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Protecting workers' rights using the EU-UK Trade and Cooperation Agreement

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Foreword

The TUC exists to make the working world a better place for everyone. We bring together more than 5.5 million working people who make up our 48 member unions.

After four long years of Brexit negotiations, in December 2020 the UK and EU signed the Trade and Cooperation Agreement (TCA). Over that time, unions in the UK and Europe lobbied hard for an agreement that would protect jobs and rights for all working people.

We secured a key principle in the agreement: that neither the UK or EU countries should lower standards on workers' rights. This was called the 'Level Playing Field' commitment. The TCA also contains an enforcement mechanism - not found in any trade deal before. If either the UK or the EU worsen workers' rights, and a potential impact on trade can be proven, then they can face penalties.

This academic study commissioned by the TUC shows that, despite significant limitations, the TCA contains important provisions that we can use to protect workers' rights, including:

- commitments to at least maintain standards of rights in place when the UK-EU agreement was signed ('non regression')
- the potential to bring a case for even a single breach of non-regression, if this can be proved to have an impact on trade or investment
- commitments to 'fundamental rights at work' which are grounded in the International Labour Organisation core conventions; and
- commitments to occupational health and safety standards; fair working conditions and employment standards; information and consultation rights at company level; and restructuring of undertakings protections

As this report makes clear, trade unions can raise complaints if UK workers' rights are attacked. As well as building our power in the workplace and using our informal influence on UK and EU governments and European institutions, we can use formal mechanisms such as the Domestic Advisory Groups and the EU Single Entry point.

This matters because we have heard repeated calls from some UK ministers to consider downgrading rights as a 'dividend' to leaving the European Union. On 9 December 2021, Lord Frost, at that point the minister responsible for the TCA, announced plans for a government review of EU retained law[1] shortly after having commented in a speech 'if after Brexit all we do is import the European social model we will not succeed.'[2] In the last year, the UK government has also consulted on proposals to weaken protections both on

[1] Hansard (2021). 'Brexit opportunities: review of EU retained law', online at: https://questions-statements.parliament.uk/written-statements/detail/2021-12-09/hlws445

[2] Frost, D. (2021). 'If we can't persuade people that freedom is the best way forward, we lose', *CapX*, online at: https://capx.co/if-we-cant-persuade-people-that-freedom-is-the-best-way-forward-we-lose/

personal data[3] and set out a comprehensive new approach to regulation and enforcement which would reduce both existing rights and effective enforcement.[4]

And we can never forget that in the past, several members of the current UK Cabinet, including the business secretary Kwasi Kwarteng, co-authored the notorious pamphlet *Britannia Unchained*. That advocated slashing workers' rights derived from the EU, including vital protections such as paid holidays and maximum working hours.[5]

Meanwhile, workers' rights in the UK already risk falling behind those in the EU. A range of new rights are in the EU pipeline, including:

- the work life balance directive which would improve paternity and parental leave rights;
- the transparent and predictable working conditions directive which would improve conditions for workers carrying out insecure work with requirements for employers to confirm a guaranteed number of paid hours and other information obligations, as well as training benefits and other measures to provide more security for workers; and
- the platform workers directive which would ensure that many platform companies have all the responsibilities of an employer towards their workers and provide important protections against algorithmic management, including more transparency.

Using the TCA is one way trade unions can try to prevent attempts to use Brexit as a means to reduce our hard-won rights.

But when the TCA comes up for review in 2026 there are important ways the TCA must be strengthened. This study presents some important changes that must be made:

- give trade unions the power to bring cases when our rights are attacked;
- remove the high bar requiring proof that violations of Level Playing Field commitment affect trade; and
- oblige the UK to *at least* keep up with improvements in EU standards of rights

Whatever our background or nationality, and wherever we live, everyone deserves a decent job and fair rights at work. The rules have been rigged against us for too long, allowing bad employers and governments to undercut workers' rights and drive down conditions of work. Instead, trade agreements must enforce decent labour standards and prevent a race to the bottom. Unions are working together across borders to win the change that all working people deserve.

