ensure that funds

[26] Letter on file with the author.

[27] Based on a call between the author and DG Trade on 10 July 2017.

[28] The article reports on a 2011 meeting of government, manufacturers, brands and NGOs during which the director of ethical sourcing from Walmart rejected proposed improvements in electrical and fire safety. They noted that such improvements would need to be made to around 4,500 factories, would be "very extensive" and "not financially feasible" (Greenhouse, 2012).

were available to do so. A complaints mechanism was created and workers were instructed on the right to refuse unsafe work. According to its 8 May 2017 report: "The overall remediation progress rate of safety issues identified in initial inspections reported or verified as fixed has reached 77 percent. Remediation is close to completion at more than 400 Accord Factories which have completed more than 90% of the remediation. 61 factories have completed all remediation from initial inspections" (Accord on Fire and Building Safety in Bangladesh, 2017b, p. 4). In 71 cases, the Accord terminated supplier relationships with brands because of the failure of the factory to meet the safety standards set out in the agreement (Accord on Fire and Building Safety in Bangladesh, 2017b, p. 12).

The success of the Accord comes from the fact that it can terminate sourcing relationships between brands and suppliers when the latter do not live up to the fire and building safety requirements. This is significant economic leverage over a factory, which the Accord has used when warranted by the evidence. The inclusion of workers in the governance of the Accord, as well as the plant level inspection, also certainly improves the quality of the labour inspection. Most importantly, the Accord has succeeded in eliminating worker deaths in the factories it covers (with the exception of a boiler explosion in 2017; Accord on Fire and Building Safety in Bangladesh, 2017c), an impressive feat given that there were over 1,350 deaths in the garment sector just between 2010 and 2013.[29]

The Accord also helped to empower workers. Safety training had been rare and workers had no role in safety management. Joint worker-management safety committees were established in factories covered by the Accord, and workers on the committees were trained on their rights and best practices. All workers were provided basic information about their rights ensure their safety at work. As of May 2017, over a million workers have received information about their rights (Accord on Fire and Building Safety in Bangladesh, 2017d, p. 15).

On 29 June 2017, the Accord was renewed (Accord on Fire and Building Safety in Bangladesh, 2017e). One important advancement with the new Accord is that it requires factories to respect the freedom of association of workers as it relates to safety and health (Accord on Fire and Building Safety in Bangladesh, 2017e). It is unclear how many of the brands under the original Accord will sign the new one, though nearly 50 brands signed on as of October 2017 (IndustriALL Global Union, 2017b).

The Accord has not been without its critics, which have argued that the Accord (and the Alliance for Bangladesh Worker Safety) cover only a small portion of the RMG sector leaving workers in many factories, particularly those in the subcontracted factories that do not directly export, outside the scope of these initiatives (Labowitz & Baumann-Pauly, 2015; but see Anner & Bair, 2016).[30] It is certainly true that not all workers are covered by the Accord. It is also true that not all manufacturers have made the necessary remedial steps to comply with the Accord. And, some brands have been taken to arbitration for failure to cover the costs of remediation. However, this should not diminish the progress made by the Accord, and limitations in the scope of commitments or coverage reflects more the reluctance of brands to move further than an inherent flaw with the Accord model.

The government of Bangladesh and the BGMEA, which have long resented their exclusion from the governance of the Accord, announced the launch of a parallel initiative. While details are not yet available, one suspects that it will be less onerous and accountable given that the government and BGMEA will have a say in its operation, likely joined by government dominated trade unions (Ullah Mirdha, 2017). As mentioned above, the inspections which were under the purview of the government under the National Action Plan were flawed and incomplete, and the lack of transparency make impossible the ability to assess what corrective measures, if any, have been taken. Of note, global unions and the government reached an agreement in late October on the eventual phase out the 2018 Accord. Under its terms, a committee comprised of industry, labour and the ILO will, after May 2018, determine every six months whether the government has achieved the capacity to monitor the industry and enforce the law effectively. If such a determination is made, responsibility for fire and building safety would revert to a national body after a further 6 months (IndustriALL Global Union, 2017c).

It should also be noted that Better Work Bangladesh, a joint program of the ILO and the World Bank, is now also operational in the country. Better Work has a broader mandate, in that it assesses conditions on fundamental labour rights as well as conditions of work, from wage and hour laws to occupational safety and health.[31] Currently it is monitoring 136 factories in Dhaka which supply to roughly 30 brands. In addition to these assessments, Better Work works with factories to provide advice and training to management to assist them to make continuous improvements. Better Work publishes synthesis reports which note which violations have been detected and which have been remediated after follow-up. The incentive for factories to participate include the higher productivity that will result from better labour-management relations and the reduction in the number

[29] This figure includes the reported estimated death tolls at Gharib and Gharib (2010, 21), Hameem Group (2010, 29), Tazreen Fashions (2012, 112), Smart Exports (2013, 8), Rana Plaza (2013, 1135) and Tung Hai Sweater (2013, 8).

[30] Report arguing that the Accord and the Alliance cover "only 27% of factories, which tend to be larger and better resourced than all other factories" amounting to about half the workforce. A rebuttal report was issued in 2016. See Rebuttal report arguing that "more than 70% of garment workers in Bangladesh are covered by the Accord and the Alliance, and if we include workers employed in factories inspected by the ILO-advised National Initiative, the percentage of covered workers reaches 89%".

[31] For more information, visit the Better Work Bangladesh website at https://betterwork.org/where-we-work/bangladesh

of audits as brands will accept Better Work assessments without requiring their own. As Better Work is still relatively new to Bangladesh, it has yet to publish its first synthesis report.

