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DISPUTE SETTLEMENT IN THE TRADE AND SUSTAINABLE DEVELOPMENT CHAPTERS OF EU TRADE AGREEMENTS

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KU LEUVEN

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Cover and design: Sara Van den Heuvel

Executive Summary

In the context of recent trade agreements, the EU has been negotiating 'trade and sustainable development chapters' (hereafter 'TSD chapters') with the aim of pursuing sustainable development objectives, especially concerning labour issues and the environment. Recently, doubts have been expressed on whether these TSD chapters live up to the expectations they create. This gives rise to the question of how these agreements can be strengthened. In this context, attention turns to the potential role of dispute settlement, the focus of this report, as one factor for fostering compliance with the provisions in TSD chapters. The focus on dispute settlement emerges in a wider debate in which the 'empowerment' of stakeholders to enforce compliance with international rules is emphasised.

The aim of the study is to identify and analyse existing dispute settlement mechanisms which could be taken into account in the context of TSD chapters in trade agreements. This resulted in the identification of different options which can be considered by policy makers. These options can take on several forms and could be used as a template or as an example to 'redesign' or enhance the existing and future TSD chapters in trade agreements. In this regard, the report provides a discussion and assessment of (1) the current approach to TSD chapters in EU trade agreements, (2) approaches concerning dispute settlement in relevant agreements negotiated by the US and Canada and (3) the investment court system. Next, the report considers options which could integrate existing external mechanisms for dispute settlement into the trade agreements. More specifically, the report analyses the potential of (1) the National Contact Points of the OECD Guidelines for Multinational Enterprises (OECD-NCPs), (2) selected aspects of the ILO supervisory mechanisms and (3) complaint systems related to voluntary sustainability standards (VSS).

For each of these six options the report provides a brief case study describing its functioning and assessing its (potential) effectiveness. The aim is not to provide an extensive discussion of each option but to present the essential features and findings in the current literature that are relevant for the purpose of the research issue at hand. The different options are discussed in terms of several dimensions: who can initiate a dispute, who is the target of a dispute, who assesses the admissibility of a dispute, what happens after a dispute is deemed justified, what are the possible outcomes of a dispute, who implements and follows up on a decision and whether there is a link with domestic

judicial mechanisms. The analysis shows differences between the options discussed in this report across all these dimensions.

First, in some cases only states can initiate a dispute against other states while other arrangements enable a broader range of actors to file complaints including investors, civil society representatives and individuals. Second, the targets of complaints also vary and include states as well as (multinational) companies. Third, each of the discussed options establishes a separate body to assess the admissibility of complaints and specific procedures to follow up on complaints, most commonly through a panel of independent experts which assess the complaint. Fourth, each option imposes follow-up requirements following the outcome of a dispute settlement, which may include the imposition of sanctions. They range from soft sanctions such as recommendations and corrective action plans to hard sanctions such as damages and suspensions of trade or other benefits. Finally, in most cases there is no link to domestic judicial mechanisms. Apart from the differences between the different options the study also discusses the distinctive features, implications, strengths and weaknesses of each option separately.

The study closes with an assessment of the different options. The report identifies four models for third-party involvement regarding dispute settlement in trade agreements: (1) State-to-State dispute settlement without any formal complaint mechanism for third parties; (2) State-to-State dispute settlement combined with a third party complaint mechanism, leaving states discretion over whether or not to activate the dispute settlement mechanism; (3) dispute settlement providing direct access to third parties and (4) State-to-State dispute settlement combined with a third party complaint mechanism, leaving states only limited or no discretion over whether or not to activate the dispute settlement mechanism.

Based on the comparative analysis the study formulates considerations and reflections on the use of dispute settlement in trade agreements. These considerations focus on (1) the purpose of the dispute settlement mechanism; (2) the degree to which one wants to integrate the different existing instruments into an EU trade agreement; and (3) the design of dispute settlement mechanisms.

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Introduction

Introduction

The issue of sustainable trade has emerged firmly on the international political agenda. The 2016 Netherlands Presidency of the EU made sustainable trade one of its priorities. The debates focus on the negative social, environmental, and health consequences of international trade and a potential 'race to the bottom' of environmental and social standards. As a result, public opinion is requesting more attention to sustainability issues in trade agreements. The support for including sustainability concerns in trade agreement is also reflected in, for example, the position of most political parties represented in the European Parliament. When trade agreements are discussed in the European Parliament, almost every political party (for different motives) supports the idea of including trade and sustainable development chapters (hereafter 'TSD chapters') in EU trade agreements (Van den Putte, 2015).

Indeed, sustainable development has been a fixture in EU free trade agreements (FTAs) for some time,[1] albeit sometimes involving different terminology, and the EU has used a number of policy devices to implement this commitment to sustainable development in its trade relations, including conditionality. For instance, the EU has included so-called 'human rights clauses' into all its trade agreements since 1995. In early (pre EU-Korea agreement) trade agreements, the human rights clause was included directly into the relevant trade agreement. In the new generation of agreements (from the EU-Korea agreement onwards), which have both a framework political agreement and a free trade agreement, the human rights clause is contained in the former, and is made applicable to related free trade agreements (see e.g. art. 43 of the EU-Korea Framework Agreement, and Art. 15.14 of the EU-Korea FTA; or Art. 28.7 of the EU-Canada Strategic Partnership Agreement, and Art. 30.9 of the Comprehensive Economic and Trade Agreement (CETA)). These clauses allow the EU to take appropriate measures in case its trade partner violates human rights. These clauses are, however, seldom[2] enforced, and have been subject to criticism for various reasons (Hachez, 2015).

[1] See for example the prominent presence of sustainable development in the 2000 Cotonou Agreement, Art. 9. However, not only in trade agreement but more in general the European Union has made a firm commitment to sustainable development. The EU is committed through its treaties to pursue sustainable development in its internal and external policies, as evidenced among others by Art. 3 (3) and (5) and Art. 21 (2) (d) and (f) TEU, and Art. 11 TFEU.

[2] Only the human rights clause contained in the Cotonou Agreement (arts. 9 and 96) has led to sanctions. For an overview, see Dohlie Saltnes (2013, p. 7).

However, more generally, the use of trade as a governance instrument to pursue non-trade objectives is becoming increasingly important in a world which has witnessed a tremendous growth in international commerce and an increasing dependency of countries on exports to sustain economic growth. As Hoekman (2014) documents, the growth of international trade, over the last half century, has been spectacular. With an almost thirty-fold increase over 50 years it has truly trans-nationalised economic activity. As a region, the European Union is the second largest trader in goods (surpassed by China in 2015, the EU has a share of 14,7% in the world trade of goods) and the largest trade block in trade in services (22.2% share in world trade in services) (European Commission, 2016, pp. 20 and 22).

The EU is using its trade-based market power (Damro, 2012; Wouters et al. 2015) to pursue not only economic objectives, but also non-economic objectives, such as the promotion of sustainable development, including the protection of the environment and of labour rights. EU trade agreements contain TSD chapters outlining which sustainable development objectives should be pursued by the contracting parties. These agreements also stipulate, to some extent, how compliance with these provisions should be monitored and enforced.

Sustainable Development in EU trade agreements

Since 2008, the EU has been implementing a softer and broader approach to the promotion of sustainable development in its trade agreements, by negotiating the aforementioned TSD chapters. The first of these chapters was included in the 2008 EU-Cariforum Economic Partnership Agreement, and since then their inclusion in EU trade agreements has been systematic. So far, TSD chapters are present in agreements currently in force with the following EU trade partners: Cariforum, Central America, Georgia, Moldova, Peru and Colombia, and South Korea, but similar chapters are included in finalised but not yet ratified agreements such as the EU-Singapore FTA, the EU-Vietnam FTA or the Comprehensive Economic and Trade Agreement (CETA) with Canada, and similar chapters are expected to be included in other agreements being negotiated, for instance with Japan.

TSD chapters often involve a reaffirmation of their existing commitments in relation to sustainable development with a specific reference to the protection of labour rights and the environment. These commitments are expressed in political declarations such as the Rio Declaration on Environment and Development or the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work; and in binding international instruments such as ILO Conventions or environmental treaties. The parties also typically commit not to lower their social and environmental

standards in order to increase their trade or investment share. Finally, these chapters stipulate that parties will cooperate or 'work together' in certain policy areas such as engagement in multilateral fora, exchange of information and best practices on relevant topics, furthering the ratification of sustainable development related conventions, or promoting corporate social responsibility.

The main added value of TSD chapters may therefore not lie in the 'harmonisation' of social and environmental standards between the partners, but rather in fostering dialogue and cooperation to achieve sustainable trade in the long run. The monitoring processes agreed upon in TSD chapters are rather complex. First of all, the general joint committees and councils in charge of overseeing the agreement as a whole, which are generally competent to discuss any issue in relation to the agreement, are also entitled to discuss sustainable development issues. However, the main innovation of TSD chapter resides in their systematic monitoring by specialised bodies. Additionally, TSD chapters seek to ensure ongoing dialogue with civil society and social partners, notably through the creation of mechanisms often referred to 'Domestic Advisory Groups' (DAGs) for each party. Composed of civil society, business, social partners, and other experts from relevant stakeholder groups, these groups are supposed to meet on a regular, typically annual basis. Dialogue at official level is therefore central and civil society is an essential actor in the implementation and monitoring of TSD chapters.

However, doubts have been raised on whether these TSD chapters make any difference in practice and are able to address potential non-compliance with the stated objectives. A number of commentators have been skeptical about the potential of these provisions to actually enforce labour rights and environmental protection in their current design (see e.g. Campling et al., 2016; Marx et al. 2016; Ebert, 2016; Marx & Soares, 2015; van Roozendaal, 2015; Velluti, 2015; Vogt, 2015). The current design might promote compliance with international agreements on labour and environment in terms of formal ratification, but it does not necessarily address non-compliance in practice. In particular, there is concern that the monitoring institutions established in relation to the TSD Chapters might be too weak for this. In this respect, closing the so-called compliance gap seems to be especially challenging. Most countries currently engaged in EU trade agreements might comply with the relevant provisions in terms of the formal ratification of international commitments, but not necessarily in practice(see in this regard also Hafner-Burton, 2013). Hence, there is a growing consensus that the current provisions are insufficient to significantly foster sustainable development. We further discuss and illustrate this compliance challenge in the case study on EU trade agreements and the conclusion.

The question thus arises of how these agreements can be strengthened in terms of their monitoring and enforcement capacity. This concerns especially the potential of having dispute and complaint systems which could allow 'stakeholders' to address non-compliance. The focus on dispute settlement emerges in

a wider context in which the 'empowerment' of stakeholders to enforce compliance with international rules is emphasized. For example, the UN Guiding Principles on Business and Human Rights (UN, 2011) is built around three components of which access to remedies (via dispute systems) is one. Additionally, academic research in for example the context of voluntary standards, has pointed towards the importance of dispute mechanisms and 'retrospective accountability' (Hachez & Wouters, 2011) for the effective enforcement of private social and environmental standards (see also Marx, 2014; Gulbrandsen, 2008).

This focus on complaint and dispute settlement mechanisms connects to the overall theme of this study on how to strengthen the TSD chapters in EU trade agreements. Currently, TSD chapters are explicitly excluded from the scope of the general dispute settlement mechanism of EU trade agreements which typically includes binding decisions by an arbitral panel (for a different approach see the discussion on EU-Cariforum in this report). Disagreements concerning obligations arising out of the TSD chapters are subject to consultations between governments or in the relevant committee/board and, in the absence of a satisfactory settlement at the end of the consultations stage, a panel of experts may be convened to examine the matter and submit recommendations. Likewise, the interplay between these treaty-based dispute settlement mechanisms and domestic judicial processes is under-researched.

This 'promotional' approach to sustainable development in EU trade agreements (ILO, 2013), and the dialogue-based remedies in case of non-compliance have been criticised as lacking the necessary vigour, especially in comparison with measures available under North-American agreements. For example (Lukas & Steinkellner, 2010) advocate additional features to be included into the EU agreements, such as the right to individual petition to national contact points and the possible imposition of fines in cases of breach of the agreement.[3] A number of voices are now calling for the setting up of binding enforcement and dispute settlement mechanisms applicable to the sustainable development provisions of EU trade agreements.

[3] See e.g. North American Agreement on Labor Cooperation (NAALC), signed 14 September 1993, Annex 39, and International Labour Organization and International Institute for Labour Studies, *Social Dimensions of Free Trade Agreements* (2013), available online <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf>, 31 ff.

Aim and Outline of the Report

In light of the above, this study proposes to survey a number of examples of dispute settlement mechanisms which have been used in trade agreements or other types of international instruments and analyse the extent to which they could provide inspiration for a reformed regime of enforcement and dispute settlement in EU trade agreements. The aim of the study is to come up with different options which can be considered by policy makers.

These options can take on several forms. First, we look at options which are currently available in the context of trade agreements. These options could be used as a template or as an example to 'redesign' the existing and future TSD chapters in trade agreements. Here the report will provide a discussion and assessment of (1) the current approach to TSD chapters in EU trade agreements, (2) approaches towards dispute settlement regarding labour and environmental issues in other trade agreements (US and Canada) and (3) investment arbitration.

Next, we consider options which would integrate existing mechanisms for dispute settlement, which were developed and run by other international organizations, in trade agreements. In this context, we analyse the potential of (1) the National Contact Points of the OECD Guidelines for Multinational Enterprises, (2) selected aspects of the ILO supervisory mechanisms and (3) complaint systems developed by voluntary sustainability standards which aim to make trade more sustainable.

For each of these six options we provide a brief case study describing how they work and assessing their (potential) effectiveness. The aim is not to offer an extensive discussion of each case but to present the essential features and findings in the current literature which are relevant for the purpose of the current report. The case studies are based on an analysis of primary and secondary sources. The study will close with a comparative assessment and general discussion of the different options. The comparative analysis will assess the advantages and disadvantages of each dispute settlement mechanism in the different cases. Based on the comparative analysis, the study will formulate some suggestions and reflections which can be used as input for political decision making on the future of dispute settlement relating to TSD chapters in EU trade agreements. Before we proceed with describing and discussing the several options, we first further define the premises and scope of the report.

Scope of the Report

This report starts from some premises which define the scope of the report and result from the terms of reference for this research. Before we proceed, we mention and discuss these premises and scope conditions.

The report is based on the idea that the current provisions on environmental and social protection in TSD are currently insufficiently effective and that a significant factor in accounting for this is the institutional design relating to the TSD chapters. Hence, the question emerges of how the institutional design concerning the TSD chapters can be altered in order to foster better compliance. In this report, we look at one possible mechanism, namely dispute settlement as a means of better enforcing the provisions in the trade agreement.

In this regard, the report assumes that the integration of dispute settlement mechanisms in the TSD-chapters of trade agreement will strengthen enforcement and compliance, either through the threat of a possible dispute (anticipatory effect) or through disputes themselves which might result in sanctions, or generate political pressure which may induce compliance. This assumption is well grounded in theoretical and empirical literature in institutional economics, political science, and public policy (see e.g. Ostrom, 2005). This literature suggests that strong monitoring and sanctioning systems are necessary conditions for ensuring compliance with rules. Dispute settlement can be considered as an important element in this context (see Marx, 2014).[4]

The focus on dispute settlement does not imply that this report dismisses other mechanisms or approaches which could foster compliance with the provisions in the relevant TSD chapters. Apart from stronger enforcement mechanisms, based on complaint and dispute settlement mechanisms, there are other mechanisms based on joint-action and institutionalised dialogue which could improve the implementation of TSD chapters in EU trade agreements. An example of such an approach is the EU-Korea joint initiative on the ILO Convention No 111 on employment discrimination which aims to promote mutual learning on the implementation of this Convention.[5] An analysis of these types of initiatives falls outside the scope of the current report. Other research might also focus on technical cooperation and capacity-building to strengthen the implementation of commitments regarding sustainable development issues (see in this regard Ebert (2016)). Indeed, a lack of capacity to deal with sustainability challenges can also be a reason for non-

[4] Having said that, the report does not exhaustively address the question of whether dispute settlement mechanisms would effectively work in terms of fostering better compliance with the provisions in the TSD chapters. The compliance question as well as the question on possible unintended and intended effects are empirical questions which can only be assessed once such mechanisms are operational.

[5] For information on this project see at: http://korea-euilo111.com/.

compliance (see Marx, et al. (2017) for a case study on Colombia). One point to note here is that these options are not mutually exclusive. Indeed, one can pursue different strategies to strengthen TSD in trade agreements simultaneously.

What all these approaches have in common is that they aim to ensure that NGOs' and other stakeholders' voices concerning non-compliance with the provisions in TSD chapter can be heard and taken into account and that domestic environmental and labour institutions are strengthened. This can be done in several ways including through complaint and dispute settlement mechanisms. Then the question emerges of how dispute settlement can be brought into trade and sustainable development chapters of EU trade agreements. This is the primary focus of this report. For this purpose, we assess several options. This assessment leads us to consider dispute mechanisms which are accessible to third parties. This approach towards dispute settlement is, it should be noted, not common in the current set-up of international trade agreements. With the exception of investment protection, which grants access to dispute settlement to a very specific group of third parties (foreign investors), third parties so far have no access to dispute settlement in EU trade agreements. Opening this up would have potentially significant ramifications: for example, regarding the number of disputes which might be launched. This is an important element for political deliberation.

Case Study: EU Trade Agreements[6]

Introduction

A variety of approaches to labour and environmental provisions can be found in EU trade agreements.[7] Earlier EU agreements containing labour or environmental provisions were mainly limited to rather general provisions regarding cooperation.[8] Others combine cooperation commitments regarding the environment and labour standards with some substantive labour provisions, although these mainly reaffirm the parties' existing international commitments.[9]

A more comprehensive approach has been adopted in later EU trade agreements, which jointly addressed environmental and labour issues in chapters on "Trade and Sustainable Development" (hereinafter "TSD Chapters). On the substantive side, this includes, in particular, the maintenance and enforcement of domestic labour and environmental law[10] and the observance of international minimum standards.[11] Exceptionally, the EU-Cariforum Economic Partnership Agreement deals with labour and environmental issues separately in two chapters and additionally establishes specific labour and environmental standards-related obligations regarding foreign investors in its investment chapter.[12] A particular approach has also been taken regarding the Comprehensive Economic and Trade Agreement (CETA), which was recently signed by the EU and Canada. This agreement contains both a TSD Chapter, setting out, in particular, the framework for civil society participation, and specific labour and environmental chapters, which contain the relevant substantive obligations and rules on dispute settlement.[13]

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[6] Parts of this section and the following section draw on Ebert (2016) and Ebert (forthcoming).
[7] It is also worth noting that the human rights clauses that can be found in a large number of EU's trade agreements protect, at a minimum, fundamental labour rights. See Bartels (2005:36). While these clauses are vested with some potential enforcement leverage, they have not been relied upon significantly for labour issues. Also, the scope of the labour-related obligations under the human rights clauses has yet to be fully ascertained. See also Bartels (2008:11).
[8] See, e.g., Articles 52 and 74(2)(d) of the EC-Algeria Agreement.
[9] See, for example, Article 50(1) of the Cotonou Agreement.
[10] See, e.g. Article 13.7 of the EU-Republic of Korea Agreement; Article 291 of the EU-Central America Agreement.
[11] Some EU agreements notably contain a list of international treaties, such as the ILO Fundamental Conventions and key environmental agreements; see, e.g., Article 268, 269(3), 270(2) of the EU-Peru and Colombia Agreement. Others mainly refer to the treaties in those areas that have been ratified by the respective parties; see e.g. Articles 13.3, 13.4(3) and 13.5(2) of the EU-Republic of Korea Agreement.
[12] See Article 72(b), (c) and 73 of the EU-Cariforum Agreement.
[13] See Chapters 22-24 of CETA.

Labour and environmental provisions contained in the EU's trade agreements typically do not involve enforcement mechanisms such as trade sanctions or fines (Ebert and Posthuma, 2011). While many EU agreements embody comprehensive substantive obligations relating to labour and environmental standards, the attainment of these commitments rests typically on dialogue and cooperation mechanisms and non-sanction-based procedures for the resolution of disputes on the interpretation and application of the relevant provisions.