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[3] UK government (2021). 'DCMS data reform consultation', online at: https://www.gov.uk/government/news/dcms-data-reform-consultation

[4] UK government (2021). 'Reforming the framework for better regulation', online at: https://www.gov.uk/government/consultations/reforming-the-framework-for-better-regulation

[5] O'Grady, F. (2021). 'Post-Brexit review of workers rights must not rip up hard won protections in a race to the bottom', online at: https://www.politicshome.com/thehouse/article/postbrexit-review-of-workers-rights-must-not-ripup-hardwon-protections-in-a-race-to-bottom

The TUC wishes to acknowledge the work of Professor Federico Ortino who wrote this report. The findings and opinions are those of the author and do not comprise a statement of TUC policy, but instead are designed to inform and stimulate debate.

Workers' rights commitments in the UK-EU Trade and Cooperation Agreement (TCA)

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Introduction

The aim of this study is three-fold: first, to better understand the protections that the European Union-United Kingdom (EU-UK) Trade and Cooperation Agreement (TCA) provides with regard to labour rights, in particular in the case either of the contracting parties weakens the labour and social levels of protection applicable at the time the UK left the EU; second, to explain the enforcement mechanisms available under the TCA in case of non-compliance with any of the substantive obligations, in particular focusing on what trade unions are able to do if they believe that non-compliance is taking place; and third, show how the TCA might be strengthened in the future, particularly considering the joint review envisioned by the agreement in 2026.

It is timely to consider, in particular, the commitments the UK government has made to uphold labour standards in the TCA as the UK government has made a number of proposals that might lead to employment protections being reduced and potential breaches of the TCA's provisions on labour standards. In September, the UK government announced it will conduct a review of EU derived law,[6] which trade unions expressed concern might lead to a lowering of standards.[7] In the last year the UK government also consulted on possibilities to deviate from EU regulations in the area of data protection[8] and employment rights.[9]

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[6] Hansard (2021). 'Lord Frost statement to the House of Lords', online at: https://www.gov.uk/government/speeches/lord-frost-statement-to-the-house-of-lords-16-september-2021

[7] Strauss, D. (2021). 'UK risks going 'backwards' on workplace rights, unions warn', online at: https://www.ft.com/content/27cc38ae-6838-4d73-8547-32ea27a979a8.

[8] UK government (2021a). 'DCMS Data reform consultation', online at: https://www.gov.uk/government/news/dcms-data-reform-consultation

[9] UK government (2021b). 'Reforming the framework for better regulation', online at: https://www.gov.uk/government/consultations/reforming-the-framework-for-better-regulation

Summary of key findings

1. In terms of substantive obligations, the TCA includes a set of (mostly) binding obligations including in particular:

    i) the requirement not to weaken or reduce the levels of labour and social protection as they existed at the end of the transition period, subject to a 'trade effect' condition ('non-regression' obligation);

    ii) the requirement to implement various ILO standards ('improvement' obligations); and

    iii) certain procedural obligations addressing domestic governance issues, including the requirement to have in place a 'system for effective domestic enforcement' (procedural obligations)

- The non-regression obligation prohibits any weakening or reduction of a Party's levels of labour and social protection; such weakening or reduction can stem from a Party's failure to effectively enforce its labour laws and standards or in other ways, such as through modifications of the underlying legislative framework (for example, by abrogating certain sections of a previous law or introducing exemptions for certain sectors)
- The non-regression obligation applies with regard to (i) law and standards in five broad areas (material scope) and (ii) the level of protection in place at the end of the transition period (temporal limitation)
- Contrary to the interpretation given by the US-Guatemala Panel, a regression should be understood as 'affecting trade or investment among the Parties' if the weakening or reduction of the labour and social levels of protection has an actual or potential effect on the conditions of competition of trade and investment between the parties; this interpretation is in line, in particular, with the ordinary meaning of the relevant phrase ('affecting') and the object and purpose of the TCA
- Differently from many other free trade agreements, one individual event of regression (whether through the modification of an existing labour law or the failure to enforce such law) is sufficient to support a finding of violation of the non-regression obligation
- With regard to 'improvement' obligations, while the TCA contains a weak obligation to increase the contracting parties' respective levels of labour and social protection, the TCA contains various, legally binding, substantive obligations to implement and promote multilateral labour standards, in particular those stemming from the work of the ILO
- The TCA also contains three sets of legally binding procedural obligations addressing domestic governance issues including the requirements to 'protect and promote social dialogue on labour matters' and to have in place a 'system for effective domestic enforcement' (the latter requirement benefits from the availability of 'temporary remedies' including sanctions)

2. In terms of monitoring and enforcement mechanisms, while civil society has a (at least formal) place in the overall institutional structure set out by the TCA (in particular,

through the domestic advisory groups and the Civil Society Forum), civil society, including trade unions, have a very marginal role in the dispute settlement procedure, which is exclusively in the hands of the contracting parties.