7. Conclusion

For workers in Bangladesh's garment industry, the situation remains dire. Worker rights violations are the norm and safety concerns are especially serious outside of Accord-covered factories. At the same time, Bangladesh remains a global powerhouse for garment production and continues to export worldwide. Indeed, the repression has ensured that labour costs remain among the lowest in Asia. The only thing in recent years that created sufficient pressure on the government and industry to reform was the Rana Plaza disaster, and even then, the reform on workers' rights was partial and fleeting. It is clear that unless there is a substantial economic incentive to change, for the government, for manufacturers and for global brands, we will not see the necessary changes take place. Clearly, the Compact has not provided an incentive, as no credible threat of economic harm was ever posed. On the other hand, we have seen trade unions and brands at the very least create the legal framework necessary to promote the limited issue of the safety of garment factories. Whether this is replicable elsewhere remains to be seen, as it took a tremendous tragedy for brands to agree to the Accord in the first place.

Conflict of Interests

The author declares no conflict of interests.

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Article

Do Labour Rights Matter for Export? A Qualitative Comparative Analysis of Pineapple Trade to the EU

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Abstract
Labour norms are increasingly considered in trade relations, but is the protection of labour standards a necessary condition for export to the EU? A Qualitative Comparative Analysis, based on countries that export pineapples to the EU, shows that labour standards protection matters in combination with distance, zero tariffs and institutional quality in a number of cases. However, for none of the cases was it a sufficient condition on its own for determining exports to the European market. Rather, we show that (1) having a zero tariff is necessary for a relatively large share of export to the EU, and (2) labour standards protection can make a difference when the institutional quality is weak in some African cases, in contrast to Latin American exporters.

Keywords
agricultural trade; globalisation; institutions; labour rights; political economy; QCA

Issue
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1. Introduction

Fruits and vegetables consumed in Europe are sourced from all over the world. The EU is the world's biggest importer of agricultural products, ahead of the US and China (European Commission, 2015a). Increasing global trade and competitive pressure have changed the nature of food production systems in the South, with significant implications for rural populations (Hurst, 2005). Many private voluntary governance mechanisms now regulate the social and environmental conditions in production, with private labels increasingly addressing production process characteristics, including working conditions (O'Rourke, 2003). At the same time, interest groups in Europe put pressure on firms to limit their use of imports from countries with poor labour practices through naming and shaming campaigns targeted at companies which fail to comply with social standards in their supply chain (Fair Trade Advocacy Office [FTAO], 2015a). Policy-wise, labour norms are increasingly considered in trade agreements, the aim being to make trade conditional upon compliance with international conventions (Van den Putte & Orbie, 2015).

Despite the growing interest in labour issues among firms, consumers and policy makers, the importance of social conditions, such as the protection of labour rights, as a determinant for trade remains understudied (International Labour Organisation [ILO], 2016; Kucera & Sarna, 2006). Most publications follow a logic of cost efficiency to explain trade performance, revealing a race to the bottom in labour standards (Hefeker & Wunner, 2002). A question yet to be clarified, however, is whether

exporting countries that comply with labour standards are rewarded with a relatively larger export share to the European market, especially in trade of agricultural products. We address this gap in the literature by questioning how levels of labour rights protection, in addition to institutional quality, tariff regimes and exporting countries' distance to the EU, affect the share of unilateral exports to the EU. We argue that countries with better levels of labour rights protection, high institutional quality, preferential tariffs and closer distance export a relatively larger share to the EU. Along the same lines, a producer country far away from the EU, without good institutional quality and/or with low protection of labour rights, is expected to export a less important share of produce to the EU.

A Qualitative Comparative Analysis (QCA) approach was used to determine the necessary and sufficient conditions for a high dependency on the EU market for a country's pineapple exports. This approach differs from the analysis of trade flows in gravity models (Kucera & Sarna, 2006), because it allows causal complexity to be addressed by testing several paths or combinations that lead to the same outcome (see *infra*). We focus on fresh pineapples, an important agricultural export product in terms of traded volumes around the world and export value. This case selection is rooted in the labour-intensive nature of production and highly visible labour challenges.

As will be explained in the next section, consumers in the EU market are said to be particularly sensitive to ethical and labour issues, and this is manifested at different levels, such as trade agendas, private labelling and consumer behaviour. In this article we search for evidence that labour protection levels do indeed matter for a country to trade intensively with the EU. The remainder of the article is structured as follows. In the next section, the importance of labour standards in trade is explained and a theoretical justification is provided for the conditions considered in this study. Section Three justifies the QCA methodology and describes the data sources. Section Four discusses the results before concluding the article.

2. Theoretical Justification for the Included Conditions

2.1. Labour Rights as a Determinant of Exports

Trade between countries may be conditional on prior levels of respect for labour rights in partner countries (Mosley & Uno, 2007). According to conventional wisdom, businesses are likely to prefer low labour cost producing countries over labour quality because of competitive pressure and profit concerns. This would induce a race to the bottom in labour conditions (Kucera, 2001). However, recent literature has demonstrated how labour rights can affect trade positively. Proponents of a positive labour rights-trade hypothesis assume that countries, or firms, purposely select partners that perform well in terms of labour standards because of reputational concerns or external ethically driven pressures (Greenhill, Mosley, & Prakash, 2009). Moreover, developed countries could serve as role models for developing countries through market integration, which can result in the harmonisation of institutions and regulatory arrangements (Kucera & Sarna, 2006; Neumayer & de Soysa, 2006). At firm level, Toffel, Short and Ouellet (2015) found better labour rights compliance among suppliers serving buyers located in countries where consumers are wealthy and socially conscious. In addition, Distelhorst and Locke (2017) concluded that importers favour doing business with companies that comply with basic labour and environmental standards.

The debate has intensified over the last few years, not least because of the devastating consequences of the collapse of the Rana Plaza building in Bangladesh (Reinecke & Donaghey, 2015). There are indications that both European consumers and public bodies across the EU have increasingly valued labour rights protection in their consumer decisions and public policies (Mosley, 2017).