Description

In terms of implementation, especially the recent EU agreements 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 and environmental requirements (Postnikov and Bastiaens, 2014:925).[14] Nonetheless, most EU trade agreements do not provide for a formal complaint procedure for submissions of civil society actors alleging breach of the TSD Chapters' provisions. Furthermore, the TSD Chapters are typically exempted from the regular (sanction-based) dispute settlement mechanism of these agreements.[15] Instead, these agreements provide for a special procedure under the TSD Chapter, including amicable consultations and, subsequently, the review of the matter at stake by an ad-hoc expert body[16] which can adopt findings and recommendations on the subject matter.[17] 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.[18] The implementation of the relevant measures is then monitored by the competent committee or body on sustainable development, as established under the relevant agreement (see figure 1).[19]

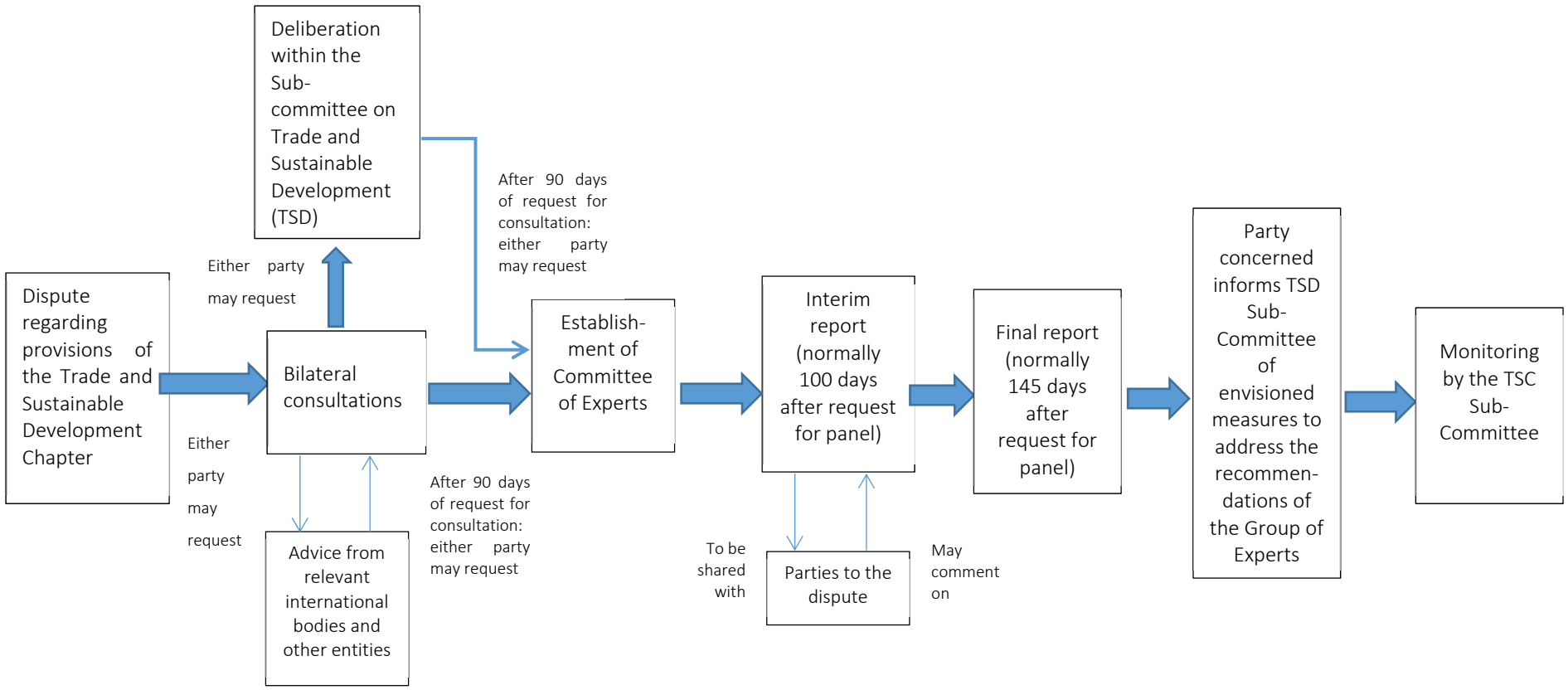
Also, CETA follows this model, albeit with some modifications. Both the labour and the environmental chapter expressly provide for the receipt of submissions by civil society actors, including regarding alleged

[14] See e.g. Article 294 of the EU-Central America Agreement. This involves bodies with consultative functions that are composed of representatives from civil society and business. Also, dialogue sessions between civil society representatives and the parties are often provided for. See, for example, Article 295 of the EU-Central America Agreement.
[15] See, e.g., Articles 13.14 and 13.15 of the EU-Republic of Korea Agreement; Articles 281 and 282 of the EU-Peru and Colombia Agreement.
[16] These are typically referred to as "panel of experts" or "group of experts".
[17] See, e.g., Articles 13.14 and 13.15 of the EU-Republic of Korea Agreement; Article 283-285 of the EU-Peru and Colombia Agreement.
[18] See, e.g., Article 301(3) of the EU-Central America Agreement. In the case of the EU-Republic of Korea Agreement "shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter", see Article 13.15(2) of EU-Republic of Korea Agreement.
[19] See, e.g., Article 285(4) of the EU-Peru and Colombia Agreement.

failure to implement the relevant provisions.[20] The dispute settlement procedure mostly resembles those established under other recent EU trade agreements. Notably, it provides for amicable consultations and review by an expert body without access to regular dispute settlement or the possibility of applying trade or other economic sanctions in the event of non-compliance.[21]

[20] See Articles 23.8(5) and 24.7(3) of CETA.
[21] See Articles 23.10; 23.11; 24.15; 24.16 of CETA.

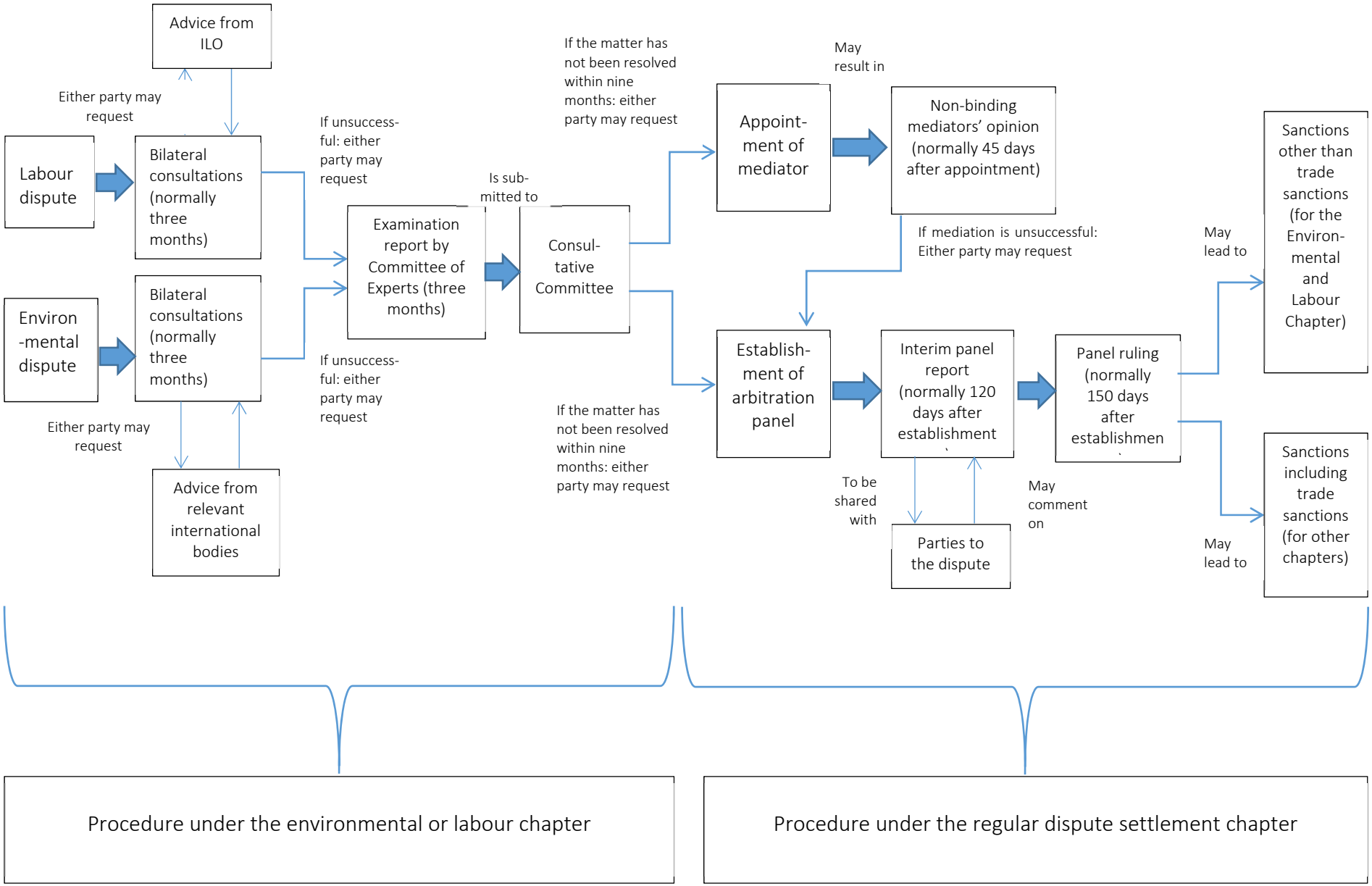
Figure 1. The consultation and expert review procedure regarding the TSD Chapter of the EU-Peru and Colombia Trade Agreement



An important exception with regard to dispute settlement on environmental and labour matters is the EU-Cariforum Trade Agreement (see figure 2). Further to a specific consultation phase, which may involve advice by relevant international bodies, and the review of the matter by a "committee of experts", parties may submit disputes regarding the labour and environmental provisions to regular dispute settlement.[22] In this regard, parties can, first, have recourse to the services of a mediator, who can issue a non-binding report. Second, either party can – subsequently to mediation or directly – request the establishment of an arbitration panel, consisting of three members.[23] Where parties fail to reach an agreement, the panellists will be chosen by lot from a previously established list.[24] For disputes relating to the environmental or labour chapter, at least two of the three panel members shall be drawn from the specific list so as to ensure their expertise in the matters at issue.[25] The panel will prepare an interim report, which is submitted to the parties for comments, and then release the final panel ruling.[26] If the panel finds a breach of the Agreement's provisions, the party concerned is then given a certain amount of time to bring the situation into compliance with the panel's ruling.[27] In the event that the relevant party "fails to notify any measure taken to comply with the arbitration panel ruling before the expiry of the reasonable period of time, or if the arbitration panel rules that the measure notified […] is not compatible with that Party's obligations", that party has, if the other party so requests, to offer compensation.[28] If the parties do not reach an agreement on appropriate compensation within a period of 30 days, the complaining party can take "appropriate measures" after having informed the other party.[29] The measures selected should affect the implementation of the Agreement's objectives as little as possible and also take into account "their impact on the economy of the Party complained against and on the individual CARIFORUM States".[30] Importantly, in relation to the environmental and labour chapters only sanctions other than trade sanctions can be inflicted.[31] This could, notably, include cuts in the area of development cooperation (see e.g. Gallie (2009:195)). That being said, the adoption of trade sanctions under this agreement is possible for disputes regarding the labour and environmental provisions included in the investment chapter.[32]

[22] See Articles 189, 195, 203(1) of the EU-Cariforum Agreement.
[23] See Articles 205 and 206 of the EU-Cariforum Agreement.
[24] See Article 207(3) of the EU-Cariforum Agreement.
[25] See Article 207(4) of the EU-Cariforum Agreement.
[26] See Articles 208 and 209 of the EU-Cariforum Agreement.
[27] See Article 211 of the EU-Cariforum Agreement. In the event of disagreement between the parties about the appropriate time limit for achieving compliance or the measures necessary to this effect, either party submit the matter to the already established arbitration panel or, if it cannot properly reconvene, a new panel. See Articles 211 and 212 of the EU-Cariforum Agreement.
[28] Article 213(1) of the EU-Cariforum Agreement.
[29] Article 213(2) of the EU-Cariforum Agreement.
[30] Ibid.
[31] Ibid.
[32] See Article 213(2) as read in conjunction with Articles 72(b) and 73 of the EU-Cariforum Agreement.

Figure 2. The dispute resolution procedure regarding the TSD Chapter of the EU-Cariforum Trade Agreement



Practical application and effectiveness

The experiences made thus far with dispute settlement mechanisms pertaining to the TSD Chapters and other labour and environmental provisions in EU trade agreements indicate a rather limited potential for enforcing labour and environmental standards. To this date, no case regarding EU trade agreements relating to labour or environmental standards is apparent that has given rise to formal consultations let alone triggered the formal dispute settlement procedure. This can be attributed to several factors. First, only governments, rather than civil society actors, can initiate formal consultations and activate the dispute settlement procedure. Second, the TSD Chapters do not require any party to take action if it has knowledge of breaches of the agreements' environment- or labour-related provisions by the other party. At the same time, despite the comprehensive civil society participation mechanisms provided for by recent EU agreements the capacity to effectively raise alleged breaches of the obligations embodied in the TSD Chapter is limited. This is due to the lack of formal complaint mechanisms requiring the parties to follow up on submissions from civil society.

As a result, the parties to the EU agreements, including the EU, have been able to refrain from taking appropriate action even in the face of allegations of serious breaches of the relevant environmental and labour provisions. For example, civil society actors in the capacity as members of the EU domestic advisory group under the EU-Korea Agreement raised allegations concerning freedom of association of workers in the Republic of Korea, and urged that the European Commission initiate formal consultations with the Korean Government on this matter (Jenkins, 2014).[33] The European Commission reacted to this request but refused to take up formal consultations, preferring to deal with the issue through the regular dialogue on sustainable development (Van den Putte, 2015:229), with little evidence suggesting that these efforts have resolved the allegations at issue.

Meanwhile, the dialogue conducted under the TSD Chapters – both among the state parties and with civil society – has, so far, only given rise to limited results in terms of labour rights improvement, including regarding the aforesaid complaint (see Vogt, 2015:857-858). This can, to some degree, be attributed to the omission by the European Commission to use political influence to bring about changes regarding environmental and labour standards in partner countries (see also Campling et al., 2016:370-371). Some observers have also called into question whether the EU actually possesses the necessary political leverage in the inter-state dialogue to induce policy change in the other parties (see Van den Putte, 2015:229). Accordingly, the EU partner countries, including the Republic of Korea and Colombia, also appear to have been rather indifferent to the allegations of relevant civil society actors (Vogt, 2015). This is exacerbated by additional problems, such as the difficulty to establish functional civil society mechanisms in relation to some EU partner countries, notably the CARIFORUM states (Oehri

[33] This included, among others, interferences by state authorities with the Korean Trade Union Confederation's premises. A reaction by the Korean Government to these allegations is not apparent (Vogt, 2015).

2015:106). Also, a lack of confidence in the relevant mechanisms on behalf of some civil society actors may to some extent reduce the likelihood of the civil society mechanisms being used to raise relevant labour or environmental issues (see below). That being said, even if the dispute mechanism were triggered it would be unclear how strong the leverage entailed thereby would be, given the absence of any pressure through trade or other economic sanctions.

The Compliance Gap: the case of the EU-Colombia agreement

One co-author of this report recently finalised a study (Brando et al. 2016) which investigated the implementation of provisions for labour rights protection provided in the EU-Colombia/Peru Agreement's Trade and Sustainable Development Chapter (Title IX of the Agreement). The study assessed the provisions' effects on two accounts, notably *de jure*, in terms of legal and institutional reforms, and *de facto*, in terms of the perceived effects in practice, focusing on traction on the ground. The findings of the study are based on a comprehensive review of complementary primary and secondary sources, including data on labour rights protection, in law and in practice, as well as on 30 semi-structured interviews with a wide range of stakeholders based in Brussels and Bogotá, including trade union representatives, EU officials as well as officials from different branches of the Colombian public administration, private sector umbrella organisations, development NGOs and trade and labour experts in academia and international organisations. The trade agreement with Colombia was chosen as a case study since it is a likely case to observe a possible impact of the TSD chapter and especially on the protection of labour rights. Ever since the early 2000s, with internal armed conflicts in a receding state, Colombia has witnessed an increase in economic growth. The national government embarked on a process of economic liberalisation, including in its trade relations with some of the world's largest economies. A major concern in this regard was about how increased trade openness affects labour rights. Both domestic and international organisations repeatedly voiced concerns over Colombia's track record in this respect (Lizarazo et al., 2014: 831–834). Hence, it should come as no surprise that labour issues were high on the agenda during the negotiations of the trade agreement. Essentially, opponents to the trade agreement with the EU feared that the latter would render legitimacy to ongoing violations of labour rights and of human rights at large (Rettberg et al., 2014). In response to such concerns, the EP called upon Colombia for a clear commitment to protect labour and human rights. (EP, 2012) Hence, the issues in the TSD chapter were of special concern in this agreement and one expects a close scrutiny on the implementation of this chapter of the agreement. In general, the study finds that, whereas Colombia's legal and institutional framework for labour protection has become increasingly comprehensive over the past two decades, progress in practice shows that compliance with this system is limited at best.

Considering the protection of labour rights *de jure*, Colombian law recognises and protects the ILO's core labour standards, included in the sustainable development chapter of the agreement, under the National Constitution of 1991, as well as under a 1950 Substantive Labour Code (reformed in 2008) and a 1948 Procedural Code of Labour and Social Security (reformed in 2001). Since the labour standards provided under the TSD Chapter are ratified by both the EU and Colombia, the agreement adds no additional requirements for reform in terms of hard law. Moreover, in 2011, in the context of trade negotiations with the US, Colombia re-established a separate Ministry of Labour, which before had been unified with the Ministry of Social Security and Health into one sole Ministry of Social Protection in 2003. Additionally, with a reputation as 'the world's most dangerous country for trade unionists' (ITUC, 2010), the Colombian government created a specialised Labour section to the Human Rights Unit of the Prosecutors Office in 2006 with the mandate to investigate and prosecute violent crimes against labour activists.

Despite the presence of a well-developed legal-institutional framework, progress in practice has been limited at best, raising questions about a lack of enforcement (HRC, 2013: 11; JFC, 2015). With regard to this enforcement gap, most interviewees in Brussels and Bogotá found the labour provisions under the TSD chapter to lack the appropriate monitoring and enforcement mechanisms to usefully and credibly contribute to improvements in Colombia's labour rights situation. While the agreement does provide laudable commitments to international standards, stakeholders argued that, as long as these commitments cannot be properly enforced through more stringent monitoring and enforcement mechanisms, they risk adding another layer of legal-institutional commitments without being of much practical use. Some interviewees therefore deemed the sustainability chapter's labour provisions to be little more than lofty words, diminishing them to a 'half-hearted exercise by the EU to tick the box on its treaty obligations'. Some perceived the current sanctioning mechanisms to be weaker than those provided under the GSP+ regime which applied to Colombia before the entry into force of the agreement. Indeed, while GSP+ allowed the EU to withdraw trade preferences in case of systematic violations of ILO standards, the TSD chapter does, as mentioned above, not provide any such sanctioning measures, nor does it provide a binding mechanism for dispute settlement.

In response to such criticism, EU officials stressed that, contrary to the GSP+ scheme, the trade agreement in place constitutes a partnership between equals, rather than a preferential market access regime. The trade agreement is therefore different in nature and spirit, most notably when it comes to conditionality and the monitoring of compliance. Essentially, the responsibility to monitor compliance with labour provisions is the sovereign competence of the respective signatory. There is thus no obligation or mandate for the EU to monitor developments in, or compliance with, labour protection in Colombia. Moreover, EU officials stressed that labour provisions in the agreement are there to indicate a mutual concern among two contracting parties – as well as to contribute to a commercial level playing field for Colombian exports - rather than as a policing tool to regulate or address violations.

As a consequence, the shift from a preferential treatment model to a *partnership* model, changed the role of each of the parties regarding their responsibility for monitoring and enforcement of labour rights and standards. While in the GSP+ much responsibility rested with the EU in ensuring that its preferential trade relations would not negatively affect the social conditions in Colombia, the 2013 EU-Colombia trade agreement returns the responsibility over these issues to the sovereign domestic authorities. While compliance with labour standards thus remains a joint commitment, the actual enforcement and monitoring of labour provisions depends entirely on the party's willingness and capacity. In the case of Colombia, a lack of each of these factors has generated little confidence among stakeholders about the effective potential of the trade agreement to contribute to improvements in the domestic labour rights situation.

Case Study: US/Canada Trade Agreements

Introduction

The Unites States has been a driving force behind the inclusion of labour and environmental provisions into bilateral trade agreements.[34] The first agreements containing such provisions were the two side agreements to the North American Free Trade Agreement (NAFTA), in force since 1994: the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC). Along with certain general commitments to high labour and environmental standards, among others,[35] NAALC and NAAEC require the state parties to enforce their domestic laws in these two areas.[36]

In the twenty years subsequent to NAALC's and NAAEC's entry into force, the design of the US's labour and environmental provisions has evolved in various regards. Most visibly, labour and environmental provisions have ever since been included directly into the trade agreements' text. Furthermore, international standards have obtained an increasingly important role in the design of the labour and environmental provisions. While earlier US agreements only contained "best endeavours clauses" regarding the ILO's Declaration on Fundamental Principles and Rights at Work adopted in 1998,[37] their more recent counterparts require state parties to comply with the said Declaration as well as a number of key environmental agreements.[38] In this regard, a somewhat less comprehensive approach to international standards in US agreements can be noted than regarding the EU agreements. Unlike the latter, US agreements, for example, typically only refer to the ILO's 1998 Declaration rather than also referencing the ILO's Fundamental Conventions (Agustí-Panareda et al., 2015:357). In addition, these agreements typically contain obligations to enforce and – in contrast to the NAFTA side agreements – to not derogate from domestic labour and environmental law.[39]

[34] Only one trade agreement concluded by the US does not involve labour provisions, namely the US-Israel Trade Agreement, in force since 1985.
[35] Among others, parties are required to "ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light". Article 2 of the NAALC.
[36] Both side agreements provide definitions of the terms "labour law" and "environmental law", respectively, which cover many but not all areas typically comprised by these concepts. See Article 49 (1) of the NAALC and Article 45(2) of the NAAEC.
[37] See, e.g., Article 16.1(1) in conjunction with Article 16.8 of CAFTA-DR.
[38] See, e.g., Articles 17.2(1) and 18.2 of the US-Colombia Trade Agreement.
[39] See e.g. Articles 17.2(2) and 18.3(2) of the US-Colombia Trade Agreement.