- For implementation and monitoring purposes, the TCA provides for a standard institutional framework including, from the top, the 'Partnership Council', the 'Trade Partnership Committee', and the 'Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development'.
- Civil society participation takes place principally through the 'Civil Society Forum' at the international level and 'domestic advisory groups' at the national level (Parties are required to consider views or recommendations submitted by its domestic advisory group(s) and representatives of each contracting party shall aim to consult with their respective domestic advisory group(s) at least once a year).
- The TCA provides for a special dispute settlement procedure to address any matter concerning labour obligations; only the two contracting parties can formally activate this procedure, which involves both a consultation phase and an adjudication phase (the latter, centred around the establishment of a Panel of Experts)
- EU-based stakeholders (including trade unions) can avail themselves of the recently established EU Single Entry Point in order to submit a complaint to the European Commission alleging non-compliance with any of the labour obligations in the TCA
- Unlike the case of the general dispute settlement procedure, the decision of the panel of experts is not binding on the respondent party; however, the TCA does provide for the availability of 'temporary remedies' (including suspension of obligations) but only in the case of disputes concerning the interpretation and application of Chapter 6, including, in particular, the non-regression obligation and the requirement to put in place a system for effective domestic enforcement.

3. The rebalancing mechanism included in the TCA provides for a novel remedy in case of future 'substantial' divergences, which is however subject to strict substantive and procedural requirements
4. Considering the joint review of the TCA required in 2026, there exist various options to strengthen the labour disciplines in the TCA including (i) addressing the 'trade effect' limitation included in particular in the non-regression obligation, for example, by providing a broader clarification or by eliminating the limitation altogether, including a commitment to dynamic alignment with regard to labour policies which would require the contracting parties to maintain equivalent standards to each other in the future, (iii) strengthening the dispute settlement process by making panel decisions binding and trade sanctions available in all cases of non-compliance with labour obligations, and (iv) expanding the role of civil society in monitoring and enforcing labour obligations, for example, by permitting civil society (including trade unions) to trigger investigations into violations of labour obligations.

This report is structured in six sections. The first section introduces the labour obligations in the TCA, focusing on their overall objectives (section A). The following two sections address the substantive protections provided in the TCA, focusing respectively on two types of

provisions often found in trade and labour chapters of free trade agreements (FTAs), 'non-regression' obligations (section B) and 'improvement' obligations (section C). The fourth section addresses the enforcement mechanisms available in the TCA with regard to labour obligations, focusing in particular on both monitoring and dispute settlement procedures (section D). The fifth section examines the novel 'rebalancing' mechanism in case of significant divergences with a material impact on trade and investment (section E). A sixth section identifies possible options for improvement (section F).

Section A

Key objectives of labour obligations

Main finding

- Labour obligations as well as the entire Level Playing Field section of the TCA are aimed to ensure (i) a level playing field for open and fair competition between the Parties and (ii) that trade and investment take place in manner conducive to sustainable development

Labour obligations in the TCA are found in Title XI on the "Level Playing Field for Open and Fair Competition and Sustainable Development". The overall framework of the Level Playing Field (LPF) title is expressed in Chapter 1 of Title XI. First of all, it is important to emphasise that the LPF title has two, related objectives: "to ensure a level playing field for open and fair competition between the Parties" and "to ensure that trade and investment take place in manner conducive to sustainable development" (Article 355.1), the latter to be understood as "encompass[ing] economic development, social development and environmental protection" (Article 355.2). While the Parties expressly exclude that the purpose of Title XI is to harmonise their standards, they do reiterate the dual objectives by affirming that their economic relationship will bring mutual benefits if it is aimed at "preventing distortions of trade or investment" and "contributing to sustainable development" (Article 355.4). A treaty's objectives are important for purposes of interpreting the treaty's provisions according to the customary rule of interpretation.