The consumer is increasingly being considered as an important actor and driver of labour governance, both through purchasing power and voice power (Donaghey, Reinecke, Niforou, & Lawson, 2014; Kolben, 2017, in this issue). Stolle and Micheletti (2013, pp. 96–98) point to the European Social Survey (2003), and the Citizenship, Involvement, and Democracy Survey in the US (2006), which demonstrated that about 31% of all people interviewed reported engaging in "political" consumption behaviour. Purposely buying labelled products (buycotting) and rejecting other products (boycotting) reflects the individual responsibility taken by consumers to foster sustainable development. In the US, 28% of the respondents reported engaging in such political consumption behaviour, while in European countries the level is higher, exemplified by 60% of the respondents in Sweden. A recent survey on behalf of DG DEVCO revealed that 50% of the respondents (out of 27,672 in the 28 EU member states) would be prepared to pay more for groceries (such as fair trade products) from developing countries to support people living in those countries (Eurobarometer, 2016). The retail sales of fair trade products, the world's leading ethical label, also point to a relatively high demand for labelled products in the European market. Global fair trade sales were estimated at EUR 7.3 billion in 2015. The EU is the most important region for fair trade products, accounting for almost 80% of the world retail sales, with the UK (30%) and Germany (13%) being the leading buyers of fairly produced products, while the US accounts for 12% of sales (Fair Trade International, 2016).

The EU has elaborated a trade and investment policy based on values in its latest trade strategy, "Trade

[1] The Fair Trade Advocacy Office proposed actions to the EU to require "transparency in supply chains and a system of due diligence…that requires persons placing products on the EU market to ensure compliance with labour, environmental rights of the country of origin. This could be applied to agricultural products and also to textiles" (FTAO, 2015b, p. 9).

for All". The Communication refers to the expectations of EU consumers[1] concerning respect for human rights, labour rights and the environment during the production of the goods they use (European Commission, 2015a, p. 20). However, since most production occurs along value chains that criss-cross developed and developing economies alike, the Commission acknowledges the challenging reality of meeting these expectations. These elements are reiterated in the 2017 review of the EU trade strategy (European Commission, 2017, pp. 2, 9–10). First, high standards of labour protection are confirmed as being fundamentals of the "Trade for All" strategy. Second, the ambition to continue to make trade "a positive force around the globe" and to shape globalisation to promote sustainable development with a trade policy based on "EU and universal values" has been affirmed. Third, consumer concerns are taken into account as "the EU continues to pursue new avenues in making trade policy more responsive to citizen's concerns". The European Parliament (2017) has confirmed these demands from EU consumers in its resolution on the impact of international trade and the EU's trade policies on global value chains, recalling that "no consumer wants to continue buying products made by children or exploited men and women".

A number of EU trade instruments incorporate the necessity to respect labour rights. In its Generalised Scheme of Preferences plus (GSP+, see *infra*), the EU grants beneficial market access to developing countries that ratify and implement, amongst others, the ILO core conventions (Velluti, 2015). In addition, all the new generation EU trade agreements, starting with the EU–Korea agreement in 2011, include a chapter on "Trade and Sustainable Development", in which the Parties pledge to adhere to the ILO core conventions, amongst others (see Van den Putte & Orbie, 2015). Finally, ad hoc instruments have been developed to address labour rights violations in specific value chains. For example, the Global Sustainability Compact aims to improve labour conditions in the garment industry in Bangladesh (Vogt, 2017, in this issue). In addition to these trade instruments, the role of and collaboration with private actors in labour governance have also received more policy attention and Corporate Social Responsibility initiatives[2] are increasingly supported, directly and indirectly, by the EU (Knudsen & Moon, in press).

Following this line of argument on the importance of labour standards in EU trade, the article engages with the positive trade-labour assumption by examining whether exports to the EU are conditional upon the level of protected labour rights in the exporting country. By confirming this assumption, we can broadly conclude that, in line with claims made by policy makers, Europe is actually a more social market. This also implies that exporting producers and governments have an interest in improving social conditions at firm and national level in order to boost their exports to the EU. If the results reject the assumption, we can conclude that the perception of the European market as being very demanding with regard to social standards is not in line with reality, resulting in an overestimation of European consumer and retailer power to raise the bar on social standards.

2.2. Institutional Quality as a Determinant of Exports

An enabling institutional environment attracts foreign investment and facilitates trade through more secure property rights, contract enforcement and investor protection (Levchenko, 2007; Rodrik, 1996). Anderson and Marcouiller (2002) showed that better institutional quality leads to larger trade volumes. A similar positive influence of domestic institutions on bilateral trade flows was found by Jansen and Nordås (2004). Absence of good governance, especially a weak regulatory framework, can be an obstacle to trade (Méon & Sekkat, 2008). For example, the decline in pineapple export share to the EU from Côte d'Ivoire since the mid-1980s was partly explained by political instability, high turnover of private and public institutions, withdrawal of state support for the agricultural sector, and the civil war (Vagneron, Faure, & Loeillet, 2009). Institutions, as business facilitators, may also indirectly affect trade through the relationship with investment (Pajunen, 2008). European importers particularly value a positive institutional environment in-country, because a good judicial system makes it easier to do business and facilitates contract enforcement (Richards, Gelleny, & Sacko, 2001).

2.3. Tariffs as a Determinant of Exports

Preferential or zero tariff rates in trade agreements can foster exports through facilitated access to the European market. Higher tariff rates for a specific product or country can work as a barrier, increasing export costs. However, the impact of tariffs differs by country and product (Emlinger, Jacquet, & Chevassus Lozza, 2008).