Also most of Canada's trade agreements subsequent to NAFTA have a labour and environmental dimension[40] although Canada has continued inserting them into separate side agreements.[41] While these provisions initially mainly emphasised the obligation to enforce domestic labour law,[42] Canada's approach, too, has over time increasingly embraced certain minimum standards, referring to the ILO's 1998 Declaration and the 1992 Convention on Biological Diversity in most of the relevant side agreement.[43] Yet, while the ILO Declaration's principles are incorporated into Canada's recent labour side agreements,[44] the obligations under the Convention on Biological Diversity are typically merely "affirm[ed]"[45] or "reiterate[d]".[46] Canada's recent labour-related side agreements furthermore contain a non-derogation clause[47] which can also be found in some environmental side agreements.[48]

Description

Most of the US' and many of Canada's agreements provide for a third-party driven submission mechanism ("complaint mechanism") as well as a state-to-state dispute settlement mechanism for labour and environment-related matters. In this regard, some differences between the environmental and the labour provisions can be noted, which pertain, in particular, to the submissions procedure. For example, under NAALC, civil society actors can submit complaints against one country to the "National Administrative Offices" (NAO) of another party.[49] The relevant NAO subsequently examines the admissibility of the complaint and, if appropriate, issues a report on the merits, involving, where appropriate, recommendations on how to deal with the problems at issue. By contrast, under the NAAEC submissions are directly filed with the Secretariat of the Commission for Environmental Cooperation (CEC), a tri-national organisation created by the NAAEC, which is formally independent from the parties. The Secretariat then determines the submission's admissibility and can prepare reports on the

[40] The Canada-Israel Trade Agreement (in force since 1997) and the Canada-EFTA Trade Agreement (in force since 2009) do not come with labour or environmental provisions.
[41] As an exception, the Canada-Colombia Trade Agreement does include some labour provisions in its main text, which are, however, rather broad and unspecific. See Chapter 16 of the Canada-Colombia Trade Agreement.
[42] See notably Article 3 of the Canada-Chile Agreement on Labour Cooperation (ALC) (in force since 1997).
[43] See, e.g., Article 10(2) of the Canada-Panama Agreement on Environmental Cooperation (AEC); Article 1(1) of the Canada-Panama ALC. No reference to ILO instruments can be found in the Canada-Chile ALC..
[44] See, e.g., Article 2 in conjunction with Annex 1 of the Canada-Costa Rica ALC; Article 1 of the Canada-Colombia ALC; Article 1 of the Canada-Jordan ALC.
[45] See, e.g., Article 2(8) of the Canada-Colombia AEC.
[46] See, e.g., Article 5(2) and (3) of the Canada-Colombia AEC; Article 10(2) and (3) of the Canada-Panama AEC.
[47] See, e.g., Article 2 of the Canada-Colombia Labour Side Agreement; Article 2 of the Canada-Panama Labour Side Agreement.
[48] See Article 2(4) of the Canada-Colombia AEC; Article 4 of the Canada-Panama AEC.
[49] See Article 16(3) of the NAALC.

submission's merits ("factual records").[50] This is subject to the approval by a two-thirds majority of the CEC's Council, consisting of the Ministers of Environment of the three State Parties.[51]

Furthermore, any state party – in the case of NAALC typically the one whose NAO received the complaint – can subsequently initiate ministerial consultations on the matter with the other party.[52] Under the NAAEC, the next procedural step involves discussions to resolve the dispute within the CEC's Council, which may also draw on outside expert advice.[53] If this is to no avail, the parties may seek the establishment of an arbitral panel for any dispute regarding the enforcement of environmental law concerning "a situation involving workplaces, firms, companies or sectors that produce goods or provide services" that is "traded between the territories of the Parties" or "that compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party."[54] Under the NAALC, the available procedural steps further to a report by the NAALC depend on the subject matter at stake. For trade union rights matters, no procedural step beyond ministerial consultations can be taken. Other matters concerning the enforcement of labour laws can be submitted to an "Evaluation Committee of Experts" provided that the issue is "trade related".[55] Disputes concerning "occupational safety and health, child labor or minimum wage technical labor standards" can, in addition, be submitted to binding arbitration after having exhausted the aforesaid procedural steps.[56] Under both the NAAEC and the NAALC, any arbitral panel awards can be enforced through monetary assessments ("fines"). The maximum amount of these assessments is capped at 0.007 percent of the trade in goods between the parties, [57] which may reflect the parties' intentions to limit the level of fines to a volume which would not unduly affect their economic relations.

Since the adoption of NAFTA and the related side agreements, the enforcement mechanisms for labour and environmental provisions have been substantially developed further by subsequent US trade agreements. In this regard, a variety of mechanisms has emerged, which differ regarding the complaint mechanisms available, the access to arbitral dispute settlement, and the sanctions available (see Table 1).

[50] Articles 14 and 15 of the NAAEC.
[51] Article 15(2) of the NAAEC.
[52] Article 22 of the NAALC and of the NAAEC, respectively.
[53] Article 23 of the NAAEC.
[54] Article 24(1) of the NAAEC.
[55] See Article 23(2) and (3) in conjunction with Article 49(1) of the NAALC.
[56] See Article 29(1) of the NAALC.
[57] See Article 34(4)(b) in conjunction with Annex 34 of the NAAEC and Article 39(5) in conjunction with Annex 39 of the NAALC. On a subsidiary basis, trade sanctions can be inflicted if, and to the extent to which, the party concerned fails to pay the fine established. See Article 39(5) and 41 of NAALC. With regard to Canada a special procedure applies: Awards against this party are enforceable through an order by a domestic court. See Annex 41A of the NAALC.

Complaint mechanisms at the level of the state parties, which are open to any group or individual and do not require the exhaustion of domestic remedies, have been a constant feature under the labour chapters of US trade agreements ever since the adoption of NAFTA and its side agreements.[58] The absence of any mechanism for the receipt of submissions by civil society in the US-Jordan Trade Agreement is the notable exception.[59] By contrast, the picture is more diverse regarding the environment chapters. Here, available mechanisms vary from complaint mechanisms involving a body separate from the state parties, e.g. in the form of an independent secretariat,[60] and complaint mechanisms at the level of the state parties,[61] to mere general opportunities for civil society to voice their views[62] or no role for civil society at all.[63] More recent US trade agreements, with the exception of the US-Republic of Korea Trade Agreement,[64] favour the first of the aforesaid solutions, thereby reverting to an approach similar to that employed by the NAAEC.[65]

In terms of access to arbitral dispute settlement under US trade agreements, the evolution of the labour and environment chapters, respectively, have been aligned. In general, the scope of the arbitration-based dispute settlement mechanism has been widened in the period after the adoption of the NAFTA side agreements. Under most of the earlier US trade agreements,[66] only the obligation to enforce domestic labour and environmental law is covered by the scope of the arbitral dispute settlement mechanism.[67] By contrast, further to an agreement reached between Democrats and Republicans in 2007,[68] later agreements allow for submitting any dispute of the labour and environmental provisions to arbitral dispute settlement.[69]

[58] See e.g. Article 16.4(3) of CAFTA-DR.
[59] See Article 6 of the US-Jordan Trade Agreement.
[60] See e.g. Article 17.7(1) of CAFTA-DR. The parties have specified the relevant arrangements in the Agreement Establishing a Secretariat for Environmental Matters under the Dominican Republic – Central America – United States Free Trade Agreement.
[61] See, e.g., Article 19.4(1) of the US-Chile Trade Agreement.
[62] See e.g. Article 17.6 of the US-Oman Trade Agreement.
[63] See Article 5 of the US-Jordan Trade Agreement.
[64] This agreement provides for a mechanism for the receipt of "written submissions". See Article 20.7(2)(b) of the US-Republic of Korea Trade Agreement.
[65] See e.g. Article 18.8(1) of the US-Colombia Trade Agreement.
[66] The exception is the US-Jordan Trade Agreement; see its Article 5, 6, and 17.
[67] See, e.g., Articles 16.6(7) and 17.10(7) of CAFTA-DR.
[68] This is commonly referred to as the "May 10 Agreement". See at: http://www.washingtontradereport.com/May10Agreement.htm, and notably Paras. I.D. and II.C. of the agreement.
[69] Cf. Articles 17.7, 18.12 and 21.2 of the US-Colombia Trade Agreement.

Finally, the nature of the sanctions has also evolved. Most of the earlier agreements[70] involve only fines, capped at 15 million USD per year.[71] The respective amount must be paid into a dedicated fund to be utilised for labour or environmental capacity building in the territory of the party complained against with a view to addressing the compliance issue at stake.[72] By contrast, more recent US trade agreements provide for the possibility of inflicting trade sanctions under the general dispute settlement mechanism.[73]

[70] Again, the US-Jordan Trade Agreement is the exception as it provides for regular sanctions as a last resort. See Article 17(2) of the US-Jordan Trade Agreement.
[71] See, e.g., Article 20.17(1) and (2) of CAFTA-DR. Only if the party complained against fails to pay the fine within the relevant timeframe, the complaining party can have recourse to alternative measures, such as trade sanctions, to bring about compliance. See, e.g., Article 20.17(5) of CAFTA-DR
[72] See, e.g., Article 20.17(3) of CAFTA-DR.
[73] See, e.g., Article 21.16 of the US-Colombia Trade Agreement.

Table 1. Overview of dispute settlement mechanisms for labour and environmental disputes under agreements concluded by the United States

Agreement and year of entry into force		Complaint mechanism	Access to dispute settlement	Availability of sanctions
NAFTA side agreements (1994)	North American Agreement on Labour Cooperation (NAALC)	Submissions to be directed to an office of a state party	Only for disputes regarding the enforcement of domestic "occupational safety and health, child labor or minimum wage technical labor standards"**	Monetary fines amounting to no more than to 0.007 percent of the trade in goods between the relevant parties (subsidiarily trade sanctions of the same value)
	North American Agreement on Environ-mental Co-operation (NAAEC)	Submissions to be directed to the NAAEC Secretariat	Only for disputes regarding the enforcement of domestic environmental law in scenarios "involving workplaces, firms, companies or sectors that produce goods or provide services"	
US trade agreement with Jordan (2001)	Labour Chapter	–	Access to regular dispute settlement	Sanctions under the regular dispute settlement mechanism, including trade sanctions
	Environment Chapter			
US trade agreements with Singapore (2004), Australia (2005), Morocco (2006), Bahrain (2006), Oman (2009)	Labour Chapter	Submissions to be directed to an office of a state party	Access to dispute settlement limited to disputes concerning the obligation to enforce domestic labour and environmental law in certain areas***	Monetary compensation of up to 15 million USD per year (to be paid into a fund and to be used to further environmental or labour law enforcement in the defendant country)
	Environment Chapter	Only an opportunity for the public to provide observations and recommendations		
US trade agreement with Chile (2004)	Labour Chapter	Submissions to be directed to an office of a state party		
	Environment Chapter			
US trade agreements with Central America and the Dominican Republic (2006)	Labour Chapter	Submissions to be directed to an office of a state party		
	Environment Chapter	Submissions to be directed to a secretariat or other joint body established by the parties*		
US trade agreements with Peru (2009), Colombia (2012), Panama, (2012)	Labour Chapter	Submissions to be directed to an office of a state party	Access to regular dispute settlement for any aspect of the agreements' labour and environment chapters	Sanctions under the regular dispute settlement mechanism, including trade sanctions
	Environment Chapter	Submissions to be directed to a secretariat or other joint body established by the parties*		
US trade agreement with Republic of Korea (2012)	Labour Chapter	Submissions to be directed to an office of a state party		
	Environment Chapter			

* Except for complaints by US residents concerning the enforcement of US environmental law.
** In addition to having initiated consultations with the other party, the access to dispute settlement is conditional on having submitted the matter to an "Evaluation Committee of Experts".
*** The definition of "labour law" used by these agreements in all cases freedom of association, and the prohibition of child labour as well as certain other areas depending on the agreement at hand.
Note: The labour-related part of the table draws on ILO (2013).

Canada's approach resembles that of the United States' trade agreements in several ways. By contrast, the trends regarding the agreements on labour cooperation (ALC) differ significantly from those concerning agreements on environmental cooperation (AEC) (see Table 2). All ALCs concluded by Canada provide for a complaint procedure for submissions by third parties.[74] Furthermore, access to dispute settlement has been expanded from covering only disputes on labour law enforcement in certain areas[75] to also applying to disputes on compliance with certain minimum labour standards, among others.[76] Finally, all except one of Canada's ALCs allow for the infliction of fines for breaches of the relevant provisions of the agreement.[77] The level of these fines has over time been expanded, ranging from 10 million USD under earlier ALCs[78] to 15 million USD under more recent ALCs[79] while the most recent ones abandon the cap on the fines altogether.[80]

Meanwhile, Canada's approach to AECs has over time been scaled down in various respects. The complaint procedure under the early Canada-Chile AEC, in force since 1997, provides the involvement of a "Joint Submission Committee" which would deal with the complaint.[81] By contrast, later agreements establish a procedure at the state-party level which refers merely to "written questions" rather than to formal submissions.[82] Access to arbitral dispute settlement has generally been confined to disputes regarding the enforcement of domestic environmental

[74] See, e.g., Articles 11, 14-21 of the Canada-Costa-Rica ALC. The Canada-Chile ALC additionally provides, provides for a review of the matter by an "Evaluation Committee of Experts". See Articles 21-24 of the Canada-Chile ALC.
[75] In this regard, the dispute settlement procedure applies only to disputes on the application of domestic labour laws regarding issues pertaining to occupational health and safety, minimum wage, and child labour. See Article 25(1) of the Canada-Chile ALC.
[76] See, e.g., Article 13 of the Canada-Colombia ALC; Article 12(1) of the Canada-Jordan ALC.
[77] As an exception, the Canada-Costa Rica ALC rules out the infliction of fines and trade sanctions and only allows for adjusting cooperative activities to reaction to a lack of compliance. See Article 23(5) the Canada-Costa Rica ALC.
[78] See Article 35(5)(b) in conjunction with Annex 35(1) of the Canada-Chile ALC.
[79] See, e.g., Article 14(6) in conjunction with Annex 3(2)(b) of the Canada-Panama ALC.
[80] See, e.g, Article 13(8) in conjunction with Annex 4 of the Canada-Jordan ALC.
[81] Article 14 of the Canada-Chile AEC.
[82] See, e.g., Article 14(1) of the Canada-Honduras AEC; Article 4(4) of the Canada-Peru AEC.

law[83] and some AECs only provide for amicable consultations rather than for a panel review.[84] Finally, none of Canada's AECs, except the aforesaid NAAEC and the Canada-Chile AEC, provides for sanctions in the event of a panel finding non-compliance with the AEC's requirements but rely on voluntary implementation by the party concerned.[85]

[83] See, e.g., Article 24(5) of the Canada-Panama AEC; Article 23(5) of the Canada-Jordan AEC.
[84] See, e.g., Article 12 of the Canada-Peru AEC.
[85] See, e.g., Article 16(10) of the Canada-Honduras AEC.

Table 2. Overview of dispute settlement mechanisms for labour and environmental disputes under agreements concluded by Canada

Agreement and year of entry into force		Complaint mechanism	Access to dispute settlement	Availability of sanctions
Side agreements to the Canada-Chile Trade Agreement (1997)	Agreement on Labour Cooperation	Submissions to be directed to an office of a state party	Access to dispute settlement limited to disputes concerning "the enforcement of a Party's occupational safety and health, child labour or minimum wage technical labour standards"**	Monetary compensation of up to 10 million USD
	Agreement on Environ-mental Cooperation	Submissions to be directed to an office of a state party, then to be transferred and processed by a Joint Submission Committee	Access to dispute settlement limited to disputes concerning the obligation to enforce domestic labour and environmental law in certain areas	
Side agreements to the Canada-Costa Rica Trade Agreement (2002)	Agreement on Labour Cooperation	Submissions to be directed to an office of a state party	Access to dispute settlement limited to disputes concerning the obligation to enforce domestic labour law in certain areas***	Modification of cooperation activities under this agreement
	Agreement on Environ-mental Cooperation	"Written questions" to be directed to an office of a state party	– (only amicable consultations)	–
Side agreements to Canada's trade agreements with Peru (2009) and Colombia (2011)	Agreement on Labour Cooperation	Submissions to be directed to an office of a state party	Access to dispute settlement for disputes regarding the non-derogation of domestic labour law and the compliance with minimum standards in certain cases**** as well as labour law enforcement***	Monetary compensation of up to 15 million USD
	Agreement on Environ-mental Cooperation	Written questions to be directed to an office of a state party	– (only amicable consultations)	–
Side agreements to Canada's trade agreements with Jordan (2012), Panama (2013), Honduras (2014)	Agreement on Labour Cooperation	Submissions to be directed to an office of a state party	As under the labour side agreements to Canada's trade agreements with Peru and Colombia (in the case of the agreements with Jordan and Honduras: without cap)	
	Agreement on Environ-mental Cooperation	Written questions to be directed to an office of a state party	Access limited to failures to maintain or enforce domestic environmental law in certain areas	–

** In addition to having initiated consultations with the other party, the access to dispute settlement is conditional on having submitted the matter to an "Evaluation Committee of Experts".
*** The definition of "labour law" used by these agreements in all cases freedom of association, and the prohibition of child labour as well as certain other areas depending on the agreement at hand.
**** This concerns disputes in relation to the ILO's 1998 Declaration on Fundamental Principles and Rights at Work
Note: The labour-related part of the table draws on ILO (2013).

Practical application and effectiveness

Inter-state disputes related to trade agreements on labour and environmental matters have been a rare sight. Indeed, no dispute on environmental issues has emerged and there is only one case regarding labour standards in which the dispute settlement procedure has been set in motion. This dispute, which arose under CAFTA-DR between the United States and Guatemala, deals with trade unions rights in Guatemala. Submitted by six Guatemalan trade unions and the AFL-CIO in 2008, this complaint raises issues regarding freedom of association and of the right to collective bargaining, including wide-spread violence against trade unionists. Further to a lengthy consultation process and repeated failed attempts to solve the dispute in an amicable manner, the case was at the time of writing pending at an arbitral panel established further to the initiative of the US.[86]

The scarcity of cases on environmental and labour issues submitted to arbitral dispute settlement contrasts with the amount of complaints that have been filed under some of the agreements. Although these complaints have often alleged serious breaches of the environmental and labour provisions, most of the complaints have, to the day of writing, been terminated or resolved by the national contact point or through ministerial consultations. In the area of labour standards, 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 had been filed with the US Government until January 2017. Of these, four related to the CAFTA-DR,[87] two related to the US-Peru Trade Agreement and one to the US-Bahrain Trade Agreement and the US-Colombia Trade Agreement, respectively.[88] An attempt by US trade unions to file a formal submission against Jordan did not succeed due to the fact that the US-Jordan Trade Agreement does not provide for the possibility for interested persons to submit complaints on labour issues.[89] Complaints under Canada's labour side agreements are

[86] For an overview of the proceedings see the website of the United States Trade Representative at:https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr.

[87] These concerned Guatemala, Costa Rica, Honduras, and the Dominican Republic.

[88] For an overview of relevant complaints see the website of the Office on Trade and Labor Affairs of the US Department of Labor at: https://www.dol.gov/agencies/ilab/our-work/trade/fta-submissions. Not included in this list is the complaint against Costa Rica or an earlier complaint against Peru. See International Longshore and Warehouse Union, Coast Longshore Division and Sindicato de Trabajadores (as) de JAPDEVA Asociación Nacional de Empleados Públicos y Privados, Costa Rica, Public Submission to the Office of Trade and Labor Affairs under Chapters 16 (Labor) and 20 (Dispute Settlement) of the Dominican Republic – Central America Free Trade Agreement Concerning the Failure of the Government of Costa Rica to Effectively Enforce Its Labor Laws under the ILO Declaration on Fundamental Principles and Rights at Work, July 20, 2010; Sindicato Nacional de Unidad de Trabajadores de Sunat (SINAUT-SUNAT, *Complaint of 29 December for non-compliance by the National Superintendency of Tax Administration (SUNAT1) in the collective bargaining for the 2008-2009 term,* December 29, 2010.

[89] In the case at hand, the unions were only able to submit a "request" which did not lead to any formal follow-up by the US Administration. See AFL-CIO, Request by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the National Textile Association (NTA) to the United States to Invoke Consultations under the United States-Jordan Free Trade Agreement to Address Jordan's Violations of the Agreement's Labor Rights Provisions, 21 September 2006, p. 5, 6.

rather scarce. That said, a complaint has, for instance, been filed by Canadian and Colombian trade union organisations under the Canada-Colombia Agreement on Labour Cooperation in July 2016 was at the time of writing under review by the Canadian National Administrative Office.[90]

With regard to the environmental provisions, a similar trend can be discerned. By November 2015, 87 submissions had been filed under the NAAEC of which only 22 had actually led to a report on the merits ("factual record") (CIEL, 2015:6). Similarly, under CAFTA-DR, some 32 submissions had been filed by November 2015, which had given rise to no more than three reports on the merits (CIEL, 2015:6). Some complaints have also been filed under the Canada-Chile Agreement on Environmental Cooperation.[91] In none of these cases has a party taken steps to initiate the arbitral dispute settlement procedure.

Commentators have also pointed to several flaws regarding the submissions process regarding both the labour and the environmental provisions. This concerns, among others, the long – and in part excessive – periods for examining complaints filed with the US Government. For example, under the NAAEC, the "factual records" have in certain cases been issued after a period as long as five years (CIEL, 2015:6), significantly reducing the remedial effect.[92] Similarly, the examination of the labour-related complaints has in a number of cases also taken several years.[93] Furthermore, in cases where the National Contact Point did establish breaches of labour provisions, this has oftentimes not been followed by sufficient remedial action. For example, in several NAALC cases the ministerial declaration ended the case provided for cooperative activities, but did not tackle the alleged violations.[94] Interestingly, despite the absence of dispute settlement, the reports by the complaint bodies as well as the political pressure emanating from the accompanying process have, in some instances, led to some improvements in specific cases (see e.g. Knox, 2004:386).[95] However, overall, their effect on the environmental standards situation in the countries concerned has been marginal, especially regarding the enforcement of domestic environmental laws.[96] A similar trend can be discerned for the labour provisions under the relevant trade agreements (ILO, 2013).