The EU has developed a number of trade regimes to manage access to its market. The EU provides preferential market access through bilateral agreements and has elaborated specific trade regimes for developing countries. The latter are mainly unilateral trade arrangements including "Everything but Arms", initiatives providing duty-free and quota-free access for the least developed countries, the GSP, which allows vulnerable developing countries to pay fewer or no duties on exports to the EU, and the GSP+, which combines more generous market access with sustainable development, governance and trade conditionality. While the former colonies, mainly referred to as the African, Caribbean and Pacific (ACP) group, long stood at the top of the EU's "pyramid of preferences", their position has been eroded. This has been a gradual evolution in which reciprocal (yet still asym-

[2] For example, several member states are actively involved in promoting sustainable supply chains by financially supporting and participating in multi-stakeholder initiatives such as the Dutch Sustainable Trade Initiative (Initiatief voor Duurzame Handel, IDH) and the UK Ethical Trading Initiative (ETI).

metrical) free trade has trumped the development aspiration of the EU trade agenda (for an overview see Orbie & Martens, 2016).

In general, the classical policy instruments, such as tariffs, have lost much of their importance due to liberalisation processes and new trade agreements (Hefeker & Wunner, 2002). Indeed, in 2014, about 71% of all agricultural imports entered the EU at zero duty, representing a value of EUR 72 billion (European Commission, 2015b). This demonstrates that factors other than tariffs are expected to influence trade with the EU (Emlinger et al., 2008).

2.4. Distance as a Determinant of Exports

Countries that are located close to the EU are expected to export more to the EU because of lower transportation costs (De Groot, Linders, Rietveld, & Subramanian, 2004). Moreover, some of these countries may also benefit from historical relations and development assistance to strengthen their capacity in productive sectors through infrastructure and human capital investment (Babarinde & Faber, 2007). These historical ties may facilitate more direct, stable export relations between producer firms in the former colonies and buyers in the former European colonisers (Emlinger et al., 2008).

3. Methodology

3.1. Case Selection

The fresh pineapple sector was selected due to its large direct export flow with few processing steps in the value chain, the labour-intensive production process, and the increased consumption in Europe. Pineapples are produced in various countries, mainly on large plantations dominated by three multinationals: Del Monte, Dole and Chiquita (Centre for the Promotion of Imports from Developing Countries, 2015). The focal area for pineapple production is Costa Rica, which is the largest fresh pineapple exporter to the EU, accounting for 85% of European supplies in 2013 (COMEXT, 2015). In fact, ACP producers have lost a large market share while imports from Costa Rica have multiplied over the past decade (Vagneron et al., 2009), as Costa Rica started to cultivate the MD-2 variety which is in high demand on the market.

The dataset used in this study consists of 44 pineapple producing and exporting countries (i.e. actors or units of analysis). The fresh pineapple export volumes to the European market were derived from the United Nations COMTRADE (2015) and Eurostat COMEXT (2015) databases (HS code 080430). Countries with less than 500 metric tonnes of total export volume were excluded from the analysis because of their negligible economic value, resulting in 26 valid cases—too few for an econometric analysis and too many for an in-depth qualitative analysis. Hence, a QCA modelling approach was chosen.

3.2. Data Sources

3.2.1. The Outcome: EXP

The outcome is defined as the share of pineapple exports to the EU compared to other destinations. It represents the relative importance or dependency on the EU market as a destination for pineapples in each exporting country considered in the model, which is quantified by the volume of exported pineapples to the EU from a specific country divided by the total pineapple exports in that country for the year 2012. Our model does not consider bilateral trade between individual countries as could be done in gravity models; instead, it analyses unilateral flows from the trade partner country to the European Union member states, which comprise one group for this purpose, the EU market. Some countries, notably in Africa, export exclusively or a large share of their pineapple to the EU. In contrast, Latin American countries export only half of their total pineapple exports or less to the EU as for them the US is an important market. Asian countries mainly trade processed canned pineapple, which we excluded from our analysis.

3.2.2. The Conditions: LAB, INST, TAR, DIST

LAB. There is no commonly approved index to measure and capture the different labour rights dimensions (Anker, Chernyshev, Egger, Mehran, & Ritter, 2003; Compa, 2003; Cuyvers & Van Den Bulcke, 2007; Teitelbaum, 2010). Measures at firm level include wage, working time and occupational health and safety, which are referred to as outcome rights (Barrientos & Smith, 2007). At country level, the four core ILO conventions are generally mentioned, namely freedom of association and the right to collective bargaining (referred to in the remainder of this article as Freedom of Association and Collective Bargaining [FACB] rights), no forced labour, no child labour, and no discrimination at the workplace. Out of these four dimensions we consider the collective bargaining rights as the lever to improved labour conditions in the agricultural sector where wages are low and workers tend to be worse off compared to those employed in other occupational sectors (Mosley, 2008). These 'enabling' FACB rights are conducive to access to outcome rights such as wage and working time (Barrientos & Smith, 2007), yet the right to form an independent workers' organisation is still suppressed in many countries, especially in agricultural sectors where unionisation is low (Hurst, 2005). Neumayer and de Soysa (2006) argued that globalisation is more likely to promote FACB rights than the outcome rights.

The QCA model presented in this article uses the most recent labour rights (LR) indicator (Kucera & Sari, 2016). The LR indicator distinguishes between two elements of workers' rights: the legal ratification of the ILO conventions (*de jure*) and their practical implementation (*de facto*). The LR indicator consists of 108 distinct eval-

uation criteria for *de jure* and *de facto* violations which are grouped in five categories: (1) fundamental civil liberties, (2) right of workers to establish and join organisations, (3) other union activities, (4) right to collective bargaining, and (5) right to strike. Factual information is obtained from the coding of nine textual sources[3]. The final indicator scores countries from 0 to 10 (respectively the best and the worst possible score).