[90] The case involved, among other things, alleged breaches of obligations regarding trade union rights and a failure to enforce relevant domestic laws. See Public communication CAN 2016-1 (Colombia) – Accepted for review. Available at: http://www.labour.gc.ca/eng/relations/international/agreements/colombia/2016-1.shtml.
[91] See Council of the Canada-Chile Agreement on Environmental Cooperation, First Review of the Canada-Chile Agreement on Environmental Cooperation (CCAEC) (2004) and Council of the Canada-Chile Agreement on Environmental Cooperation, Second Review of the Canada–Chile Agreement on Environmental Cooperation (2004-2009) (2009). Both available at: https://www.ec.gc.ca/can-chil/default.asp?lang=En&n=AF64227B-1.
[92] For a critique of the submission process under the NAAEC see Wold et al. (2004).
[93] See e.g. Compa and Brooks (2015:86-89) for the NAALC.
[94] For examples regarding cases under the NAALC see Schurtman (2005:32-333); Compa and Brooks (2008: 53-54).
[95] Such effects can in some cases also be identified regarding the labour provisions related to US trade agreements; see ILO (2013:45-55).
[96] See for the NAAEC Allen (2012:191); Scherrer et al. (2009:25)

The state of affairs described above largely reflects the legal design of the relevant agreements. Notably, the agreements 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 contact point of the party receiving the complaints identifies severe violations of environmental or labour provisions of the relevant agreement, that state party is by no means legally compelled to take further action. Furthermore, earlier US and Canadian trade agreements exclude dispute settlement for certain labour and environmental provisions. Another explanatory factor consists of the perceived widespread reluctance of the State parties to use these mechanisms in a vigorous manner to address such issues (Sagar, 2004:948). Also, the agreements do typically not provide for strict deadlines regarding the complaint procedure which may, together with a shortage of staff in the offices examining the merits of the relevant submissions, partly account for the repeated delays concerning the assessments of the complaints.

Finally, even if the dispute settlement mechanisms were applied more frequently in those cases and gave rise to sanctions, a number of questions would arise. In particular, a number of US trade agreements, including CAFTA-DR under which the labour-related dispute between the US and Guatemala arose, provide that any fine is to be paid into a fund aiming to address the enforcement issue at hand in that country.[97] This would seem to allow the government concerned to reduce the sanction's punitive effect through internal budgetary adjustments as the funds are still available for domestic governance purposes.[98] Also, the experience with labour-related trade sanctions under the US' and the EU's unilateral trade arrangements, suggests that their effectiveness for furthering compliance depends on a number of contextual factors (Cheong and Ebert, 2016). This highlights the necessity to design and apply sanction-regimes in a tailor-made manner in order to ensure their effectiveness on avoiding adverse effects on workers.

[97] See, e.g., Article 20.17 CAFTA-DR.
[98] See in a similar vein Hunt (2007:560) on the environmental chapter of CAFTA-DR.

Case Study: The Investment Court System

Introduction

Another existing initiative that is interesting to consider for the purpose of strengthening enforcement of TSD chapters is the arbitral mechanism present in the 'Investment Court System' (ICS) contained in recent EU-FTAs that include an investment chapter. In the context of trade agreements, arbitration has been used as a means to settle investor-state disputes relating to investment provisions contained in trade agreements, or to standalone investment agreements. Foreign direct investment (FDI) became part of the Common Commercial Policy (CCP) after the Lisbon Treaty (Art. 207 TFEU), which gives the EU exclusive competence to negotiate agreements with other countries in respect of FDI.[99] In the future, it is expected that many EU trade agreements will comprise an investment chapter. For example, the texts of CETA, the EU-Vietnam and the EU-Singapore FTA contain investment chapters. The EU is also currently negotiation a standalone investment agreement notably with China.[100]

In this chapter, we will shortly describe the ICS as it is designed in (upcoming) EU trade agreements. Next, we assess the advantages and disadvantages of this option in the context of TSD chapters.

Description

In investment treaties, disputes between an investor and the host state are most often subject to an arbitral mechanism, which has traditionally been based on the model applicable to commercial disputes between two corporations. Such a mechanism is primarily meant to allow a foreign investor to bring a claim against the host state in case of an alleged breach of its rights and protections under the investment provisions contained in an international agreement. A core of substantive rights and protections can be found across the majority of the more than 3,000 international investment agreements currently in force

[99] The question of whether the EU has exclusive competence over FDI and what the extent of such competence would be has been debated, notably in the context of the EU-Singapore FTA. See in that regard, the forthcoming Opinion 2/15 of the CJEU, and the Opinion of Advocate General Sharpston of 21 December 2016 in that opinion procedure, particularly paras. 330, 336, 337 and 343. Concerning the investment agreements of Member States pre-dating the inclusion of FDI in the CCP by the Lisbon Treaty, see the transitional regulation which allows Member States to maintain their existing investment agreements into force and negotiate new ones pending authorization from the EU Commission. Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, *OJ L* 351, 20.12.2012, p. 40-46.

[100] For a full overview of the state of current negotiations of trade and investment agreements as at October 2016, see trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

(Dolzer and Stevens 1995: 165-204; Lowenfeld 2004: 128; Lowenfeld 2008: 555; UNCTAD 2007: 141; Kuijper *et al.* 2014: 13).[101] This core generally comprises at least the following: non-discrimination (national treatment and most favored nation), fair and equitable treatment, full protection and security, and protection against direct and indirect expropriation (for an overview, see MacLachlan, Shore and Weiniger, 2007). The arbitral mechanism creates an international dispute settlement mechanism which allows the investor to directly use international arbitration as a means of dispute settlement, for which in most cases exhaustion of domestic remedies, such as judicial and administrative litigation, is not required (Lorz, 2009).

As indicated, the EU, a new player in international investment law since it gained competence on FDI in 2009, has designed an 'investment court system' (ICS) which it intends to include in its upcoming FTAs. ICS is so far only present in the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) and the EU-Vietnam free trade agreement (EU-Vietnam FTA). It has been proposed by the EU in other negotiations such as the one on TTIP. Other recently negotiated agreements such as the EU-Singapore FTA (EUSFTA) have not yet fully transitioned to the new system, as the latter still relies on *ad hoc* arbitration and not on the ICS (see art. 9.18 EUSFTA). Let us first briefly describe the mechanism, by taking CETA and the EU-Vietnam FTA as objects of study.[102]

Composition

Both CETA and the EU-Vietnam FTA establish a permanent tribunal. The CETA tribunal is composed of five EU nationals, five Canadian nationals, and five nationals of third countries, and each case is normally heard by three members,[103] one from each category, drawn by lot. Members of the tribunal must 'have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements.' (art. 8 27.) The EU-Vietnam FTA contains similar language, but the Tribunal is only composed of nine judges. Both agreements also establish appellate tribunals entitled to hear appeals of arbitral awards and review them for legal or factual mistakes (art. 18 28. CETA; art. 13 EU-Vietnam FTA). Art. 8 30. CETA and Art. 14 and Annex II of the EU-Vietnam FTA set ethical rules for arbitrators, complemented by a binding 'code of conduct'.

Access and transparency

Investors holding an investment covered by the agreement have standing to make a claim (CETA, art. 8 23 (1) and EU-Vietnam FTA, Art. 2). Counterclaims by the respondent state seem to be ruled out by

[101] Litigable investor protections are also included in so-called 'investment contracts', which are (most often confidential) agreements signed directly between an investment and a host state for the purpose of regulating one particular investment.
[102] Articles referring to the EU-Vietnam Agreement are numbered as they appear in Chapter 8, Section 3, entitled 'Resolution of Investment Disputes'.
[103] Unless a party requests that the case be heard by a sole arbitrator and the other party agrees (art. 8 23. (5) CETA).

both agreements, as they only list Canada or Vietnam, the EU or EU Member States as 'respondents' in the list of definitions (art. 8 1 CETA; art. 2 EU Vietnam FTA). At least in CETA, this is confirmed by the provisions on consent to arbitrate, which only mention consent by the said respondents (art. 8.25). This is less clear under the EU-Vietnam FTA, which also mentions consent by the claimant, without however raising the possibility of counterclaims (art. 10).

Concerning access to the proceedings by third parties, both CETA and the EU-Vietnam FTA include the UNCITRAL transparency rules and provide for the publication of most proceeding documents (with possible protection for confidential information) and for the publicity of hearings (art. 8 35 CETA; art. 20 EU-Vietnam FTA). By referring to the UNCITRAL Transparency Rules, CETA and the EU-Vietnam FTA make possible the submission of briefs by *amici curiae* such as NGOs wishing to press a point related to the dispute (art. 4 UNCITRAL Transparency Rules). Non-disputing parties, i.e. the state which is not a respondent in the proceedings (art. 8.1 CETA; art. 2 EU-Vietnam FTA), is entitled under both agreements to receive the procedural documents, either automatically or on request, and to make observations regarding the interpretation of the agreement (art. 8.38 CETA; art. 25 EU-Vietnam FTA).

Procedure

Both CETA and the EU-Vietnam FTA provide that procedure is governed by pre-established arbitration rules, i.e. ICSID, ICSID Additional Facility, UNCITRAL or other rules if the parties agree on them (art. 8 23 (2) CETA; art. 7 2 EU-Vietnam FTA). Both agreements provide that the submission of a claim to the tribunal must be preceded by consultations aiming to amicably settle the dispute (art 8.21 (1) CETA; art. 6 (1) EU-Vietnam FTA).

Concerning the relation of the arbitral proceedings with domestic remedies, none of the agreements requires exhaustion of domestic remedies, but contain a 'no U-turn' provision, requiring claimants to desist from other existing/pending domestic or international proceedings relating to a similar claim, and to waive their right to initiate a similar claim (art. 8 22 1. (f) and (g) CETA; art. 8. 1 and 4 (b) EU-Vietnam FTA).

Material jurisdiction

The material jurisdiction of both tribunals is strictly limited to a determination of whether there has been a breach of well-defined treaty provisions granting rights to investors, explicitly excluding any other legal basis (art. 8 18 CETA; art. 1 EU-Vietnam FTA).

Remedies and costs

When a breach is found by the tribunal, both treaties limit strictly the possible outcomes to monetary damages commensurate with the loss suffered by the investor, plus interest, or restitution of property, in which place the respondent state may however elect to pay monetary damages (art 8 39 (a) CETA; art. 27 EU-Vietnam FTA). In no case does the tribunal have jurisdiction to annul any state measure or order it to take any positive measure. Concerning costs, both agreements provide that they are normally

borne by the unsuccessful party, unless circumstances to be determined by the tribunal warrant otherwise which might result in an apportionment of costs (art 8 39 (5) CETA; art. 27 4 EU-Vietnam FTA).

Evaluation of the potential of an ICS-like mechanism to act as dispute settlement mechanisms for TSD chapters

In this section, we evaluate, considering the ICS' main features, the prospects to use an ICS-like mechanism in the context of disputes relating to TSD chapters.

There are advantages to this model. First of all, arbitral mechanisms for settling investor-state disputes, including ICS, give direct access to third private parties (i.e. investors, with an investment covered by the agreement) to a dispute settlement mechanism issuing binding decisions. Historically, such decisions have been shown to have a high compliance rate (Saunders and Salomon 2007: 467; Sattorova 2014: 133; Lagerberg and Mitselis 2008: 4), which therefore raises the potential for rights and obligations to be enforced. Second, the possibility to set up ad hoc tribunals on the model of commercial arbitration has been linked to quicker proceedings, even though, in the case of an ICS-like mechanism, the addition of an appeals mechanism may significantly qualify this assumption. Third, ICS is equipped with a double degree of jurisdiction (submission and treatment of a case and the existence of an appeals mechanism) and renewed ethical rules apply to arbitrators. This increases the perception of independence and competence of ICS whereas such perception may be lacking in some domestic jurisdictions were they to be faced with claims relying on international obligations in relation to sustainable development.

There are, however, a number of obstacles and downsides to this option. First of all, the material jurisdiction of investment tribunals is strictly limited to a narrow range of issues and obligations, i.e. investor protection. Subjecting the broad and wide-ranging commitments contained in TSD chapters to an ICS-like mechanism would expand its scope. The issues at hand would no longer be contained in a relatively limited body of law and case-law. Also, the expertise required to deal with these issues would be more varied than that now present on arbitral benches.

Second, as noted above, ICS grants to private parties the right to sue sovereign states. In investment chapters, this right is strictly limited to a specific group of third parties, namely foreign investors. Since provisions in the TSD chapters concern a wider group of third parties this restriction to who has access needs to be considered and the question of which kind of interests would – in the eyes of the parties – deserve to be extended protection through an ICS-like mechanism would have to be answered. In investment chapters, the rationale for granting foreign investors such protection is that host states hope to reap benefits in return: foreign capital and related benefits such as tax revenue, jobs, transfer of

technology, knowhow, etc. In the TSD context, this instrumental rationale is arguably not present. Solving the puzzle of access to an ICS-like mechanism in case of breaches of TSD chapters does however not necessarily imply to grant standing to everybody. The pool of potential claimants could be limited in a fair and non-discriminatory manner by, for example, only granting standing to representative organisations interested in the issue at hand, or to a minimal number of claimants grouped together, in the manner of a class action. Additionally, the 'international' element of granting only *foreign* investors standing would most likely have to disappear in such an ICS-like mechanism, since TSD provisions also are also relevant to the local population and established at least partly for its benefit.

Third, the relationship with domestic judicial mechanisms under ICS is very specific in the sense that it allows the direct use of an international mechanism instead. This is probably not applicable in the context of TSD chapters given that, as indicated, the pool of claimants will include the local population. This could be countervailed by re-instating the requirement of exhausting local remedies.

Fourth, standing implies that the claimant may rely on litigable rights, which are not currently present in TSD chapters. This concerns the depth of the substantive provisions which are included in the TSD chapters. For such a mechanism to be applicable in the context of TSD chapters, the contracting parties will need to rewrite the TSD chapters in such a way as to formulate state commitments into litigable rights for private parties. A possible consequence is that the scope of TSD chapters would have to stay limited to well defined/litigable commitments such as greenhouse gas emission targets.

Fifth, in terms of remedies sought, ICS can only award monetary damages or order restitution of property, which the state can elect to turn into monetary damages. These are typically remedies based on the logic of compensation of loss or damages and this derives from the assumption that a breach of investment provisions by the host state likely affects the investor's interests in a direct and quantitatively demonstrable manner. Such assumption is more difficult to discern in regard to interests affected by breaches of TSD chapters, and these types of remedies might be less suitable in the context of sustainable development objectives. Pursuing sustainable development goals requires to put in place long-term strategies and to implement 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. The threat of such monetary sanction might, however, be one incentive to foster compliance and change.

A final disadvantage which can be identified on the basis of ICS concerns the costs involved in litigating through such a dispute settlement system. Operating costs of arbitration tribunals are typically high (costs in the millions of dollars for complex cases are not infrequent, see OECD 2010), and may not be accessible to the private parties such as NGOs unless measures are taken to limit these costs (see in this respect art. 8 39 (6) CETA and art. 27 EU-Vietnam FTA, pursuant to which the respective relevant Committees are mandated to consider such solutions in respect of SMEs and natural persons).

Conclusion

This chapter has briefly presented the ICS currently present in CETA and the EU-Vietnam FTA, and has identified its main features as to composition, access and transparency, procedure, material jurisdiction and remedies and costs. This overview has evidenced – under the caveat that the ICS is not yet into force and we cannot prefigure how it will concretely operate – that ICS is a possible dispute mechanism which has as a main advantage to allow private persons to sue state parties for breaches of their treaty-based rights, and which may result in a binding award.

However, an examination of the potential of such system to act as a dispute settlement mechanism for TSD chapters evidences legal-technical obstacles. Opting for an ICS-like mechanism in TSD chapters would require to make determinations regarding such issues as who has access, the relationship with domestic judicial mechanisms, the standing of claimants and litigable rights and the costs involved in dispute settlement.

Case Study: International Labour Organisation

Introduction

One existing option that is interesting to consider for the purpose of strengthening the enforcement of TSD, and especially labour rights provisions in trade agreements, through dispute settlement are the ILO supervisory mechanisms.

A number of ILO conventions and especially the 1998 Declaration on Fundamental Rights and Principles at Work (hereafter: 1998 Declaration) feature explicitly in TSD chapters of EU trade agreements. For the purpose of this case study, two types of ILO procedures of importance. On the one hand, the *reporting system* (Article 22 of the Constitution of the International Labour Organisation (hereinafter: ILO Constitution) and on the other hand the submission-based procedures of *representation and complaints* on the basis of Articles 24 and 26-29 and 31-34 of the ILO Constitution, including the procedure before the Committee of Freedom of Association. In this case study, we describe and reflect upon the existing reporting and submission-based procedures.

Description

Reporting in the context of the ILO is done on the one hand by the ILO's permanent organisations and on the other hand by supervisory bodies. The permanent organisations consist of three organs: the General Conference, the Governing Body and the International Labour Office. The underlying idea behind the reporting system is that governments of ILO Member States are under the obligation to provide the various supervisory bodies with reports including observations on behalf of employers and workers on how the ILO conventions (and standards) are being implemented into their domestic legal practice. (Sauer, 2014, p. 7)

The *General Conference* is a tripartite body composed of four representatives of each Member State. Two representatives are government delegates and the remaining two are employer and worker representatives. The General Conference adopts conventions and recommendations and declarations on ILO's general policy (Articles 2-3, ILO Constitution). It meets every year, and makes its decisions by simple majority (Sauer, 2014, p. 4). The *Governing Body*, is again a tripartite organ composed of 28 representatives of governments, 14 worker representatives and 14 employer representatives. (Article 7, ILO Constitution) It meets three times a year, makes general decisions on policy, budget, and the General Conference's programme. (Sauer, 2014, p.4) Finally, the *International Labour Office,* has a

wide range of duties assigned to it. It is an information 'hub' in charge of collecting and distributing information on all subjects relating to the international adjustment of conditions of labour and industrial life. (Article 10 (1), ILO Constitution). It is the ILO's permanent secretariat, appointed and headed by the Director-General. (Sauer, 2014, p. 5) With regard to its duties relating to supervision, governments may request its assistance to help them frame laws and regulations that would correctly implement all the instruments that the General Conference has adopted (Article 10(2), ILO Constitution). It is further in charge with annual reporting activity on the basis of Article 22 of the Constitution which will be specified below in detail.

Apart from the three permanent organisations, two appointed bodies are also in charge of supervision: the Committee of Experts and the Conference Committee on the Application of Standards (hereinafter: Conference Committee). The *Committee of Experts* is appointed by the Governing Body. It is composed of 20 eminent jurists who undertake regular reporting activity (ILO, 2016). The members of the Committee of Experts are intended to represent the judicial, social, and economic diversity being present in Member States (La Hovary, 2013, p. 346). The Conference Committee is a tripartite organ that consists of the representatives of governments, employers, and workers. (ILO, 2014, p. 38)

Regular reporting procedure in the ILO works in two stages. Member States undertake reporting activity before the ratification of a Convention, and also after such instrument has been ratified. Instruments that do not require ratification are also included in reporting procedure. All ILO instruments (conventions and recommendations) that have been adopted by the Labour Conference have to be communicated to a competent national authority of each Member State. The competent national authority is the one that has the power to implement ILO's instruments. (ILO, 2012, p. 10) Regarding the ILO instruments, the Labour Conference adopts either a Recommendation or a Convention. A Convention is open to ratification by a Member State which will then create legal obligations. A Recommendation is not open to ratification, it does not create legal obligations and it can only serve as guidance to national legislation or policy-making. (ILO, 2012, p. 2) The aim of submission to a competent authority is different depending on whether it is a Convention or a Recommendation that is being submitted. In case of a Convention, the purpose is to promote its future ratification. (ILO, 2012, p. 10) If the competent national authority consents to the ratification, the Member will communicate the formal ratification of a Convention to the Director-General (Article 19 5(d), ILO Constitution). If the Member does not receive consent, the Governing Body will request reports "at appropriate intervals" "about the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise, and stating the difficulties which prevent or delay the ratification of such Convention" (Article 19 (5)(e), ILO Constitution). In case of a Recommendation, the aim is to let the competent authority consider what kind of effect will be given to the Recommendation (Article 19, ILO Constitution). The Governing Body again at appropriate intervals

will request reports with regard to matter dealt with in the Recommendation (Article 19 6 (d), ILO Constitution).

On the basis of Article 22 of the Constitution, Members States have agreed "to make an annual report (to the International Labour Office) on the measures taken to give effect to the provisions of Conventions to which [they are] a party". Due to the increasing extent of these reports two new Committees have been established to examine the reports: the Committee of Experts and the Conference Committee **(**Sauer, 2014, p. 7).

A report on the application of ratified fundamental and priority Conventions is required every two years. For other Conventions reporting is required every five years if not specifically requested otherwise (ILO, 2012, p. 9). The Governing Body determines the Conventions that are fundamental or priority (ILO, 2012, p. 20) [104]. Members are expected to issue either detailed or simplified reports (see ILO, 2012, p. 21).