INST. The World Bank Governance Indicators are widely used to measure institutional quality (Kaufmann, Kraay, & Mastruzzi, 2010). The indicators are based on the opinion of a large number of enterprise, citizen and expert survey respondents, including 32 individual data sources. It consists of six dimensions measured on a scale of −2.5 to 2.5 (with 2.5 as the best score): voice and accountability, political stability, government effectiveness, regulatory quality, rule of law, and control of corruption. The dimension rule of law was selected in this study because it captures the perceptions of confidence in abiding by the rules, in particular the quality of contract enforcement, property rights, police and courts, which is relevant in trade relations (Kaufmann et al., 2010).

TAR. We compared the trade regime and the product-specific tariff line for pineapple applied to each country in 2012, derived from the TARIC database (European Commission, 2016). Bolivia, Costa Rica, Ecuador, Guatemala, Honduras and Paraguay fell under the GSP+ scheme. Benin, Thailand, Togo and Uganda had an EBA agreement. Other countries had a GSP agreement except for the USA for which normal tariffs apply. The GSP trade regime did not guarantee zero tariffs for pineapple in the case of China, Brazil, India, Malaysia, Philippines and Thailand. Therefore we opted to account for the variation in tariff lines for pineapple. A dummy variable was constructed for having a zero tariff rate.

DIST. This article uses the distance measures developed by the Centre d'Etudes Prospectives et d'Informations Internationales (CEPII) to determine the distance between Brussels as Europe's institutional centre and each capital city in the world (Mayer & Zignago, 2011).

3.3. Qualitative Comparative Analysis

QCA differs in several respects from traditional statistical methods and is increasingly being applied in comparative political research at country level (Giumelli & Van Roozendaal, 2016; Pajunen, 2008).

First, the objective of the study is not to estimate if a variable or an interaction term has a positive or negative significant effect on a dependent variable as in the gravity model of Kucera and Sarna (2006), who found a limited positive effect of FACB on total export trade. Instead, we seek to identify the different combinations of conditions that lead to the outcome, the relative importance of the EU as export market, because it is theoretically more likely that various paths for specific cases bring about this outcome.

Second, QCA and regression analysis have different explanatory approaches, each of which lends itself to different research questions and hypotheses (Vis, 2012). QCA follows a causes-of-effects approach, because the goal is to explain the different causal patterns in the cases under study that produce specific outcomes (effects), such as dependency on the EU market for pineapple exports in this study. Quantitative approaches adopt an effects-of-causes approach, with the central objective to estimate the average effect of one (or more) variables in a sufficiently large sample. Hence, a QCA is well-suited to address the question of why some countries are exporting relatively more to the EU and others not, because the outcome is probably shaped by combinations of factors and not by one causal model with individual factors in isolation.

Moreover, QCA is especially appropriate for small to medium n-samples where regressions are problematic (Marx, Rihoux, & Ragin, 2014). We do not focus on worldwide bilateral trade flows (exports and imports between all countries in the world) as in gravity models. Instead we want to compare cases of countries having a high or low dependency on exports to the EU, in particular for pineapple as a labour-intensive agricultural product.

The essence of QCA is to understand the combination of conditions that is necessary and/or sufficient for a certain outcome. The QCA method focuses on relations of implication (absence or presence of conditions), while in regression models the causation is assumed to be linear, testing hypotheses about relations of covariation or correlation between the independent and dependent variables (Katz, Vom Hau, & Mahoney, 2005; Thiem, Baumgartner, & Bol, 2016).

A first advantage is that QCA allows for equifinality, or in other words, different causal paths can explain the same effect. This notion of equifinality is omitted in most mainstream statistical methods, which serve to assess the average effect of one individual factor (Grofman & Schneider, 2009). It is true that regression analysis can also account for a combination of conditions through interaction terms, but the interpretation is less straightforward than in QCA and the number of interaction terms that can be included is limited (Vis, 2012). QCA cannot simply be substituted by an interaction-based regression model, because it is hard to deal with many high order interaction terms without violating statistical assumptions (Marx et al., 2014). Even with interactions, regression models are insensitive to the differences between necessity and sufficiency (Grofman & Schneider, 2009, p. 669; Vis, 2012, p. 173).

[3] *Country Reports on Human Rights Practices* (US Department of State), *Annual Survey of Violations of Trade Union Rights* (International Trade Union Confederation—ITUC), ILO's *Reports of the Committee on Freedom of Association*, *Reports of the Committee of Experts on the Application of Conventions and Recommendations*, *Reports of the Conference Committee on the Application of Standards*, *Country Baselines Under the ILO Declaration Annual Review*, *Representations under Article 24 of the ILO Constitution*, *Complaints under Article 26 of the ILO Constitution*, and the relevant *national legislation* for non-ratifying countries.

A second advantage is that QCA explains why specific groups of cases fit with a combination of factors. Moreover, a coefficient might appear not statistically significant in regression results or an extreme value might be seen as an outlier, while it can still be informative and crucial as a condition explaining the occurrence of a few cases in a QCA solution (Grofman & Schneider, 2009; Katz et al., 2005). QCA thus has the advantage that it has less severe data requirements than regressions (Vis, 2012).

The following steps were adopted in the QCA approach. The number of cases complies with the minimal number of cases needed for a QCA. This is calculated as 2^k with k the number of conditions. As we consider four conditions (see above), we need a minimum of 16 cases to have a reliable solution. The 26 countries thus represent an intermediate N-situation, for which QCA is particularly adequate.

QCA is a set-theoretic approach to test causal complexity based on the notion of sets, set membership scores and set relations to find the necessary and sufficient conditions. A condition is considered necessary if whenever the outcome is observed, the condition was present. A condition is sufficient if whenever the condition was present, the outcome also occurred.

In a QCA model, the outcome and conditions are formulated in terms of set membership, with a value assigned to each individual case, indicating the extent to which it belongs to the set. This data needs to be calibrated using empirical information on the cases in order to assign set membership scores that vary between 0 and 1. Membership scores are calculated using both crisp set (0 = out or 1 = in the set) as fuzzy set approaches. Fuzzy set models allow for partial membership in the set. When calibrating the fuzzy set data, a threshold or point of indifference (0.5) needs to be defined; this allows a qualitative distinction to be made in the case of membership. Fuzzy sets also require the selection of anchor points between full set membership (1) and full non-membership (0). From the three commonly used calibration methods (theory-guided qualitative, direct and indirect), we apply the qualitative approach that identifies meaningful anchors based on conceptual and case knowledge.

Through such a qualitative calibration method, the fuzzy set anchor points determined the threshold values for each of the four levels within a set: 0 (no membership), 0.33 (partial non-membership, more out than in the set), 0.67 (partial membership, more in than out), and 1 (full membership) (Table 1). For the outcome variable, the cases with an export share of less than 0.05 were recalibrated as "no dependency" on the EU market for pineapple export (0), values between 0.05 and 0.3 were assigned to the "low dependency" subset (0.33), values between 0.3 and 0.7 belonged to the "intermediate dependency" subset (0.67) and values above 0.7 covered the "highly dependent" cases (1). The point of indifference for the fuzzy set "many labour rights violations" is considered in the middle of the scale as 0.5, meaning that cases passing this threshold are more in the set (1) than out (0). For the crisp set enabling institution, the cases with a value below −0.50 on the original scale of −2.5 to 2.5 were recalibrated to zero (no enabling institutions) and above −0.5 to 1 (enabling institutions). The dummy of tariff rates is already binary and did not have to be recalibrated. The distance to the EU over 10,000 km was calibrated as "very far" (1), between 6,000 and 10,000 km as "far" (0.67), between 4,000 and 6,000 km as "intermediate" (0.33), and less than 4,000 km as "close" (0).

Table A1 of the annex compares the calibrated data used in the analysis with raw data values. The fit of a QCA is measured by its consistency and coverage. "Consistency" measures the degree to which a relation of sufficiency between a causal condition (or combination of conditions) and an outcome is met within a given data set (Ragin, 2006). Consistency values range from 0 (no consistency) to 1 (perfect consistency). Once it has been established that a condition or combination of conditions is consistent with sufficiency, coverage provides a measure of empirical relevance, or the extent to which this combination of conditions is covered by empirical cases. There are three measures for coverage of different parts of the solution in the case of equifinality (i.e. more than one different solution path lead to the same outcome) (Ragin, 2006). The solution coverage refers to how much is covered by the solution term. The raw coverage (cov.r) indicates which share of the outcome is explained by each alternative path. The unique coverage (cov.u) refers to the share of the outcome that is exclusively explained by a specific alternative path.

The QCA package of the software programme R was used to analyse the necessary and sufficient conditions.

4. Results

This section presents the results of the QCA model that examines which (combined) factors are necessary and

Table 1. Calibration of anchor points for the conditions and outcome.

Set name	Type	Anchor points (range of calibrated values)
High importance EU (EXP)	Fuzzy	(0) < **0.05** (0.33) < **0.3** (0.67) < **0.7** (1)
Many labour rights violations (LAB)	Fuzzy	0.5
Enabling institutions (INST)	Crisp	(0) < **–0.50** < (1)
Zero tariff (TAR)	Crisp	1 (zero tariff), 0 (no zero tariff)
Far from the EU (DIST)	Fuzzy	(0) < **4,000** (0.33) < **6,000** (0.67) < **10,000** (1)

sufficient conditions for a high importance of the EU market for pineapple exports. The first step in a QCA after calibration is to check for necessary conditions. This is done separately from the analysis of sufficient conditions, which is the second step.

4.1. Analysis of Necessary Conditions

The necessity solution is determined by a threshold of consistency equal to 0.9 and the coverage should not be lower than 0.5 (Ragin, 2006).

Table 2 shows one necessary condition for the occurrence of the outcome, namely zero tariffs, with a consistency score of 0.937 and a coverage value of 0.527, slightly above the corresponding threshold levels. Whenever the outcome (relatively large share of pineapples exported to the EU) occurs, the condition zero tariff is present. This suggests that having a zero tariff is necessary for a high relative importance of the EU market for pineapple exports.

The analysis was repeated for the non-occurrence (∼) of the outcome and conditions, which is a qualitatively different event than its occurrence. None of the necessary conditions scored above the threshold level of 0.9.

4.2. Analysis of Sufficient Conditions

The truth table (Table 3) summarises all possible combinations of the four conditions, here 16 rows, for the outcome that the EU is an important export market. Each row identifies the possible combinations of conditions and the cases that belong to that combination. Some of the rows in the truth table are empty because there were no empirical cases for these combinations of conditions.

Next, the truth table is minimised towards a conservative solution. For this purpose, an inclusion threshold score for sufficiency of 0.75 or higher is considered (Schneider & Wagemann, 2012), which means that 75% of the cases' membership scores in a combination of conditions must be consistent. Cases with a consistency

Table 2. Analysis of necessity for the (non-)occurrence of the outcome with consistency, coverage and relevance of necessity values.