Upon the examination of a report on the application of a particular Convention, it is the Committee of Experts' duty to make an Annual Report, in which the Committee of Experts make observations and direct requests. Observations contain comments on questions raised by the State on the application of a particular Convention. Direct requests contain more technical questions or request further information. These are communicated directly to the Government and are not published in the Annual Report (ILO, 2014, p. 102)

In the Annual Report the Committee of Experts distinguishes cases of progress, where it is able to express satisfaction concerning a specific country's application of Conventions. The expression of satisfaction does not mean that the country is in conformity with the Convention. It means that following the Committee of Experts' examination, the Member has made considerable steps to comply with a specific Convention either through adapting new legislation or amending the existing one (ILO, 2012, p. 18). In addition to cases of satisfaction, it also determines cases of interest, thereby implicating that it is convinced about the potential of further development and thereby the Committee of Experts wishes to maintain dialogue with the Government (ILO, 2012, p. 19). The Report by the Committee is not binding. However, they are considered to have a persuasive value which derives from the impartiality,

[104] Currently, there are 12 Conventions considered to be priority or fundamental**.**
Fundamental Conventions: (1) Forced Labour Convention, 1930 (No. 29) and its Protocol of 2014 to the Forced Labour Convention, 1930, (2) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), (3) Right to Organise and Collective Bargaining Convention, 1949 (No. 98), (4) Equal Remuneration Convention, 1951 (No. 100), (5) Abolition of Forced Labour Convention, 1957 (No. 105), (6) Discrimination (Employment and Occupation) Convention, 1958 (No. 111), (7) Minimum Age Convention, 1973 (No. 138) (8) Worst Forms of Child Labour Convention, 1999 (No. 182) *Priority Conventions*: (1) Labour Inspection Convention, 1947 (No. 81) with its Protocol of 1995 to the Labour Inspection Convention, 1947, (2) Employment Policy Convention, 1964 (No. 122), (3) Labour Inspection (Agriculture) Convention, 1969 (No. 129), (4) Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)

experience, and expertise of the Committee of Experts and also from its unique cooperation with both governments, workers, and employers (ILO, 2016, p. 9). In addition, though not legally binding, observations and comments may trigger legal effects. As a result, national legislation may change in order to comply with Conventions or they may also be used at international or national courts (La Hovary, 2013, p. 346).

The ILO also has a reporting mechanism for Member States with regard to some Conventions which are not ratified by Member States. The Conventions refer to conventions included in the 1998 Declaration on Fundamental Rights and Principles. The 1998 Declaration was adopted by the International Labour Conference on 13 June. (Wet, 1995, p. 1434) It originated from the idea that the ILO needed to look for a more flexible approach to promote international labour standard effectively, since in the 1990s the formal ratification of ILO Conventions remained low. (Wet, 1995, p. 1433; see also Bellace, 2001; Baccaro, 2015) The 1998 Declaration includes a list of four principles which refer to eight ILO conventions: (i) freedom of association and the right to collective bargaining, (ii) elimination of forced or compulsory labour, (iii) the effective abolition of child labour, (iv) elimination of discrimination. Its format – a declaration – was supposed to add an extra political and moral weight to standards of 'long - lasting importance' (Wet, 1995, p. 1437). The four principles of the 1998 Declaration derive from the ILO Constitution. It means that the obligation to 'respect, promote and realize' these principles rests on the membership in ILO and does not establish new obligations for Member States (Wet, 1995, p. 1437).

The 1998 Declaration has established two reporting mechanisms. The first one is the *follow-up mechanism*. It is not a new obligation, but rather a specification of reporting under Article 19 5(e) and 6(b) of the Constitution (see above). However, some differences remain between Article 19 and the follow-up mechanism. The follow-up mechanism requires *annual* reporting about all the non-ratified Conventions. The second reporting mechanism is, a *Global Report* drafted by the International Labour Office and is submitted to the Labour Conference. The Global Report focuses on information collected from the reporting activity related to both non-ratified Conventions (Article 19, ILO Constitution) and ratified Conventions (Article 22, ILO Constitution).

Dispute Settlement and Complaints in the ILO

The ILO has three types of complaints procedures: representations, complaints, and a special procedure for freedom of association. Each of the procedures is introduced below and data on their use is presented. The data on the number of times a specific mechanism is used comes from NORMLEX, that is the ILO's official information system and database. Apart from data on the use of the supervisory mechanism, it contains information on the ratification of ILO Conventions. It also creates a profile for each Member State addressing its latest ratifications, reporting obligations and complaints procedures. The data was collected from the database end of October 2016 – beginning of November 2016.

Representation

Pursuant to Article 24 of the ILO Constitution, "in the event of any representation being made to the International Labour Office by *an industrial association of employers or of workers* that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit". The Director-General brings the representation to the Officers of the Governing Body in order to decide about its admissibility. Six requirements have to be met in order for a representation to be admissible: (1) "it must be communicated to the International Labour Office in writing"; (2) "it must emanate from an industrial association of employers or workers; (3) it must make specific reference to article 24 of the Constitution of the Organisation"; (4) "it must concern a Member of the Organisation"; (5) "it must refer to a Convention to which the Member against which it is made is a party"; and (6) "it must indicate in what respect it is alleged that the Member against which it is made has failed to secure the effective observance within its jurisdiction of the said Convention" (Article 2(2), Standing Orders). The right to make a representation remains with any industrial association (Article 2 (2), Standing Orders) irrespective of its number of members. The industrial association could be a local, national, or even an international organisation. The Governing Body's duty to determine whether the association making the representation is in fact an industrial association of workers or employers in the natural meaning of the words and should not be bound by national definitions of the term 'industrial association'. (Introductory Note, 2005, p. 2) While indicating in what respect a Member failed to secure the effective observance of a Convention, the representation must be sufficiently precise. (Introductory Note, 2005, p. 3) If the representation is admissible the Governing Body will set up a tripartite committee, composed of members in equal numbers of workers', employers' and governments' groups. However no representative or national of the State against which the representation is made shall be included in this committee. (Article 3 (1), Standing Orders). If the representation falls within the scope of conventions dealing with trade unions, the Governing Body refers it to the Committee on

Freedom of Association. (hereinafter: CFA) (Introductory Note, 2005, p. 3). Upon examination of the representation the committee invites the Government against which the allegations have been made to make a statement of reply. The government may request an oral hearing and invite the representatives of the Governing Body to visit the country. (Articles 4-5, Standing Orders, 2004) The committee presents a report to the Governing Body with its own conclusions and recommendations as to what decision the Governing Body should make. (Article 6, Standing Orders). While formulating a recommendation, the committee takes into account the interest that the association has with regard to the situation that triggered the representation. (Introductory Note, 2005, p. 4) The Governing Body may decide to publish the report of the committee if the Governing Body is not satisfied with the statement it has received from the Government on the matter (Article 25, ILO Constitution). It can also initiate a procedure of complaint in accordance with article 26 of the Constitution. (Article 10, Standing Orders)

Table 3 lists all the ILO member countries which have ever been involved in a representation procedure, meaning that 70 out of 187 Member States were targeted by this mechanism. Column (1) indicates the number of representations made more recently, between 2000 and 2016. The table shows that for most countries there are only a few cases and the geographical distribution is mainly limited to Europe, and North, Central, and South America. In total, 97 representations were filed in this period. Of these 97, 10 did not meet the formal requirements of the Governing Body to be considered as a representation and were not admissible. Ten cases are still pending a conclusion (Column 2): that is, the representation was admissible, the Governing Body has decided to set up a tripartite committee to examine the case, but no recommendations have been concluded yet. As a result, 77 cases led to a recommendation which needs to be followed up by the Member State by making a statement on the subject of the representation or by providing further information on the subject of the representation. The Governing Body may decide to publish the representation and the statement by the Government concerned if it considers the follow up insufficient. Representations are often used and representations are made against the whole spectrum of ILO conventions including the core ILO conventions contained in the 1998 Declaration.

Table 3: Total number of finalized and pending representation cases at ILO

	Country	(1)	(2)		Country	(1)	(2)		Country	(1)	(2)
1	Argentina	1	1	25	Germany	1		49	Norway	0	
2	Austria	1		26	Greece	1		50	Panama	0	
3	Belgium	1		27	Guatemala	3		51	Paraguay	1	
4	Bolivia	1		28	Hungary	1		52	Peru	6	2
5	Bosnia Herzegovina	1		29	Iceland	0		53	Poland	3	1
6	Brazil	1		30	India	0		54	Portugal	5	
7	Bulgaria	3		31	Iraq	0		55	Quatar	2	
8	Canada	4		32	Ireland	1		56	Romania	2	1
9	Chile	3		33	Israel	1		57	Russia	1	
10	China	0		34	Italy	1		58	Senegal	0	
11	Colombia	3		35	Japan	3		59	Serbia	0	
12	Congo	0		36	Latvia	1		60	Slovakia	2	
13	Costa Rica	0		37	Lybia	0		61	Slovenia	1	
14	Croatia	2	1	38	Lithuania	1		62	Spain	5	2
15	Cyprus	1		39	Luxembourg	1		63	Sweden	1	
16	Czech Republic	2		40	Malta	1		64	Thailand	0	1
17	Denmark	2		41	Mauritania	0		65	Turkey	2	
18	Dominican Rep	0		42	Mauritius	0		66	Ukraine	0	1
19	Ecuador	2		43	Mexico	6		67	United Arab Em.	1	
20	Estonia	1		44	Moldova	2		68	United Kingdom	2	
21	Ethiopia	1		45	Myanmar	0		69	Uruguay	1	
22	Finland	1		46	Netherlands	3		70	Venezuela	0	
23	France	4		47	New Zealand	0					
24	Gabon	0		48	Nicaragua	0					

Legend: (1) Period: 2000-2016 – (2) Pending cases
Source: ILO NORMLEX Database – November 2016

Complaints

The procedural requirements of the complaint mechanism are in included in Articles 26 to 29 and 31-34 of the ILO Constitution. The starting point of the procedure is that "[a]ny of the Members have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified" (Article 26 (1), ILO Constitution). Accordingly, any Member State having ratified the same Convention, delegates to the Labour Conference and the Governing Body itself may file a complaint. The Governing Body may initiate communications with the Government in question. It may also decide to appoint the Commission

of Inquiry consisting of three independent members to carry out the investigation of the case. (Sauer, 2014, p. 8) However the appointment of the Commission of Inquiry is very rare, it happens only when the members state is accused of committing persistent and serious violations and repeatedly refused to address them (ILO, 2016). To date, 12 Commissions of Inquiry have been established. On the rare occasions that the Governing Body decides to set up the Commission of Inquiry, there is no Standing Order to determine the rules of its procedure and the Commission is entrusted to define its own rules of procedure on the basis of the Constitution and the practice followed by previous Commission of Inquiry. The Commission of Inquiry has different means to investigate a case: individual, on the spot meetings to collect testimonials from workers, governments, employers, and oral hearings in Geneva. It makes a report on all the facts of the case as well as recommendations. The report is published and the Government concerned must inform the Director General within three months whether it accepts the report or it is going to refer the complaint to the International Court of Justice. Though this has never happened before, the possibility remains. In case no Commission of Inquiry has been appointed following a complaint, the Governing Body may forward the complaint either to the Committee on Freedom of Association if the case is concerned with trade union rights or to the Committee of Experts for follow up.

Table 4 lists all the complaints and Commission of Inquiries (CIs) that have been ever initiated under this procedure. Any of the 187 Member States has the right to file a complaint if it is not satisfied with the effective observance of the ILO Conventions by another Member State. So far, only 27 Member States were targeted with these procedures. The complaint procedure may be initiated by delegates of the International Labour Conference. They may not necessarily come from the country targeted with the procedure. In addition to delegates, a Member State can also file a complaint. This happened in one case, when France filed a complaint against Panama in 1976. In two cases, two procedures were started. In almost half of the cases (13), violations were so severe that a Commission of Inquiry was set up. In three cases the Governing Body decided to discontinue the procedure because it observed substantial progress on the alleged matter. Currently, one case is pending concerning whether a Commission of Inquiry will be established (Guatemala) by the Governing Body.

These complaints and Commission of Inquiry lead, after conclusion, to a set of recommendations. Generally speaking, recommendations include broadly defined orders that the governments should follow up with. Governments should review legislation and take all the necessary measures in order to fully implement a Convention. Sometimes recommendations also include suggestions as to what exactly can be done to fully implement a Convention. This can be for example the establishment of a permanent dialogue structure between management and trade union or the establishment of mechanisms which provide access to justice without discrimination, fresh and impartial examination of cases. As a preventive measure, the Commission of Inquiry or the Governing Body may suggest that the

Government make publicly available the fact that it has violated an ILO Convention along with respective recommendations.

Table 4: Number of Complaints and Commissions of Inquiry at ILO

	Country	Year	Pending	CI		Country	Year	Pending	CI
1	Argentina	1977		No	16	Myanmar	2010		No
2	Bahrain	2011		No			1996		Yes
3	Belarus	2003		Yes	17	Nicaragua	1987		Yes
4	Bolivia	1975		No	18	Nigeria	1998		No
5	Chile	1975		Yes	19	Panama	1987		No
6	Colombia	1998		No	20	Poland	1982		Yes
7	Cote d'Ivoire	1992		No	21	Portugal	1962		Yes
8	Dominican Rep.	1983		Yes	22	Qatar	2014	Yes	No
9	Fiji	2013		No	23	Romania	1989		Yes
10	Germany	1985		Yes	24	Sweden	1991		No
11	Greece	1968		Yes	25	Uruguay	1976		No
12	Guatemala	2012	Yes	Possible	26	Venezuela	2015	Yes	No
13	Haiti	1983		Yes			2004		No
14	India	1934		No	27	Zimbabwe	2010		yes
15	Liberia	1963		Yes					

Source: ILO NORMLEX Database – November 2016

Freedom of association

There is a specific complaints mechanism and procedure for instances related to violations of the freedom of association convention which is administered by the Committee on Freedom of Association (hereinafter: CFA) which is composed of an independent chairperson and three representatives each of the governments, employers, and workers. Their consultations are private and the working documents are confidential. It takes its decision by consensus. A complaint may be issued by an organisation of workers and employers or governments. (ILO, 2012, p. 50) No complaint may be issued by a natural person. In case of a complaint, a Fact Finding and Conciliation Commission (nine independent persons) is appointed by the Governing Body to investigate the matter. (ILO, 2006, p. 8) The procedure does not intend to sanction Member States; rather, its main objective to establish a tripartite dialogue on that matter. Complaints may be lodged irrespective of the fact that a country has ratified the freedom of association convention or not. The CFA's mandate is to review whether national legislation and practices comply with the Convention. In case of non-compliance it examines to what extent trade unions have been affected. It further provides guidelines and assistance on the promotion of freedom of association (ILO, 2006, p. 9).

The Committee of Experts' regular reporting activity interplays with the Committee on Freedom of Association, since the latter regularly selects about 25 serious non-compliance cases from the reports

submitted to the Committee of Experts in order to provide the governments concerned with the opportunity to explain their situation to the Committee. (La Hovary, 2013, p. 344)

Table 5 lists all the countries that have ever been involved in this procedure, but only the complaints filled between 2000 and 2016 are counted (column (1)). This is the most used ILO procedure. The table displays a huge variation in the number of cases between countries. Especially the high number of cases in Latin American countries is striking. Twenty-six out of 151 Member States have 10 or more cases. Hence, most cases are concentrated only in a limited number of countries. Column (1) reports on all the cases submitted to the Committee. Column (2) reports on the cases still pending a decision of the Committee at the time this report is written. Column (3) lists in which cases the follow up mechanism is active. This mechanism requires governments to send information on how previous allegations are being considered at a national level. This can be any kind of information, such as court decisions, results of investigations and changes in legislation. All this information is summarised and provides an overview of what effect the government has given to the recommendations. The Committee on Freedom of Association expresses its satisfaction or its regret and may ask the government to keep it informed.

Table 5: Total number of finalised, pending, and follow up cases by Expert Committee on Freedom of Association at ILO

	Country	**(1)**	**(2)**	**(3)**		**Country**	**(1)**	**(2)**	**(3)**		**Country**	**(1)**	**(2)**	**(3)**
1.	Albania	2			51	Fiji	2		1	101	Myanmar	3		1
2.	Algeria	2			52	Finland	0			102	Nepal	3		
3.	Antigua de Barbuda	0			53	France	8		1	103	Netherlands	3		
4.	Argentina	96	13	10	54	Gabon	3			104	New Zealand	0		
5.	Australia	3			55	Georgia	4			105	Nicaragua	20		2
6.	Austria	0			56	Germany	1			106	Niger	2		
7.	Bahamas	2			57	Ghana	0			107	Nigeria	2		
8.	Bahrain	3	1		58	Greece	7			108	Norway	5		
9.	Bangladesh	6	1		59	Grenada	0			109	Pakistan	14	2	2
10.	Barbados	1			60	Guatemala	49	20	8	110	Panama	18	1	3
11.	Belarus	1			61	Guinea	2		1	111	Papua New Guinea	0		
12.	Belgium	2			62	Guinea-Bissau	0			112	Paraguay	16	4	5
13.	Belize	0			63	Guyana	1			113	Peru	59	17	20
14.	Benin	5		1	64	Haiti	2			114	Philippines	14	3	6
15.	Bolivia	9	1	1	65	Honduras	11	3	1	115	Poland	9		
16.	Bosnia and Herzegovina	4			66	Hungary	3			116	Portugal	4		1

17.	Botswana	2			67	Iceland	1			117	Qatar	1		1
18.	Brazil	19	1	1	68	India	9	1	4	118	Romania	10	2	
19.	Bulgaria	1			69	Indonesia	15	2		119	Russia	11		1
20.	Burkina Faso	1			70	Iran	6	1	2	120	Rwanda	1		
21.	Burundi	6	1		71	Iraq	3			121	Saint Lucia	0		
22.	Cabo Verde	3			72	Ireland	1			122	Saudi Arabia	0		
23.	Cambodia	10	2	1	73	Israel	0			123	Senegal	1	1	
24.	Cameroon	15	3	2	74	Italy	1			124	Serbia	2		
25.	Canada	38	3	2	75	Jamaica	0			125	Sierra Leone	0		
26.	Cen Afr. Rep.	0			76	Japan	10	2	2	126	Slovakia	1		
27.	Chad	3			77	Jordan	1		1	127	Somalia	1	1	
28.	Chile	48	6	2	78	Kazakhstan	1			128	South Africa	3	1	
29.	China	2	1		79	Kenya	1			129	Spain	8	1	
30.	Hong Kong	2			80	Kiribati	1			130	Sri Lanka	6		
31.	Colombia	103	27	20	81	Rep. Korea	9	3	1	131	Sudan	0		
32.	Comoros	1			82	Latvia	0			132	Suriname	0		
33.	Congo	0			83	Lebanon	5		1	133	Swaziland	3	1	
34.	Costa Rica	26	2	3	84	Lesotho	0			134	Sweden	0		
35.	Croatia	2	1		85	Liberia	2	2		135	Switzerland	9		
36.	Cuba	1			86	Libya	0			136	Syrian A. R.	0		
37.	Cyprus	1			87	Lithuania	4			137	Thailand	9	3	1
38.	Czech Rep.	0			88	Luxembourg	1			138	Togo	5		1
39.	Cote d Ivoire	2			89	Madagascar	2			139	Trinidad Tobago	0		
40.	D. R Congo	9	1	3	90	Malawi	0			140	Tunisia	4	1	1
41.	Denmark	3		1	91	Malaysia	5	1	12	141	Turkey	15		6
42.	Djibouti	4		2	92	Maldives	1	1		142	Uganda	1		
43.	Dominican Republic	6	1	1	93	Mali	2		2	143	Ukraine	6		
44.	Ecuador	12	1	2	94	Malta	2			144	U. Kingdom	4		
45.	Egypt	2			95	Mauritania	2	1		145	United States	9		1
46.	El Salvador	59	9	6	96	Mauritius	12	1		146	Uruguay	17	1	1
47.	Eq. Guinea	1			97	Mexico	42	5	3	147	Venezuela	34	7	5
48.	Eritrea	1			98	Moldova	2			148	Vietnam	0		
49.	Estonia	2			99	Montenegro	5		1	149	Yemen	0		
50.	Ethiopia	1			100	Morocco	9		1	150	Zambia	0		
										151	Zimbabwe	9		1

Legend: (1) # cases in the period: 2000-2016 - (2) Pending cases - (3) Follow up cases
Source: ILO NORMLEX Database – November 2016

Conclusion

The ILO offers a range of monitoring and complaint procedures whose potential might be considered in the context of trade agreements with a view to strengthening the enforcement of labour rights. As Agusti-Panareda et al. (2014-2015, p. 368) point out, some agreements already envision the involvement of the ILO in the resolution of disputes relating to labor provisions. Indeed, various mechanisms exist through which '*parties may seek advice from the ILO'*. This involvement would not necessarily be limited to dispute settlement, but could also extend to monitoring compliance with the labour rights provisions of trade agreement more generally speaking. Avenues in this regard include the involvement of the International Labour Office in providing advice to the contracting parties on the implications of the ILO instruments, offering technical assistance as well as carrying out advisory services to support the implementation of labour standards. (Agusti-Panareda et al., 2014-2015, pp. 370-371) No equivalent institutional mechanism is available for the enforcement of environmental issues, although some international environmental agreements and conventions involve specific monitoring and reporting mechanisms.

Case Study: The OECD Guidelines for Multinational Enterprises[105]

Introduction

Another existing initiative that is interesting to consider for the purpose of strengthening enforcement of TSD chapters are the Guidelines for Multinational Enterprises (Guidelines) of the Organization for Economic Co-operation and Development (OECD). The Guidelines are a set of (voluntary) recommendations addressed by participating governments to multinational enterprises (MNEs) operating in or from their territory, for conduct relating, *inter alia,* to labor rights environmental protection, human rights, consumer protection, information disclosure and the fight against corruption. For each of these substantive areas the Guidelines make reference to the relevant international conventions and treaties. Hence, the Guidelines make reference to most social and environmental international commitments also included in the TSD chapters of trade agreements. However, the Guidelines do not further operationalise these commitments in more precise commitments which would facilitate the assessment of compliance and non-compliance.