	Consistency		Coverage		RoN	
Conditions	EXP	∼EXP	EXP	∼EXP	EXP	∼EXP
LAB	0.480	0.583	0.441	0.769	0.689	0.842
∼LAB	0.748	0.576	0.556	0.614	0.646	0.677
INST	0.469	0.522	0.385	0.615	0.619	0.722
∼INST	0.531	0.478	0.436	0.564	0.639	0.696
TAR	0.937	0.587	0.527	0.473	0.438	0.412
∼TAR	0.063	0.413	0.096	0.904	0.750	0.966
DIST	0.621	0.850	0.354	0.695	0.375	0.559
∼DIST	0.850	0.209	0.695	0.442	0.559	0.823

Notes: TAR: zero tariff; LAB: many labour violations; DIST: far from EU; INST: enabling institutions; EXP: high importance EU.

Table 3. Truth table for the importance of EU for pineapple exports with conditions TAR, LAB, DIST and INST.

TAR	LAB	DIST	INST	EXP	n	incl	Cases
1	1	1	1	1	2	0.857	Panama, Colombia
1	0	0	0	1	3	0.856	Benin, Côte d'Ivoire, Togo
1	1	0	0	0	1	0.749	Cameroon
1	0	0	1	0	1	0.732	Ghana
1	0	1	1	0	4	0.709	Costa Rica, Mauritius, South Africa, Uganda
1	1	1	0	0	1	0.449	Guatemala
1	0	1	0	0	7	0.440	Bolivia, Dom. Rep., Ecuador, Honduras, Mexico, Paraguay, Tanzania
0	0	1	1	0	1	0.187	Brazil
0	1	1	1	0	4	0.173	China, India, Malaysia, Thailand
0	0	0	1	0	1	0.080	USA
0	1	1	0	0	1	0.000	Philippines
0	0	0	0	?	0	—	
0	0	1	0	?	0	—	
0	1	0	0	?	0	—	
0	1	0	1	?	0	—	
1	1	0	1	?	0	—	

Notes: TAR: zero tariff; LAB: many labour violations; DIST: far from EU; INST: enabling institutions; EXP: high importance EU; n: number of cases; incl: inclusion of sufficiency score.

value higher than 0.75 were assigned a 1 in the outcome for the minimisation process.

Table 4 suggests that the outcome is reached through two solution paths, which is given in QCA notation[4] as: TAR*∼INST*∼DIST*∼LAB + TAR*INST*DIST*LAB ⇒ EXP.

The first solution path suggests that the combination of a zero tariff, being closely located to the EU, weak institutions and few labour rights violations are sufficient for a high relative importance of the EU as an export market for pineapples. This combination of conditions is found in Benin, Côte d'Ivoire and Togo. The second solution path suggests that the combination of a zero tariff, enabling institutions, distance far from the EU, and many labour rights violations also suffice for having a high relative importance of the EU market in the case of Colombia and Panama. Whenever one of these two combinations of conditions is present, the EU market for pineapple exports is relatively important. Moreover, the outcome is not attributable to a unique factor or individual condition. Results suggest that the quality of institutions is less relevant in the West African exporters of pineapples compared to the Latin American exporters such as Colombia and Panama. The reverse is true for the protection of labour rights, which matters more for the West African exporters than for Colombia and Panama.

Regarding the model fit, the solution has a consistency value of 0.857, a score that indicates that some cases deviate from the conditional patterns. The solution coverage is 51% of the cases, meaning that half of the cases are not explained by the solution, which limits the generalisability of the results. The raw and unique coverage values are rather low for both paths. The first path is covered by more cases and is of more empirical importance than the second path.

In sum, the model confirms that a combination of conditions (protection of labour rights, institutional quality, tariff regime and distance) explain the relative share of pineapple exports to the EU market. Surprisingly, the solutions did not cover as many cases of pineapple exporting countries as we had expected. This result is probably influenced by the outcome definition, because West African producers heavily rely on the EU market for pineapple exports, receiving a score 1 on the outcome variable. These countries have few alternative market channels except for local consumption. The market outlets for Costa Rican pineapples are ample. Half of the Costa Rican pineapples go to the US market. Defined in the way it is, the outcome variable underestimates the importance of the EU for Costa Rican pineapples, which are market leaders in terms of volume exported to the EU.

5. Conclusion

The protection of labour standards is increasingly relevant for trade relations because of consumers' ethical concerns and corresponding attention paid by firms and policy makers. The European market is an important destination for agricultural export commodities and European firms might favour countries with good labour standards to establish their global value chains in addition to decisions based on cost logic. However, our understanding of the extent to which labour standards play a decisive role in exporting to the EU is limited. The advantage of QCA is that it allows the combination of conditions that lead to the outcome to be determined. In our study, the results distinguished between two distinct paths, contrasting African to Latin American cases. On the one hand, the combinations of few labour violations and weak institutions are sufficient in the case of Benin, Côte d'Ivoire and Togo. On the other hand, the combinations of many labour violations and enabling institutions are sufficient in the case of Panama and Colombia.

Our QCA analysis, based on countries that export pineapples to the EU, shows that protection of labour standards matters in a number of cases. However, it does not always play a role, and it is never a sufficient condition on its own for determining exports to the European market. Rather, we have shown that (1) having a zero tariff is necessary for a large share of export to the EU, and (2) labour standards protection can make a difference when the institutional quality is weak.

The first finding highlights the relevance of preferential market access. Having zero tariff market access constitutes a necessary (but not sufficient) condition for a relatively large export share to the EU. Interestingly, distance to the European market in itself does not appear as a sufficient condition as it needs to be complemented with other factors such as labour standards protection and institutions. The second finding does indeed sug-

Table 4. Conservative solution of sufficient conditions.

Solution paths	Inclusion Sufficiency Score	Raw Coverage	Unique Coverage	Cases
1) TAR*∼INST*∼DIST*∼LAB	0.856	0.302	0.302	Benin, Côte d'Ivoire, Togo
2) TAR*INST*DIST*LAB	0.857	0.208	0.208	Colombia, Panama
Total Solution	0.857	0.510		

Notes: TAR: zero tariff; LAB: many labour violations; DIST: far from EU; INST: enabling institutions.