Description

The Guidelines were originally adopted by the OECD Ministerial Council in 1976, as part of the Declaration on International Investment and Multinational Enterprises (MNEs), which aimed to encourage positive contributions by MNEs to economic, environmental, and social goals. The Guidelines have been revised several times (1979, 1984, 1991, 2000 and 2011). They are now endorsed in 46 states (all 34 OECD member states and 12 non-OECD members). Two actors are entrusted with monitoring compliance with the Guidelines: the National Contact Points (NCPs) and the OECD Investment Committee. Of these, the NCPs are more important in the context of this report since they can contribute to the resolution of issues that arise following the implementation of the Guidelines.

[105] A note of referencing in this section. The official document used for this section is the OECD Guidelines for Multinational Enterprises 2011 Edition (available online). This document contains several documents including the Declaration on International Investment and Multinational Enterprises, the Guidelines themselves, the implementation procedures of the Guidelines, the amendment to the Council Decision on the Guidelines, procedural guidance documents and the commentaries on the implementation procedures. Each of these documents has its own paragraph numbering. Each time the page number and the paragraph number on that page are presented.

All adhering states must establish an NCP domestically, to enhance the effectiveness of the Guidelines by promotional activities, the handling of enquiries and, especially relevant in the context of this study, '*contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances'* (OECD, 2011, p. 68, § 1). NCPs must operate in accordance with the Guiding Principles for dealing with specific instances which include impartiality, predictability, equality, and compatibility with the Guidelines (OECD, 2011, pp. 81-82, §22). States are granted flexibility concerning the organisational form of their NCPs, and diverse organisational forms have been adopted (OECD, 2011, p. 71, part A). An NCP may be a governmental unit, or an organisation consisting of government representatives, independent experts and representatives of business, worker organisations and other non-governmental organisations. In practice, many NCPs are structured around different combinations of these actors. The OECD identifies several possible structures for NCPs: monopartite (located in a single governmental department); interagency (with representatives from several departments); pluripartite (including representatives from government and from business and civil society); and independent expert body (consisting of independent experts) (OECD, 2011, p. 71, §2).

As noted, the main tasks of NCPs are to promote the Guidelines within their jurisdictions and raise awareness, handle enquiries, and contribute to the resolution of complaints (involving alleged non-compliance) that arise in the course of implementation (OECD, 2011, p. 68, §1). The NCP provides an alternative dispute resolution mechanism (Linder and Steinkeller, 2013) or non-judicial grievance mechanism (Commentary to principle 25 of the OECD guidelines; UN, 2011). Under this mechanism, any interested party may file a "specific instance" with an NCP when the party has evidence that a MNE is in non-compliance (domestically or abroad) with the Guidelines (OECD, 2011, p. 72, section C). Generally, specific instances will be dealt with by the NCP of the country in which the issue which led to the specific instance occurred (OECD, 2011, p. 82 §23). This applies to countries which adhere to the Guidelines. However, as the Guidelines make clear, MNEs are encouraged to observe the Guidelines wherever they operate. Hence, there is also the possibility to file specific instances for issues occurring in non-adhering states (OECD 2011, p. 88, §39). In this case a specific instance can be raised with the NCP of the MNE's home state (OECD 2011, p. 88, §39).

The NCP deals with specific instances in three phases[106]. In the first phase, the NCP makes an initial assessment of whether the issues raised merit further examination, or should be dismissed (OECD, 2011, p.72, §1). The NCP needs to determine, *inter alia,* whether the issue is relevant to the implementation and impact of the Guidelines, based on facts including the identity of the complainant and its interest in the matter, and the link between the MNE's activities and the issue raised (OECD, 2011, pp. 82-83,

[106] In some cases, NCPs can also conduct research on their own initiatives without a specific instance be filed.

§25). If the NCP concludes that the specific instance does not merit further examination, it issues a statement that describes the specific instance and the reasons for its decision.

Where a specific instance merits further examination, the NCP should, in a second phase, discuss the complaint with the parties involved and try to help resolve the issue (OECD, 2011, p. 72, §2; pp. 83-84, §28). This resolution effort must rely on consensual and non-adversarial procedures agreed upon by the parties (OECD, 2011, p. 84, §29). In acting as mediator, the NCP can consult relevant experts, stakeholders (e.g., NGOs and worker or business representatives), and other NCPs (OECD, 2011, pp. 83-84, §28), or the OECD Investment Committee (OECD, 2011, p. 72, §2c; England Olsen & Engsig Sorensen, 2014, p. 29). The aim of NCP mediation is to reach an agreement that is acceptable to both parties. However, an NCP can continue to deal with a specific issue and issue a statement even if the MNE refuses to take part in mediation (England Olsen & Engsig Sorensen, 2014, p. 29).

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 reached, or if a party refuses to participate, the NCP has the authority to consider the allegation and state ("name and shame") its conclusion as to whether the MNE has breached the Guidelines. This however rarely happens. The statement of conclusion constitutes the only "sanctioning" mechanism that NCPs have at their disposal, as they lack authority to sanction through financial penalties, suspension of licenses, or the like (Davarnejad, 2011, p. 364). This naming and shaming mechanism is therefore considered by some to be relatively weak, as it is not tied to any specific penalty (Fick, 2010, p. 480) and relies on voluntarism of MNEs to take corrective action which does not always materialise in significant changes (Ruggie & Nelson, 2015, p. 122).

To supplement the decentralised implementation structure based on diverse NCPs, the OECD established the Working Party on Responsible Business Conduct, under the OECD Investment Committee. As an intermediary, the Working Party performs three functions. First, members exchange information and coordinate between NCPs. Second, members aim to ensure consistent application of the Guidelines. They engage in substantive supervision in order to ensure uniform interpretation and application. The Working Party advances uniformity through the issuance of clarifications (OECD, 2011, p. 69, §4). Thirdly, the Working Party performs a control function over NCPs, by considering substantiated submissions by an adhering state, an advisory body or the NGO coalition OECD Watch as to *"whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances"* (OECD 2011, p. 74, § 2, b). This is a potentially powerful tool to address shortcomings in NCP performance.

Effectiveness/Use of complaint system

The Guidelines were designed as a voluntary, non-binding, non-legally-enforceable instrument of corporate social responsibility (CSR) addressed to MNEs. The text of the Guidelines itself stresses their "voluntary," "non-binding" and "not legally enforceable" character. However, the Guidelines apply to all MNEs within an adhering country and to operations, produces and services of those MNEs in non-adhering countries. It is important, moreover, to distinguish between the non-binding nature of the substantive provisions of the Guidelines, and the obligatory nature of their institutional and procedural provisions, set out in the Council Decision on the Guidelines and the attached Procedural Guidance[107]. These provisions oblige states to set up NCPs (first intermediary), and define the role of the Investment Committee (second intermediary) (Schuler, 2008; Yann, 2007).

Moreover, a MNE cannot avoid a specific instance procedure by refusing to cooperate in proceedings before the NCP. As noted above, refusal of mediation does not necessarily result in dismissal of the specific instance. Furthermore, the Guidelines are applicable to all multinational MNEs in countries that have accepted the Guidelines, and their operations all over the world (OECD, 2011, §3). In this sense, MNEs cannot opt out. However, it should be noted that the Guidelines are also not binding law and MNEs cannot be prosecuted by a domestic court if they violate the Guidelines.

However, the real impact in terms of better compliance with international commitments related to sustainable development depends on the performance of the two main actors in the OECD regulatory approach. The NCPs have the potential to promote the Guidelines, raise awareness and inform civil society actors on what they can do in case of non-compliance; in this way, they can actively contribute to implementation and enforcement through disputes and complaint-handling. The degree to which NCPs take on such an active role will influence their effectiveness. A more active role can be stimulated by the second actor, the Investment Committee, which has a mandate to assess whether NCPs perform adequately in addressing specific instances and to hold dormant NCPs to account.

The degree to which NCPs are effective in this sense can be assessed on the basis of the number of complaints (specific instances) with which they deal. There are, however, severe doubts as to the effectiveness of the complaint systems managed by NCPs. Official data from the OECD show that there are very few specific instance proceedings. Table 6 reports on the number of specific instances based

[107] The Council Decision on the Guidelines for MNEs and the attached Procedural Guidance were adopted by a binding Decision of the OECD Council following article 5 of the OECD Convention: Decision of the Council on the OECD Guidelines for Multinational Enterprises, 5 May 2011, C/MIN(2011)11/FINAL.

on the online database of the OECD (https://mneguidelines.oecd.org/database/).[108] Between 2001 and 2015, there were 345 specific instances in 32 countries. This works out, on average, to less than one complaint per year for each adhering country[109]. In some countries, there has been only one complaint in 15 years. In some others, the numbers are a bit higher, but still very low (less than 20 over 15 years). Six NCPs (Brasil, Germany, France, Netherlands, UK and US) dealt with more than 20 specific instances. According to the OECD (2016, p. 38), the number of specific instances has increased over the past 15 years but not at a regular nor a significant rate. Ruggie and Nelson (2015) note that the near absence of specific instances in some countries signals very weak enforcement, as it is implausible that there were no breaches of the Guidelines in those countries. As a result, they are highly skeptical concerning the effectiveness of NCPs.

Table 6: Number of Specific Instances with OECD Guidelines NCP

NCP	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
Argentina	0	0	0	1	0	1	2	1	0	0	5	0	0	0	0	0	10
Australia	0	0	0	0	1	1	1	0	0	1	0	0	2	1	0	0	7
Austria	0	0	0	1	0	1	0	1	0	0	0	0	0	2	0	0	5
Belgium	1	0	2	5	1	1	0	1	1	1	0	1	1	0	0	0	15
Brazil	0	0	1	1	1	2	3	0	2	5	0	2	5	0	1	0	23
Canada	1	2	0	1	3	0	0	0	1	1	1	1	1	1	1	0	14
Chile	0	1	0	0	1	0	3	0	0	0	1	0	0	4	0	0	10
Czech Rep.	2	0	1	2	0	0	0	0	0	0	0	0	0	0	0	0	5
Denmark	0	1	1	0	0	1	0	0	0	0	1	1	5	4	0	0	14
Finland	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	2
France	3	1	4	1	1	0	0	0	0	4	1	1	1	3	1	0	21
Germany	0	2	2	1	0	1	2	1	2	1	0	2	4	4	3	1	26
Hungary	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1
Ireland	0	0	0	0	0	0	0	1	0	0	1	0	0	0	0	0	2
Israel	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	0	2
Italy	0	0	0	0	1	0	3	0	0	0	2	0	0	0	1	0	7
Japan	0	0	1	2	1	0	0	0	0	0	0	0	0	1	0	0	5
S. Korea	0	1	2	0	0	0	0	0	0	0	0	2	1	1	0	0	7
Luxembourg	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1
Mexico	0	1	0	0	0	0	0	1	0	0	0	3	0	0	0	0	5
Netherlands	4	2	3	3	1	3	0	1	0	0	3	3	0	1	2	0	26
New Zealand	0	0	0	0	0	0	1	0	1	0	0	0	1	1	0	0	4
Norway	0	1	0	0	1	0	0	1	2	0	3	1	1	3	0	0	13
Peru	0	0	0	0	0	0	0	0	2	0	1	0	0	0	0	0	3

[108] The fact that we used the online database of the OECD as a reference point explains that our figures slightly differ from the ones reported in the OECD (2016) report on implementing the guidelines for MNEs through the national contact points. This report includes some additional specific instances which were not yet included in the database (see OECD, 2016, p. 32)

[109] It should be noted that not all countries were adhering to the Guidelines already in 2001.

Poland	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	2
Portugal	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1
Spain	0	0	0	2	0	0	0	0	0	0	0	2	1	0	0	0	5
Sweden	0	0	1	0	0	1	0	0	0	1	0	1	2	0	0	0	6
Switzerland	0	0	0	1	1	0	0	2	1	3	1	1	0	0	3	2	15
Turkey	0	0	0	0	0	0	0	1	0	0	0	0	0	2	0	0	3
UK	0	1	5	0	5	4	0	2	2	3	2	5	9	4	0	0	42
US	2	3	2	4	1	4	3	1	3	2	9	1	5	3	0	0	43
Total	**13**	**16**	**26**	**27**	**19**	**23**	**18**	**14**	**17**	**23**	**32**	**27**	**39**	**36**	**12**	**3**	**345**

Source: Own calculations based on OECD database - https://mneguidelines.oecd.org/database/ – data until June 2016

In addition, NCPs have very little leverage to force compliance even where submissions are made. Civil society organisations (OECD Watch, 2011) and academics (Ruggie & Nelson, 2015; Maheandiran, 2015; Ochoa, 2015) have criticised this general lack of enforcement capacity. The only thing NCPs can do is "name and shame." Yet OECD Watch (2013) has reported that, in practice, very few NCPs actually name MNEs that have breached the Guidelines (see also Davernejad, 2011). Maheandiran (2015) argues that, for NCPs, it is unclear whether they are intended to determine, investigate and sanction breaches, or whether they are intended to serve merely as mediation platforms between antagonistic parties. Most NCPs interpret their role in the latter fashion, i.e. to provide a forum for discussion so as to contribute to the resolution of specific instances. Ochoa (2015) shows, on the basis of five NCP case studies, that NCPs have fundamentally different conceptions of their roles and powers in handling complaints. This observation is supported by Davarnejad (2011, p. 381), who notes that many NCPs see it as outside their mandates to investigate whether MNEs have breached the Guidelines and to sanction them if so.

Some NCPs do examine conduct when a specific instance is issued, but most do not. Ochoa (2015a) finds that few NCPs conduct thorough examinations of possible breaches. The UK and the Dutch NCPs, notably, do name MNEs that are in breach and enumerate their violations (Fick, 2010, p. 480). However, even in these cases it remains unclear "*what actual remedy complainants receive or what changes in company policies and practices result from NCP findings and mediation"* (Ruggie & Nelson, 2015, p. 121). In principle, the Investment Committee, could address these issues, providing more guidance on the specific roles of the NCPs and even activating dormant NCPs, but it does not do so sufficiently. On the other hand, the OECD (2016) did report impacts resulting from specific instances, in 36% of all specific instances analysed between 2011 and 2015, such as follow up plans of MNEs including changes in MNEs policies and remediation of adverse impacts (OECD, 2016, pp. 12-13)

The limited effectiveness of the NCPs, as a dispute settler or complaint mechanism[110], could also be attributed to the absence of any sanctioning mechanism. As noted, there are few NCPs willing to name and shame MNEs, which might induce them to take action. The OECD Guidelines rely on the willingness of MNEs voluntarily to address issues related to non-compliance with rules laid down in the Guidelines.

[110] For a more general assessment of the performance of NCPs on all three mandated activities (promotion guidelines, handling enquiries and dealing with specific instances) see OECD (2016)

Case Study: Voluntary Sustainability Standards

Introduction

Another existing initiative that is interesting to consider for the purpose of strengthening enforcement of TSD chapters through dispute settlement concerns voluntary sustainability standards (VSS). The United Nations Forum on Sustainability Standards (UNFSS)[111] defines VSS as *"standards specifying requirements that producers, traders, manufacturers, retailers or service providers may be asked to meet, relating to a wide range of sustainability metrics, including respect for basic human rights, worker health and safety, the environmental impacts of production, community relations, land use planning and others* (UNFSS, 2013, p. 3)*."* They comprise a collection of organisations which certify producers which 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 trade agreements. These commitments refer to protection of labour rights, addressing climate change, biodiversity protection, etc. These VSS are becoming an important governance mechanism to govern value chains. (Oorschot et al., 2014) Over the last two decades the number of VSS has proliferated (Marx & Wouters, 2015) as well as the number of certified entities which comply with these standards (Potts et al., 2014). One of the reasons for this growth is that many firms need labels to sell their products, get access to markets, respond to consumer demand, etc. Indeed, the demand for VSS certified products is driven by private economic actors (consumers, business to business, retailers) and public governmental actors (through public procurement, integration of VSS in regulatory measures). Concerning the latter, it is worth noting, that other regulatory instruments of the EU already integrate VSS in their regulatory design and accredit VSS. One example is the 2009 EU Renewable Energy Directive (RED) (2009/28/EC). Under RED, the European Commission set up an accreditation system for VSS in order to prove compliance of biofuel providers (from countries outside the EU) with the Directive. The list currently comprises 19 VSS. In essence, in the context of biofuels, the EU is confronted with a similar challenge as in the context of trade agreements. Products entering the EU market cannot be assessed on their 'sustainability performance' since such performance hinges on the production process. This means that the sustainability of products (compliance with environmental and social standards) has to be assessed at the production stage and, arguably, across the value chain (Ponte and Daugbjerg, 2015). Since VSS

[111] In the spring of 2013 the United Nations Forum on Sustainability Standards (UNFSS), a joint initiative by five UN agencies (FAO, UNIDO, ITC, UNEP and UNCTAD), was launched. The UNFSS is a platform created to generate knowledge and information on voluntary sustainability standards (VSS) with a particular focus on their potential contribution to development. The initiative is a recognition of the increasing importance of VSS in international trade.

provide this type of monitoring and assessment capacity, they offer a regulatory service which is absent for the EU as a (public) actor. This way, VSS close a regulatory gap which cannot be closed by the contracting partners in a trade agreement because of issues of sovereignty. In other words, they enable public actors to transcend the scope of their national regulatory capacities. As Ponte and Daugbjerg (2015) and Schleifer (2013) point out, this type of hybrid governance is based on deep and mutual dependence and interconnection between public and private elements. A recent report by the United Nations Forum on Sustainability Standards (2016) highlights many other examples and ways in which governments are engaging with VSS. The idea to integrate VSS in bilateral trade agreements builds on proposals made to integrate VSS in the EU's unilateral GSP+ trade policy (Schukat et al., 2014, p. 420).

Description

In a way, VSS are instruments which enforce international legal commitments related to sustainability issues. How do they do this? First, they embed the sustainability standards they develop in international law by including international legal commitments in their foundational principles. Second, and important 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 systems. Let us further briefly elaborate each step.

First, they integrate existing international rules and agreements, often developed in a multilateral context in their set of rules and standards. In this way, they integrate public rules and standards in a private set of procedures. Take the example of the Forest Stewardship Council, a leading VSS in the area of forest governance. It bases its transnational regulatory approach on 10 principles of which the first one explicitly refers to public international law. This principle implies that the standards which are developed in the context of the FSC should adhere to provisions included in *inter alia* the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, Convention Concerning the Protection of the World Cultural and Natural Heritage, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on Biological Diversity (UNCED), Framework Convention on Climate Change, and International Tropical Timber Agreement, the ILO Declaration on Fundamental Principles and Rights at Work (see Marx et al. 2012). Almost all VSS state in their mission commitment to international conventions and agreements and list them in their foundational documents and principles. Some of these international conventions and agreements also are referred to in trade agreements.

Second, VSS operationalise international norms and principles in specific standards and benchmarks which makes compliance assessment possible and further operationalises the substantive provisions in conventions and international agreements. Often VSS initiatives start with defining general principles as noted above and delegate the formulation of specific standards to working groups or committees. These working groups translate principles in specific 'compliance benchmarks'. These benchmarks contain more specific criteria which are related to each of the broad principles. Each of these benchmarks is in turn further defined and operationalised in to measurable indicators. The way in which some of these VSS transform principles into specific standards is remarkably democratic. Take for example again the Forest Stewardship Council (FSC). Many scholars have suggested that FSC's standard-setting structures and procedures encompass several institutional features which could be considered democratic (that is, inclusiveness, participation, transparency, deliberation) (Dingwerth, 2007). These features include the organisation's membership structure and the decision-making procedures. One of the primary goals of the FSC is to provide voice to a whole range of forest stakeholders, such as forest owners and managers, stewards of the forest, resident forest-dependent people, local communities, indigenous people, and forest workers.[112] This concern for broad representation and inclusiveness is particularly apparent in the organisation's open and chamber-based membership structure (Gale, 2009). Membership to the FSC is open to any individual or organisation who shares the scheme's goals and vision, providing that they secure the support of two existing members and the payment of a membership fee.

After operationalising international norms into specific standards VSS, thirdly, put systems in place to monitor compliance with standards by VSS adopters. Monitoring allows for the assessment of compliance with specific standards. Monitoring in VSS is a function of two interrelated aspects, namely the design of conformity assessment tools based on auditing and, important in the context of this study, the provision of complaint systems (Marx & Wouters, 2016).

Concerning the former (monitoring based on auditing) many VSS organise the assessment of conformity with standards through a set of standardised procedures primarily based on audit procedures. These audits allow for quantification of conformity via different indicators and comparison between certified entities. Auditing in the context of VSS occurs via auditing protocols. A walk through a factory or forest with auditors relying on common sense is not considered effective monitoring. Initially auditing relied on a checklist/questionnaire approach. Auditors visited different units and filled out a questionnaire. On the basis of the results of the questionnaire, an assessment was made. An advantage of this approach was that it allowed for the quantification of compliance with standards on the basis of different indicators. It also standardized auditing. However, this approach was criticised for not providing

[112] Forest Stewardship Council (2003). FSC Social Strategy: Building and Implementing a Social Agenda. Version 2.1

sufficient reliable data on compliance with standards (Locke, 2013). One of the criticisms was that standardisation leads to routinisation resulting in auditors doing a 'quick' job and missing crucial information. (Sabel et. al., 2000) Consequently, more qualitative and participatory approaches to auditing were introduced which include participation of workers, local communities, and local governments in monitoring (Barrientos, 2003).

Auditing systems, however, are incomplete for monitoring compliance with standards on a continuous basis (Locke, 2013). In order to overcome the limitations of audit-based approaches, bottom-up complaint or dispute settlement procedures are set in place which allow different stakeholders to constantly monitor and report any violations of standards. This has been referred to as the establishment of procedures which allow for 'retrospective accountability' (Hachez and Wouters, 2011). These complaint and dispute systems allow 'internal' participants (members of VSS, VSS certificate holders, etc.) and 'external' stakeholders to raise issues relevant for the functioning of VSS including non-compliance with standards. Complaint mechanisms provide a necessary complement to conformity assessment and auditing in order to guarantee compliance. Recently, one observed the emergence of complaint and dispute settlement systems in many VSS. They take a variety of forms but several VSS allow external stakeholders (NGOs, citizens, etc.) to file a complaint if they believe that a violation of standards occurs (Marx, 2014) In order to enable stakeholders to raise a complaint, 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.

An illustrative example of how these two enforcement mechanisms are used is the Dutch Fair Wear Foundation (FWF), which was created in 1999[113]. It is an independent not-for-profit organization. The FWF aims to implement and enforce a set of rules codified in the FWF "Code of Labor Practices" (FWF Code), which fully integrates the ILO Declaration on Fundamental Principles. The FWF Code is a standard for companies' supply chain management; firms that join are required to "adjust their management systems in order to allow effective implementation" of the Code (FWF 2009a, 9). To facilitate monitoring and implementation, FWF has also developed an audit manual, which all auditors (including FWF itself, member firms and independent auditors) must follow. This manual operationalises the ILO conventions into specific standards and verifiable indicators. For example, the FWF guidance document for auditors and member companies on freedom of association and the right to collective bargaining contains a detailed overview and checklist (33 pages) of all the dimensions that must be assessed during monitoring (FWF, 2008).

[113] This example builds on Marx, A. & J. Wouters (forthcoming, 2017)

In both the substance of its standard and its verification procedures, FWF aims to be the "gold standard" (FWF 2012c). When a firm adopts the FWF Code, it "agrees to put *sufficient and effective efforts"* into ensuring that the Code is respected throughout its supply chain (FWF, 2009a, p. 13 - emphasis added). FWF focuses on the management practices of firms and on labour conditions in their first-tier supplier factories (FWF, 2012b, p. 10-11). Firms not only sign up to the FWF Code, but actually become "members" of FWF, clearly committing to its values. In addition, FWF requires members to actively engage with their suppliers (other independent firms), while taking into account that members "*have influence, but not direct control, over working conditions*" in supplier facilities (FWF, 2014, p.6).

In terms of monitoring and implementing the Code, FWF has sought to shift from factory auditing alone to a "multilevel verification process" that utilises (i) factory audits, (ii) complaints procedures, and (iii) so-called Brand Performance Checks (BCPs) (which will not be further discussed). The FWF audit system itself involves several actors. A first actor is the FWF verification department, which is involved in monitoring compliance with the FWF Code and also contributes to rule implementation by providing technical expertise. The FWF carries out its own annual "verification audits" in a random sample of factories. FWF can also decide to audit specific factories to follow up on complaints of non-compliance, because the factory is a major supplier to FWF member firms, or on the request of a member firm (FWF 2009c, p.10-11). Firms not only agree to cooperate with FWF's verification efforts, but are also expected to develop their own "*coherent system for monitoring and remediation" as well as a "complaints procedure*" (FWF 2009a, p.9). Each member must establish an audit plan, in which it commits to monitoring a minimum percentage of its production each year. A firm is also expected to commission audits, which are performed by independent professional auditors.

The FWF's auditing system is considered by experts to be "rigorous and trustworthy," incorporating the most "stringent and credible factory audits in the garment industry" (Egels-Zandèn and Lindholm 2014, p. 4). To complement its auditing system, FWF has increasingly elaborated and invested in a complaint mechanism (second component). As with audits, firms joining FWF are obliged to set up their own complaints procedures. FWF's policy states that "*complaints by workers or their representatives […] should preferably be handled within the company*" and "*only if the internal procedure does not exist or does not function can workers or their representatives use the FWF procedure*" (FWF 2013b, p. 1).

The FWF's procedure is open to "*unions, NGOs, local authorities, companies, employers' organizations"* and "*others who are concerned with the implementation of FWF labor standards*"(FWF 2009a, p.12). The procedure is highly accessible[114] to a range of actors, to enable all stakeholders to contribute to the monitoring of compliance with labor standards. FWF elaborated a new complaint procedure in 2009, setting out eight "stages" in enabling and responding to complaints (FWF 2009c,

[114]Complaints can be filed in written or verbal form, using e-mail, letters, or telephone (FWF, 2013b. p. 2).

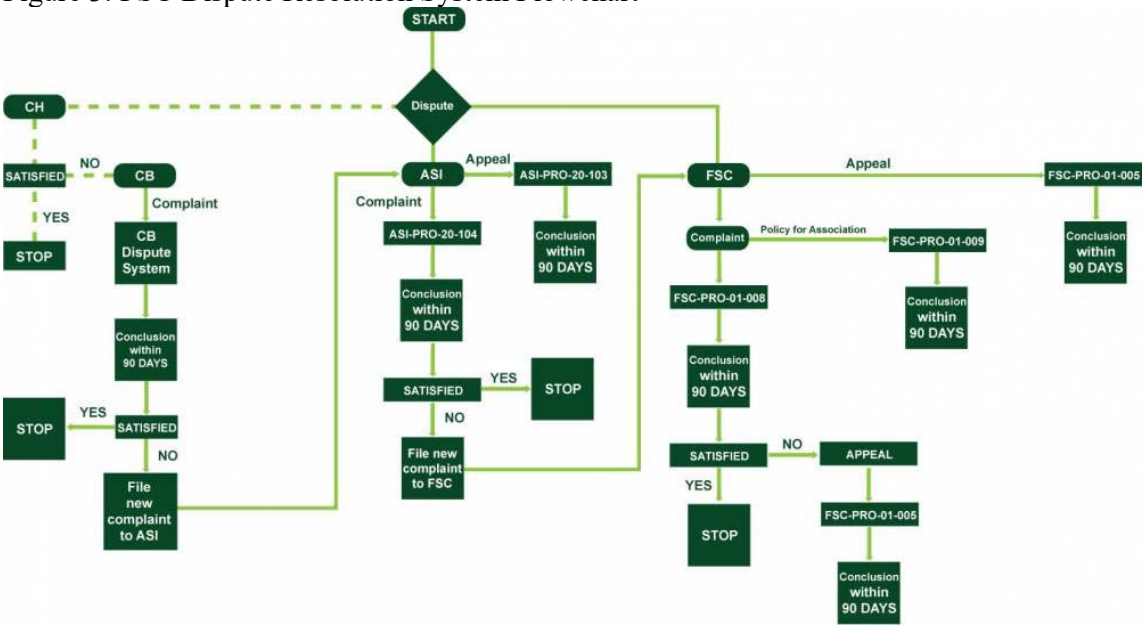
p.18; FWF 2013b, p. 2). In addition, FWF has invested in establishing free "help-lines" for workers, providing auditors with pocket-sized "helpline cards" to give to workers, and supporting "Workplace Education Programmes," which inform workers about firm-based grievance mechanisms and FWF's complaint system (FWF 2012a, p. 20). The FWF sees its open complaint mechanism as a tool to empower stakeholders and to achieve remediation between workers, local trade unions, factory management and FWF's member companies in case of non-compliance.

Effectiveness/Use of complaint systems

The literature on the effectiveness and impact of VSS on the ground in terms of fostering compliance with social and environmental standards is very extensive and a discussion of it goes behind the scope of this study (for an overview and discussion see Marx et al., 2015). However, concerning the effectiveness of the complaints and dispute systems of VSS little information and analysis is currently available. In many VSS dispute procedures are of a more recent nature and little research is available on their use and impact. There is no consolidated data on the total number of complaints which are handled by VSS. With more than 400 VSS active (reference ecolabel index) it is difficult to get a total overview on how these complaints systems are used. At present, it is also not yet clear how many VSS out of 400 have a complaint system although there is evidence that several do have a complaint system (Marx, 2014). The ISEAL alliance, which is a meta-regulator of VSS (Loconto and Fouilleux, 2014; Paiement, 2016), requires its members, as a baseline requirement, to have a complaints and dispute system concerning the standard-setting process as well as a dispute settlement and complaint system for certification and verification (article 6.7.3 of their assurance code). The ISEAL alliance currently has 21 members of which many are leading VSS which are operational on a global scale.

When focusing on specific VSS one can identify the number of complaints and how they are handled. Some VSS give very detailed information on dispute cases and have an elaborated set of procedures to deal with them. Figure 3 presents, by way of example, the flow chart of handling disputes in the Forest Stewardship Council (FSC). The FSC for example has a dedicated website [https://ic.fsc.org/en/stakeholders/dispute-resolution] which details the dispute procedure and the number of finalised and on-going dispute cases.

Figure 3: FSC Dispute Resolution System Flowchart



Disputes addressed by FSC concern disputes which address core commitments which are included in free trade agreements. One example is a dispute settled under the dispute settlement mechanism of the FSC on compliance with two core ILO conventions namely Convention 87 (freedom of association) and Convention 98 (collective bargaining). The Conventions are included the 1998 ILO Declaration on Fundamental Principles and are referred to in EU trade agreements. This dispute was between, on the one hand Building and Wood Workers International and the International Trade Union Confederation, and on the other hand Fiji Pine, Tropik Wood Industries, and Tropik Wood Products, all three companies based in Fiji and certified by the FSC.

The complainants alleged that the three companies were in violation of the FSC Policy for Association (FSC-PRO-01-004) due to national Fijian legislation that was allegedly incompatible with International Labor Organization Core Conventions 87 and 98. An independent complaints panel was established in December 2015 and submitted an evaluation report in June 2016. The panel aimed to assess whether Fiji labour law was incompatible with the ILO conventions and extensive report of this evaluation is available on-line. During the evaluation period, the situation around the case evolved considerably in Fiji. First of all, the Fijian Government repealed the Essential National Industries decree, a piece of legislation that allegedly violated the ILO conventions and which featured in the case against the three companies. Second, the case referred to the ILO complaint against the Fiji government (also filed by ITUC) concerning a violation of the same conventions. This case was closed by the ILO. Thirdly, Fiji's National Union of Workers was able to renegotiate a collective bargaining agreement with Fiji Pine Ltd.

Given these developments, the panel concluded and recommended FSC to maintain the association with the companies and keep them certified. The FSC International Board of Directors followed this conclusion and agreed to maintain association with Fiji Pine Ltd, Tropik Wood Industries, and Tropik Wood Products on the 21st of July, 2016.

In other cases, the outcome of dispute procedure can be to disassociate. For example, FSC disassociated from Asia Pulp and Paper (APP) Company because of substantial publicly available information that APP was involved in destructive forestry practices, which brought it into conflict with the standards, principles, and mission of FSC.

Marx and Wouters (2015) discuss the complaint system of the Fair Labour Association and also present a detailed set of procedures to deal with complaints. The important point to note in the context of this report is not such much the number of complaints which are handled by these systems at this stage but that they have well developed systems in place which also have an ultimate sanction, namely the withdrawal of the certificate which can imply loss of market access and reputational damage. These procedures have a clear starting point and a clear endpoint with determined periods to deal with issues and reach decisions. The latter is nicely illustrated by the FSC Dispute Resolution System Flowchart which is presented in Figure 3. Without going into detail of all the steps and abbreviations the flowchart nicely illustrates the standardised procedures developed for dispute settlement within VSS.

Conclusion: Comparative Analysis and Discussion

Introduction

In this report, we mapped and discussed several possible dispute settlement mechanisms which might be considered in the context of better enforcing the provisions in TSD chapters of EU trade agreements. We considered some options which might be used as an example for EU trade agreements such as applying the general dispute settlement mechanisms of the agreement to the TSD chapter (as is the case in the Cariforum agreement for the social and environmental chapters), the US/Canada model and the model of international arbitration used in investment disputes. The report also considered options of other existing dispute or complaints systems run by other (public or private) organisations. The basic idea here is that these mechanisms could be integrated in trade agreements, through modelling a dispute mechanism to one of the options described in the report and/or through inserting clauses in the agreements that make the use of existing dispute settlement mechanisms possible in the framework of a trade agreement. This can be done in various ways. In this context, we discussed the existing ILO mechanisms, the OECD Guidelines on multinational enterprises and voluntary sustainability standards.

For each, we provided a short presentation on how they operate and discuss what is known about their effectiveness. In this concluding chapter, we briefly compare the different options and assess the strengths and weaknesses of each option.

Comparison of the different options

In this report, we mapped and discussed several possible dispute settlement mechanisms which might be considered in the context of trade agreements. Table 7 summarises the different options on several dimensions: who can initiate a dispute, who is the target of a dispute, who assesses the admissibility of a dispute, what happens after a dispute is deemed justified, what are the possible outcomes of a dispute, who implements and follows up on a decision, and whether there is a link with domestic judicial mechanisms.

The table shows differences between the options discussed in this report on all these dimensions. In some cases, only states can initiate a dispute against other states, other systems would allow a broader range of actors to file complaints including investors, civil society representatives and individuals. Second, the targets of complaints also vary. In some cases, states are targeted and in some cases

(multinational) companies. Third, each of the discussed options established a separate body to assess the admissibility of complaints and specific procedures to follow up complaints, most often through a panel of independent experts which assess the complaint. Fourth, each option imposes follow up requirements including possible sanctions following the outcome of a dispute settlement. They range from soft sanctions such as recommendations and corrective action plans, to hard sanctions such as damages and suspensions of trade or other benefits. Finally, in most cases there is no link to domestic judicial mechanisms.

Table 7: Overview on Key Aspects of the Different Options

	US Trade Agreement		**ICS**	**ILO**	**OECD**	**VSS**
Who can initiate a dispute/complaint?	Typically any person from a party's territory or any interested party, depending on the specific agreement		Foreign Investor	State, union, or employer federation	Any person	Any person, sometimes restricted to VSS member
Who is the target of a complaint	State		Host state	State	Multinational corporations	Certificate Holders / mostly companies
Who assesses admissibility of complaint	Labour Provisions Office established by the state party receiving the complaint	Environmental Provisions: Joint body established by the parties or office established by the state party receiving the complaint	Arbitral tribunal itself	Governing Board of International Labour Conference	OECD NCP	(separate body within) VSS or accredited certified
What happens after a complaint is deemed justified	State party receiving the complaint may initiate dispute settlement procedure or resolve the matter amicably		Arbitral tribunal may order compensation	Appropriate body (several) investigates complaint	Dialogue between complainant and firm to resolve matter amicably	Standardised complaint procedure
What are possible outcomes of a dispute/complaint (sanctions)?	Panel awards; monetary fines or trade sanctions (depending on the specific agreement)		Damages (or restitution of property)	Recommendations from ILO body to states Follow up reporting from states to ILO body	A statement or recommendation (possibly followed by corrective action by a MNE) (Rare) Naming and shaming	Range of outcomes Corrective action plans Suspension of certificate

					Withdrawal of certificate
Who implements and follows up the decision	Parties	Parties and domestic courts	States to whom recommendations are addressed	NCP	VSS
Link with Domestic Judicial Mechanism	Exhaustion of domestic remedies is usually not required	Exhaustion of domestic remedies is not required. Parallel domestic claims can be prohibited.	Exhaustion of domestic remedies is not required Domestic jurisprudence can be used in reporting on the follow up of the recommendations and as factual evidence by the body examining the complaint	Exhaustion of domestic remedies is not required	No

Discussion of the different options

Besides the differences between the different options we also discuss the possible strengths and weaknesses and particularities of each option. We discuss each option separately following the sequence of the presentation of the case studies.

Trade agreements

Including provisions regarding the protection of labour and environmental standards into trade agreements itself involves several advantages vis-à-vis other international mechanisms. Notably, the agreements' institutional framework as well as the accompanying political dynamics can provide a platform for deliberating and initiating steps to strengthen domestic environmental and labour standards. Especially the EU agreements also provide for opportunities to involve civil society actors into the labour and environmental provisions' implementation.

Features under the US' and Canada's agreements that may be of particular interest to the debate on how to improve the TSD chapters under EU trade agreements concern, in particular, the complaint and the sanction mechanisms. In particular, the US trade agreements usually provide for mechanisms through which stakeholders can formally allege breaches of labour provisions and, albeit to a lesser extent, environmental provisions. Further, US trade agreements as well as partly Canada's agreements and the EU-Cariforum Agreement, foresee arbitral dispute settlement and economic sanctions as a measure of last resort. This provides the environmental and labour provisions with a more vigorous follow-up than many other international arrangements in these areas and could be considered also for other EU trade agreements.

Two lessons from the US and Canada's agreements may be worth highlighting. First, the experience with those agreements suggests that the creation of complaint mechanisms does not lead to a flood of complaints. Rather, the amount of complaints has been, as noted above, overall, limited and tends to focus on high-profile cases, which has not led to a disproportionate burden of the administrative bodies concerned. Second, the available evidence does not suggest that sanction-based labour and environmental provisions have been used for protectionist purposes (Cheong and Ebert, 2016). As noted above, no case concerning labour and environmental provisions related to a trade agreement has, to this date, led to the application of economic sanctions. Furthermore, the parties to the relevant agreements have so far shown a strong inclination to deal with relevant issues outside arbitral dispute settlement (ILO, 2013:57). Also, the fact that any sanctions could only been imposed after a breach of relevant provisions has been established by an impartial arbitral panel, arguably minimises the risk of protectionist considerations in the application of the labour and environmental provisions (Polaski and Vyborny, 2006:102). The risk of a protectionist application of such mechanisms appears therefore very low.

That being said, overall the impact of the environmental and labour provisions contained in relevant US, Canada and EU agreements has so far been weak, which can at least in part be attributed to the design of the relevant procedures. Notably, under EU trade agreements, including those with a TSD chapter, a formal complaint mechanism is typically absent which makes it easy for the parties to the agreements to disregard concerns by civil society actors that are politically inconvenient. That being said, even where agreements do provide for a complaint mechanism, as under many US and Canada's agreements, the follow-up has tended to be limited. This is foremost due to the fact that once the complaint is filed, the follow-up is typically within the discretion of the parties[115] which do not necessarily have an interest in the other party's compliance with the agreement's labour or environmental provisions. In order to render these mechanisms more effective, it would therefore seem pivotal to entrust the investigation of the merits of the complaint and the possible follow up to an independent entity rather than to the state parties. Apart from investor-state arbitration, such an approach could also draw inspiration from the procedure relating to the ILO's Committee of Freedom of Association, among others. Another, albeit arguably less effective option would be to reduce the discretion of state parties regarding the complaint process once their national contact point has confirmed the alleged violations wholly or partly. As a result, the relevant state party would, in such a case, be obligated to seek formal consultations and, if they prove unsuccessful in resolving the violations at hand, to activate the arbitral dispute settlement mechanism.[116]

In order for these mechanisms to be effective, building compliance incentives, including, as a last resort, sanctions, into the institutional and procedural framework of environmental and labour provisions seems highly advisable. This appears also important in order not to give the impression that issues relating to sustainable development rank lower on the priority of the parties than other issues dealt with by the agreement. Whether trade sanctions are the most appropriate device for this purpose is open to debate. Open questions in this regard include the quantification of the damage caused by the breach of labour and environmental provisions and possibilities to avoid the risk that trade sanctions unintentionally affect the parts of the population which they are supposed to benefit. In some contexts, the imposition of fines may be more appropriate to induce compliance (see also Davey, 2009:125). Such fines could also be used to address the violations subject to the dispute or be awarded to the workers concerned.

Importantly, evidence suggests that to have some positive effects sanction regimes do not necessarily to be applied; rather it is often already the threat of trade sanctions that can induce compliance (Charnovitz,

[115] Note that, as mentioned above, this is somewhat different regarding certain environmental chapters regarding which complaints can be filed with a body established by the relevant agreement. However, even in those cases parties retain full discretion as to whether or not to follow up on the complaint through consultations or dispute settlement.

[116] Such an option would, however, require to put in place sufficient procedural standards to ensure that the assessment process by the national contact point is carried out in an impartial, comprehensive, and timely manner.

2001:809; see also Lacy & Niou, 2004; Davey, 2009: 124). With a view of avoiding sanctions, arbitral dispute settlement could also be used in order to device a comprehensive strategy to bring the party concerned into compliance. In this regard, the Enforcement Plan agreed upon by the US Government and the Guatemalan Government in the course of the dispute between the two parties under CAFTA-DR (ILO, 2013:60) could be seen as a precursor.

Investment Court System

Investor protection provisions included in upcoming EU FTAs are enforced by way of an Investment Court System (ICS) allowing foreign investors to directly sue the host state for alleged breaches of the rights they derive from such agreements. This ICS profoundly reforms the traditional mechanism for the settlement of investor-state disputes, which has historically been modelled on commercial arbitration, the parties setting up ad hoc tribunals to settle disputes. ICS works on the basis of a permanent court and an appellate mechanism. One option which can be considered is to set up a similar permanent court (and appellate mechanism) in order to settle disputes regarding the implementation of the commitments taken in the TSD chapter between one state party to the agreement and private complainants. Under the caveat that the ICS is so far only present in FTAs which are not yet in force and is therefore not yet in operation, we can identify potential opportunities and potential obstacles in the use of the ICS to settle disputes related to TSD chapters.

The main opportunity would be to allow private complainants (third parties) to make claims to an independent arbitral tribunal, and to seek a binding outcome following proceedings which have typically been quicker than domestic judicial avenues. The international character of the tribunal, the highly specialised composition of the bench, the double degree of jurisdiction (submission and treatment of a case and the existence of an appeals mechanism) and the renewed ethical rules for arbitrators also reinforces the perception of independence and competence of this mechanism.