[2] In Boolean algebra + means (non-exclusive) OR, * stands for AND, while ∼ refers to the non-occurrence of a term.

gest that labour standards protection can matter but only in combination with the quality of institutions. Specifically, countries where labour standards are respected have been relatively successful exporters to the EU market even if the institutional context is weak (e.g. in Benin, Côte d'Ivoire, Togo), whereas countries where labour standards are violated will only have a large share of exports when their limited compliance with labour rights is compensated for with a high institutional quality (e.g. Panama, Colombia). Countries that do not manage to compensate for their weak track record of labour rights with a higher institutional quality (e.g. Honduras and Guatemala) will not benefit from a larger relative export share to the EU.

Further research needs to engage in a more profound analysis of the interaction between the importance of institutional quality for determining export performance, which has been well established in research on international trade, and compliance with labour rights conventions. The finding that weak institutional quality in the African cases did not hinder business probably reflects the political and economic relations which, historically, have facilitated trade with the ACP countries. In addition, the firm and retailer levels should be examined more closely to determine how important compliance with labour standards is in purchasing decisions and how labour standards are monitored in global value chains. Why and how exporters that respect labour standards have managed to export successfully to the EU market despite weak institutions (in African cases) remains to be investigated more closely. Finally, it is unclear to what extent the findings can be generalised beyond the peculiarities of pineapple to other agricultural commodities and value chains such as garments.

We can conclude that even (Latin American) violators of labour standards have a relatively large export share to the EU, provided that they benefit from zero tariffs and have good institutions. This calls into question whether the image of the EU market as being very demanding in terms of labour standards coincides with the purchasing behaviour of importers, retailers and consumers, who might not sufficiently reward or incentivise compliance with labour standards at sourcing sites. Although the EU is explicit in its discourse on promoting labour standards, it appears to miss its intended leverage effect on actual export decisions and consequently fails to drive higher standards in sourcing sites.

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Conflict of Interests

The authors declare no conflict of interests.

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Marijke D'Haese is a Professor of Rural Development Economics at Ghent University. In 2003, she obtained a PhD on the economics of woolgrowers' associations in the Transkei region in South Africa. She is involved in several projects on diverse aspects of agricultural development in the South. She previously worked as an Assistant Professor in the Development Economics Group at Wageningen University and has conducted fieldwork in Ethiopia, Bolivia, South Africa and Costa Rica.

Jan Orbie is the Director of the Centre for EU Studies (CEUS) and a Professor in the Department of Political Science at Ghent University. His primary research focus is on the EU's foreign policy and specifically the "soft" dimensions (trade, development, social, democracy promotion) of EU external relations. In particular, he follows the interaction between trade, development and foreign policies from an EU perspective. He teaches similar subjects within Ghent University's Master's programme in EU Studies.

Annex

Table A1. Raw and calibrated data of the outcome and conditions.

		EXP		INST		LAB		TAR		DIST	
	Case	Cal.	Raw	Raw	Cal.	Raw	Cal.	Raw	Cal.	Raw	Cal.
1	Cameroon	1	0.98	−1.04	0	5.61	0.56	0	1	5272	0.255
2	Côte d'Ivoire	1	0.98	−1.12	0	2.40	0.24	0	1	5126	0.216
3	Benin	1	0.93	−0.64	0	2.38	0.24	0	1	4948	0.180
4	Mauritius	1	0.92	0.95	1	3.67	0.37	0	1	9453	0.927
5	Togo	1	0.86	−0.94	0	1.31	0.13	0	1	4979	0.182
6	Ghana	1	0.82	−0.04	1	2.02	0.2	0	1	5058	0.200
7	Panama	0.67	0.67	−0.23	1	6.67	0.67	0	1	8814	0.888
8	Dominican Republic	0.67	0.62	−0.7	0	3.81	0.38	0	1	7325	0.726
9	Thailand	0.67	0.52	−0.17	1	6.09	0.61	2.3	0	9261	0.917
10	Costa Rica	0.67	0.48	0.47	1	2.9	0.29	0	1	9046	0.904
11	Ecuador	0.67	0.40	−1.16	0	4.17	0.42	0	1	9535	0.931
12	Colombia	0.67	0.38	−0.39	1	5.27	0.53	0	1	8874	0.892
13	South Africa	0.33	0.28	−0.11	1	1.68	0.17	0	1	9536	0.931
14	Honduras	0.33	0.10	−1.17	0	4.50	0.45	0	1	8916	0.895
15	Tanzania	0	0.02	−0.56	0	4.22	0.42	0	1	7242	0.714
16	Bolivia	0	0	−1.04	0	3.28	0.33	0	1	10261	0.958
17	Brazil	0	0	−0.11	1	4.07	0.41	2.3	0	9666	0.937
18	China	0	0	−0.49	1	10	1	2.3	0	7971	0.810
19	Guatemala	0	0	−1.1	0	7.08	0.71	0	1	9095	0.907
20	India	0	0	−0.1	1	6.83	0.68	2.3	0	6420	0.577
21	Malaysia	0	0	0.51	1	6.65	0.67	2.3	0	10261	0.958
22	Mexico	0	0	−0.56	0	4.15	0.42	0	1	9259	0.917
23	Paraguay	0	0	−0.87	0	3.45	0.35	0	1	10417	0.963
24	Philippines	0	0	−0.55	0	5.81	0.58	2.3	0	10516	0.965
25	Uganda	0	0	−0.36	1	3.70	0.37	0	1	6219	0.540
26	USA	0	0	1.6	1	4.57	0.46	5.8	0	5892	0.460

Notes: EXP: high importance EU; INST: enabling institutions; LAB: many labour violations; TAR: zero tariff; DIST: far from EU.

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