There are also challenges related to modeling dispute settlement for TSD chapters on an ICS like system. First of all, appending and ICS-like mechanism to TSD would greatly expand its material jurisdiction compared to investment chapters, which might inhibit its proper functioning. Second, the standing requirements would also have to be precisely determined, and ways to limit in a fair and non-discriminatory manner the potential pool of claimants interested in bring TSD-related claims would have to be carefully elaborated. Third, the relationship with domestic jurisdictions would also have to be considered and clarified, as this mechanism would allow to directly file a case to this body without first using local jurisdiction. Fourth, having a binding dispute settlement mechanism applicable to TSD chapters would require granting litigable rights to private parties. Here the issue of how many sustainability issues (substantive provisions) should be included in a trade agreement emerges. Should the TSD chapters focus only on a few commitments or should they be inclusive and cover many issues? Fifth, the current regime of remedies, limited to monetary compensation or restitution of property, is

probably not suitable for enforcing most TSD obligations which entail putting in place long-term strategies and taking positive measures. Finally, the costs of ICS may not be accessible to many potential claimants under TSD chapters.

International Labour Organisation

One option to strengthen the enforcement of labour rights provisions in trade agreements through dispute settlement is via the integration of the ILO supervisory machinery and related mechanisms in trade agreements. The ILO benefits through its tripartite structure from particular political legitimacy (see also La Hovary, 2013, p. 345). Further, specifically with regard to dispute settlement or complaints, the ILO is the most comprehensive and authoritative source to assess compliance with its conventions. Integrating ILO mechanisms in EU trade agreements would also build on already existing practices since the involvement of the ILO in trade arrangements is already partially happening. As Agusti-Panareda et al. (2015) note, the ILO has been involved in trade agreements with capacity-building projects and the monitoring of projects. The EU has in the past also relied on an ILO Commission of Inquiry to suspend benefits to Myanmar and Belarus under the GSP regime (see Orbie and Tortell, 2009). This constitutes a basis on which to build further and more in-depth collaboration and cooperation.

In the context of trade agreements one can consider three options of involving the ILO. First, trade agreements might rely on an ILO body to deal with disputes arising under a TSD Chapter of a trade agreement. Given the limited mandates of the existing ILO supervisory bodies which currently do not include dealing with disputes arising under trade agreements, such an arrangement would arguably require the competences of (one of) those bodies to be extended or a new body to be created. Such bodies could be expert-based or tripartite in nature and could also be created on an ad-hoc basis, depending on the issues arising in the case at hand. The involvement of such a body would also serve to ensure coherence with the ILO's application regarding international labour standards as such a body would be likely to take into account the ILO's jurisprudence regarding the relevant conventions. This might also strengthen the institutional mechanisms for monitoring compliance which are currently established in the TSD chapters such as the Domestic Advisory Groups and social dialogue. Outcomes of the ILO procedures such as recommendations could be further followed in the DAGs and the bilateral meetings which follow the implementation of the agreement. In this way, the ILO recommendations will be followed up in multiple fora's which might increase their chances of being implemented.

Second, the ILO mechanisms might be used as information providers for a trade agreement specific dispute settlement mechanism. In other words, the information on compliance with ILO conventions generated by the ILO's supervisory bodies procedures, including guidance on the meaning of ILO conventions, could be used in a (either specific or general) dispute settlement mechanism which might be developed in the context of TSD chapters in trade agreements. Among others, the ILO's Office could be asked to provide factual information or provide clarification on the legal scope and content of the

ILO instruments. (Agusti-Panareda et al., 2015, pp. 369-370). The ILO could be entrusted with conducting fact-finding missions or similar activities with a view to establishing the factual basis of the alleged violations at issue. Such requests to the ILO could be made optional or mandatory for the dispute settlement body considering cases related to a TSD Chapter. Finally, these dispute settlement bodies could also be required to take into account the available jurisprudence and any compliance assessments of the ILO's supervisory bodies and defer to this guidance when applying provisions relating to the ILO conventions.[117]

Naturally, the aforesaid ILO mechanisms for TSD chapters only focus on labour rights issues and do therefore not provide guidance or support for cases involving environmental provisions. Furthermore, it is highly advisable that the TSD chapter reference the specific ILO conventions rather than merely referring to the ILO's 1998 Declaration as only the former are subject to the ILO's supervisory machinery (see also Agusti-Panareda et al., 2015, pp. 379-378). For some of the functions outlined above, it may also be necessary that the states concerned at hand ratify the relevant conventions.

A final note, the limited number of complaints and commissions of inquiries and, to a lesser degree, representations seems to suggests that the ILO mechanisms are only triggered in case of a substantial body of evidence on severe violations. Only the mechanism under the Expert Committee on Freedom of Association is used far more often but this only refers to two ILO Fundamental Conventions (those relating to freedom of association and collective bargaining) referred to in TSD chapters of EU trade agreements. Table 8 identifies the number of cases under the different mechanisms for some countries with whom the EU has a trade agreement (countries from the Cariforum agreement, Korea, Colombia, Peru and [not yet ratified] Vietnam). This table shows that, with the exception of cases under freedom of association in some countries, little action occurs in some countries with whom the EU currently has a trade agreement. Second, the table shows a specific geographical distribution. This might imply that not all mechanisms are used equally around the world (prominence of cases in Europe and the Americas).

[117] Provisions containing similar obligations have already been included into the environmental chapters of certain US trade agreements where the arbitral panel is required to consult with the bodies of the relevant international organizations and "defer to any interpretative guidance on the issue under the agreement to the extent appropriate in light of its nature and status". E.g. Article 18.12(8) of the US-Peru Trade Agreement.

Table 8: Use of ILO mechanisms against selected countries with whom the EU has a trade agreement (or commitment to a trade agreement)

	# Representations	# Complaints	# CI	# FoA cases
Antigua and Barbuda	0	0	0	0
Bahamas	0	0	0	2
Barbados	0	0	0	1
Belize	0	0	0	0
Chile	3	1	1	56
Colombia	3	1	0	150
Costa Rica	0	0	0	31
Dominica	0	0	0	0
Dominican Republic	0	1	1	8
Ecuador	2	0	0	15
El Salvador	0	0	0	74
Guatemala	3	1	possible	77
South Korea	0	0	0	13
Panama	0	1	0	22
Peru	8	0	0	96
Vietnam	0	0	0	0

Voluntary Sustainability Standards

Some voluntary sustainability standards have a dispute settlement mechanism which allows for initiating a dispute in case of non-compliance with sustainable development provisions. The integration of VSS in trade agreements can follow the example of how VSS are currently integrated in other regulatory measures of the EU. The EU has already incorporated VSS into its regulatory framework through the 2009 Renewable Energy Directive as noted in the case study on VSS. According to this directive Member States have to ensure that certification (VSS) is available for providers of biofuels and bioliquids in order to comply with the directive (Article 14§3). The directive requires exporting firms to comply with the Sustainability Criteria for biofuel and bioliquids laid down in Article 17 of the directive. Bio-energy providers must meet the Sustainability Criteria. In order to assess compliance with the Criteria the Commission uses a 'meta-standard approach' which relies on VSS as an enforcement mechanism. That is, economic operators must prove their compliance with the Criteria by being certified by one or more VSS (see also Article 18 on verification of compliance with the sustainability

criteria for biofuels and bioliquids). In other words, the Commission and the Member States do not directly assess compliance with the Criteria, but entrust a number of VSS to do so (Lin, 2011, p. 11). These VSS set standards for the production of biomass products. In order for a VSS to be recognised and therefore serve as a certifier under the EU RED, accreditation of the VSS is required according to the criteria laid down in the articles of the directive and in Annex IV, which assesses whether the VSS complies with the substantive sustainability criteria as well as a series of other criteria including information on whether the sustainability characteristics can be traced to the origin of the feedstock, all information in VSS is well documented, companies are audited before they start to participate in the VSS, retroactive audits take place regularly, the auditors are external and independent, the auditors have both the generic and specific auditing skills needed with regards to the scheme's criteria.[118] Annex IV of the directive further details the criteria to which VSS should adhere to be recognised and accredited for the purpose of the directive. The Commission then adopts a decision on which VSS are accredited for the purpose of the directive. This decision is published in the Official Journal. The recognition lasts for five years.

Such an approach could be considered for integrating VSS in trade agreements. The directive provides in the articles and annex mentioned above a template which could be used for this purpose. However, the scope of the directive is narrower than a trade agreement and the substantive provisions on sustainability are more specific. Hence, the integration of VSS would require more precise substantive provisions on sustainability in the trade agreement *inter alia* for the purpose of accrediting VSS in the context of trade agreements. In addition, it should be noted that using VSS in trade agreements would imply a deepening of the substantive provisions on sustainability since these VSS contain precise benchmarks on when an economic provider is complying with sustainability criteria (according to the specific VSS) and when not; and also on what grounds a complaint or dispute can be raised. Hence, this approach would have ramifications on the substantive provisions on two levels, one on the level of the trade agreement which should contain more precise sustainability criteria and second on the level of the VSS.

Pursuing this option has some possible advantages (strengths) and weaknesses (risks). We first discuss some strengths. First of all, it has a detailed framework and set of procedures to identify non-compliance. Through operationalising conventions and international agreements in specific standards one can assess whether certificate holders comply with these standards. This is facilitated by providing information (based on audits or other sources) on compliance through public information disclosure mechanisms. In case of non-compliance a complaint or dispute can be initiated by a range of third parties including sometimes individual citizens. If non-compliance is proven a significant sanction is available in the form

118 https://ec.europa.eu/energy/en/topics/renewable-energy/biofuels/voluntary-schemes [December 12, 2016]

of annulation or suspension of a certificate which would influence market access in the importing country. In this way, VSS offer a well-developed set of procedures for enforcement which are far more developed than currently available in trade agreements. Second, integrating VSS in trade agreements would target firms more directly. Firms would be required to obtain VSS certification as a result of a trade agreement. This would imply a shared responsibility of states and firms to comply with the provisions in TSD chapters of trade agreements. In practice, this implies that all firms who would like to enter the territory of the trading partners require certification and, hence, provisions on certification requirements would be included in trade agreements[119]. Third, there are now for most economic sectors VSS operational which operate across the globe. The potential coverage of these VSS is significant in terms of economic sectors and countries. Several of these VSS, which operate in many countries in the world, now also have complaint and dispute settlement mechanisms.

Considering this option also requires to take some possible weaknesses in to account. First of all, getting certified is costly and not all firms might have the capacity to participate which might create a barrier to trade (Maertens, & Swinnen, 2012). Hence, capacity and cost issues need to be addressed. Second, several authors have raised concerns about the proliferation of VVS and their wide variety in terms of comprehensiveness and enforcement, including the presence of dispute settlement mechanisms (Marx, 2014; Marx and Wouters, 2015). Hence, only credible systems, with a strong dispute settlement mechanism, should be recognised and accredited in the context of trade agreements (Mavroidis and Wolfe, 2016). There are already some examples on how this can be achieved. For example, in the case of sustainable public procurement, EU directives stipulate requirements on how social and environmental standards should be set and enforced in order to be recognized for sustainable public procurement (D'Hollander & Marx, 2014). Another example is the 2009 EU Renewable Energy Directive (RED) (2009/28/EC) discussed above. These examples provide some guidance on how accreditation of VSS might take form in the case of trade agreements, although these need further strengthening and refinement (Schleifer, 2013). Third, normatively speaking, this option entails, to a degree, an outsourcing and privatisation of rule enforcement and rule-making. Although many standards of VSS are based on international commitments laid down in conventions and protocols (Marx, 2017) the substantive rule-making and standard-setting process remains private. This can result in a debate on

[119] It might be objected that this option is not compatible with WTO law. The compatibility with WTO law of this option should indeed be assessed. This falls outside the scope of this report since the assessment will depend on how exactly these provisions will be formulated; and more precisely on what sort of measures they would require - e.g. technical regulations, import restrictions, export restrictions, etc. This implies an assessment of compatibility with several provisions in WTO law including Article 2.1 of the TBT Agreement (non-discrimination obligation) and whether the proposed measure could be allowed based on the fact that the technical regulation bases itself on a 'legitimate regulatory distinction'; and with Article 2.2 of that agreement, which requires measure not to be more trade restrictive than necessary for fulfilling a legitimate objective (e.g. protection of public health or of the environment). Other provisions relevant for the assessment of compatibility with WTO law include Article XI:1 GATT, which prohibits quantitative restrictions on both imports and exports.

the desirability of this approach and issues related to accountability and democratic legitimacy, and may trigger resistance due to sovereignty concerns, in particular in relation to the state's right to regulate in the field of sustainable development.

OECD Guidelines on Multinational Enterprises

The OECD contact points also offer a dispute settlement mechanism which might be considered. Integrating the NCPs in trade agreements would first imply that the OECD Guidelines are incorporated in the trade agreement. This is possible since the recognition of the OECD guidelines is not restricted to OECD members, but is open for all states. Indeed, non-OECD members have recognised the OECD guidelines. The option of integrating the OECD guidelines in trade agreements is also in line with considerations included in the Dutch National Action Plan on Business and Human Rights (Ministry of Foreign Affairs, 2014, p. 20). The incorporation of the OECD guidelines in the trade agreement could imply two things. First, concerning the substantive provisions, the OECD guidelines might replace the references to the substantive provisions which are currently in the trade agreement. The OECD guidelines refer to many of the conventions and international agreements which are also referred to in the trade agreements. This however, in turn, would imply both a deepening and widening of the substantive provisions in the trade agreement since the OECD guidelines cover more substantive issues than currently in the trade agreements, such as provisions on bribery, anti-corruption, etc. (widening) and provide more details on when there is compliance or non-compliance with the provisions (deepening). Second, for parties which do not yet have an NCP, it implies that the parties to the agreement set up a national contact points which can monitor compliance with the Guidelines and can act as a dispute system. Next, in the provisions in the TSD chapter an article can be included which recognises the NCPs as a non-judicial dispute settlement mechanism which can be used in case of non-compliance. As discussed in the OECD case study these national contact points can take different forms and also have different mandates (compare for instance the mandate of the Danish NCP which can carry out its own investigations in firms when they have evidence of non-compliance versus other NCPs which can only act on the basis of 'specific instance'). A further specification on the mandate of the NCPs could be included in the trade agreement, although this might be controversial and unrealistic. Following this approach the NCP would become a part/provision in the trade agreement.

Pursuing this options has some possible advantages (strengths) and weaknesses (risks). We first discuss some strengths. First, the OECD guidelines come from an official intergovernmental organisation with which governments agree. This significantly increases the legitimacy of this instrument. Second, also the NCP and its dispute settlement procedures are recognised by governments and are often embedded in state structures, or are run by recognised independent experts, which increases their legitimacy as dispute settlement mechanisms. Third, the mechanism covers all multinational corporations in a country or in countries in which they are active. Although the Guidelines are currently only adopted/recognised by 34 countries, their potential reach is larger since specific instances can also be filed against

multinationals for actions they conduct in other countries in which they are active. This implies a significant coverage. Indeed, if bilateral trade agreements are used to further diffuse the OECD model, the coverage will further increase. Fourth, the mechanism is easily accessible and has a low threshold to file ‘a specific instance’. This makes it open to citizens and stakeholders and hence is an inclusive mechanism.

The system of NCPs however also displays weaknesses. First, as shown in the case study, their effectiveness is low and many commentators are very skeptical about the OECD Guidelines and NCPs as enforces of rules and standards related to sustainable development (as distinct from awareness-raising effectiveness). The number of specific instances against firms for violations of the Guidelines is very low and concentrated in only a few OECD countries. Although more empirical research is needed on the nature of the specific instances, the low use of specific instances might indicate that this mechanism is only triggered in case of severe violations. The limited effectiveness of the OECD Guidelines is also related to the absence of any sanctioning mechanism. As discussed above, there are few NCPs willing to name and shame firms, which might induce them to take action. The OECD Guidelines rely on the willingness of firms to voluntarily address issues related to non-compliance with rules laid down in the Guidelines.

General conclusion

This report presented and discussed several dispute settlement mechanisms which might be considered in the context of TSD chapters. Each of the proposed options has strengths and weaknesses. They also target different parties (states versus third parties) and have different consequences. With regard to third-party involvement one can identify four models across the different options.

1. State-to-State dispute settlement without any formal complaint mechanism for third parties (currently common in EU trade agreements)
2. State-to-State dispute settlement combined with a third-party complaint mechanism, leaving states discretion over whether or not to activate the DSM (currently common in many US trade agreements and Canadian side agreements)
3. Dispute settlement giving access to third parties (such as currently is common with ICS, ILO CFA, VSS, OECD-NCP).
4. State-to-State dispute settlement combined with a third-party complaint mechanism, leaving states only limited or no discretion over whether or not to activate the DSM

The choice of options will depend to a degree on the purpose of the dispute settlement mechanism. If the goal is to address violations which are tolerated by the state and hence to 'discipline' states, then OECD-NCP or VSS are not really an option. In that case, one would be better advised with pursuing trade agreement specific dispute systems and considering further pursuing collaboration with the ILO. However, in this context, disputes and subsequent action will probably only be triggered when sustained and severe violations are documented. Data on ILO complaints and Commissions of Inquiry presented in the ILO case study show that these mechanisms are seldom relied upon. It seems therefore safe to project that such mechanisms will be rather rarely used. Some parallels may be drawn to the use of investigations in the context of the GSP regime which so far only saw a small number of investigations and only three suspensions. Two of them were based on findings of an ILO Commission of Inquiry. Appending a system modelled on ICS to TSD chapters would also constitute a strong dispute settlement mechanism, which would allow private parties to call on an independent institution to discipline states in a legally binding manner. If the idea is to have a more general and gradual enforcement of international commitments it might be contemplated utilizing instruments which target firms directly in cases of non-compliance. In this context, also the VSS option might be worth considering. Given the weaknesses of the OECD-NCP systems, this system should probably be reformed to become more viable as a template for dispute settlement.

Alternatively, if the dispute settlement has the purpose to keep violations of provisions on the 'discussion table' in state-to-state dialogue, one could consider establishing a mechanism which is comparable to the ILO-CFA. This mechanism has no strong sanctioning systems but regularly reports on violations and develops recommendations to address them. This form of dispute settlement might generate

dynamics which more gradually address non-compliance concerns and provide incentives for corrective action and learning. The possible downside is that this approach might be too gradual and slow to generate the substantial change towards sustainability.

A second issue to consider in terms of different options is the degree to which one wants to integrate the different international instruments into an EU trade agreement. In this regard, different forms of cooperation could be considered. For example, cooperation with the ILO does not necessarily require activating the ILO's supervisory mechanisms regarding disputes arising under the trade agreement's TSD chapter. Rather, a highly-developed jurisprudence by the Committee of Experts and the Committee on Freedom of Association, among others, is available which could be relied upon by a dispute settlement mechanism relating to the TSD chapter. Also, the possibilities for consultation with the ILO on an ad-hoc basis could be strengthened to ensure consistency with ILO jurisprudence. Similarly, information generated in the context of OECD guidelines or VSS could be used in the context of a dispute system in the trade agreement without involving these mechanisms formally in provisions of the trade agreement.

A third issue which might be taken into consideration when considering the different options at hand is the sensitivity to the possible application of double standards in the triggering of such mechanisms. This is a common concern in the application of GSP(+) sanctions for instance, as some have questioned why some countries like Belarus were sanctioned, while others like Pakistan, which also had severe labour rights issues and had been investigated by the Commission, were not (Beke and Hachez 2015, 193-194). Options which would include an independent party such as ILO, OECD, or private organisations such as VSS are probably less sensitive to this issue.

Finally, one can also consider a combination of options. Future EU trade agreements could include a specific dispute settlement mechanism for the TSD chapter which makes use of ILO (and other international monitoring bodies) information on compliance to hold states to account while at the same time introducing VSS or OECD guidelines which could address (multinational) firms more directly. When designing such a dispute settlement mechanism, the following aspects might be taken into account:

1. The need to provide for an accessible complaint mechanism where a range of stakeholders can allege breaches of the TSD chapters' provisions such as is the case in the options of VSS and the OECD NCP.
2. The need to remove the discretionary elements of the relevant procedures which allow parties to refrain from activating the dispute settlement procedures even in the face of egregious violations. This could be done by entrusting the examination of the complaints to an independent body created under the trade agreement. Where this body finds that sufficient evidence sustains the allegations, the case should automatically be submitted to arbitral dispute settlement. Rather

than as state-to-state dispute settlement, these procedures could be designed as complainant-state dispute settlement, which would facilitate taking into account the concern of the complainant in the course of the dispute settlement process.

3. The need to ensure coherence between the interpretation of the trade agreements' environmental and labour provisions and the relevant international environmental and labour conventions. This could be done by requiring the relevant dispute settlement bodies to take into account the jurisprudence of the competent international bodies, e.g. of the ILO, similar to how certain bilateral trade agreements require arbitral panels to take into account the multilateral case-law of the WTO Dispute Settlement Body (see for instance Art. 14.16 of the EU-Korea FTA). Also, mechanisms for ad-hoc consultations with those bodies could be considered.
4. The need for robust 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 harm against vulnerable parts of the population or sanctions which would be disproportionate. Or which would result in trade diversion, i.e. countries redirecting its trade flows towards other countries.

The pursuit of sustainable development is a key goal for the EU. Trade and the governance of trade relations can play an important role in this context. This is recognised through the insertion of the TSD chapters in trade agreements. Making these chapters work will depend on a mix of approaches. Linking the TSD chapters to a binding dispute settlement mechanism might be one approach. The shadow of disputes, complaints and possible sanctions might provide additional incentives to comply with the requirements of the TSD chapters. This report aimed to map and discuss possible options for integrating different formal dispute settlement mechanisms into EU trade agreements.

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