Second, Article 356.1 recognises each party's right to regulate, in particular the right (i) to set its policies and priorities in the areas covered by Title XI, (ii) to determine the levels of protection it deems appropriate and (iii) to adopt or modify its law and policies. However, Article 356.1 crucially subjects each party's right to regulate to each Party's international commitments, including its commitments in Title XI. Accordingly, each party's right to regulate is clearly subject to the obligations undertaken in the TCA.

While the LPF title includes several thematic chapters including on 'competition', 'subsidies', 'state-owned-enterprises' (SOEs), 'taxation', 'environment and climate', the labour-related disciplines are mainly found in Chapter 6 ('Labour and social standards'), Chapter 8 ('Additional instruments for trade and sustainable development') and Chapter 9 ('Horizontal and institutional provisions').

Section B

Non-regression obligations

Main findings

- The non-regression obligation in Article 387 prohibits any weakening or reduction of a Party's labour and social levels of protection; such weakening or reduction can stem from a Party's failure to effectively enforce its labour laws and standards or in other ways, such as through modifications of the underlying legislative framework (for example, by abrogating certain sections of a previous law or introducing exemptions for certain sectors)
- The non-regression obligation applies with regard to law and standards in five broad areas (material scope) and the level of protection in place at the end of the transition period (temporal limitation)
- A regression should be understood as 'affecting trade or investment among the Parties' if the weakening or reduction of the labour and social levels of protection has an actual or potential effect on the conditions of competition of trade and investment between the parties; this interpretation would be in line, in particular, with the ordinary meaning of the relevant phrase ('affecting')
- Differently from many other FTAs, one individual event of regression (whether through the modification of an existing labour law or the failure to enforce such law) is sufficient to support a finding of violation of the non-regression obligation in Article 387.2

Recent FTAs concluded by the EU and the UK often contain non-regression (sometimes also referred to as 'non-derogation') clauses.

There are generally two types of non-regression provisions in the area of labour policy. One is about "not lowering the level of protection" provided by labour legislation of each contracting party and one is about "not derogating from" such labour legislation. The former appears to address possible future weakening of 'general' policy (including through changes or amendments to the underlying labour laws or regulations), while the latter addresses possible future non-application of legislation in 'specific' cases (including through waivers, derogations and non-enforcement of existing labour laws or regulations). Accordingly, one could refer to the former as 'general' (legislative) non-regression provisions and to the latter as 'specific' (enforcement) non-regression provisions.[10]

[10] Some have referred to them as 'legislative' non-derogation and 'enforcement' non-derogation provisions. "States can derogate from existing labour law in two ways: (1) by failing to enforce its legislation, and (2) by changing it. In the former scenario, the state's legislative framework will remain intact. In other words: non-enforcement hinges on the violation of domestic labour law by an employer, which the state then fails to correct. The second category captures changes in the existing normative framework. Legislative derogations and enforcement derogations are addressed through different types of provisions." From: Zandvliet R. (2019). 'Trade, investment and labour: interactions in international law', PhD thesis, University of Leiden, online at: https://scholarlypublications.universiteitleiden.nl/handle/1887/68881

Article 387.2 TCA incorporates both types of non-regression provisions as it requires each contracting party not to "weaken or reduce its labour and social levels of protection [...], including by failing to effectively enforce its laws and standards". Accordingly, failure to effectively enforce labour laws and standards is only one way in which labour and social level of protection may be weakened or reduced.[11] Such weakening or reduction can also take place in other ways, such as through modifications of the underlying legislative framework (for example, by abrogating certain sections of a previous law or introducing exemptions for certain sectors; ie, general or legislative regression) or through the granting of waivers with regard to specific employers (for example, by failing to enforce existing labour laws in specific cases; ie., specific regression).

The focus of the non-regression provision in Article 387.2 will thus be on determining whether one of the contracting parties has 'weakened' or 'reduced' its labour and social levels of protection. From a textual reading, there does not appear to be any requirement of 'intent' to achieve such weakening or reduction or, for that matter, that such weakening or reduction be of a certain magnitude. Furthermore, it is not clear whether or not, for purposes of determining the existence of a weakening or reduction in the relevant levels of protection, a holistic assessment of all the changes (both reducing and increasing the levels of protection) is required. Reference in the definition of 'labour and social levels of protection' to the 'levels of protection provided overall in a Party's law and standards' would seem to support a holistic assessment. However, such a holistic assessment would entail serious difficulties, for example, comparing various legislative changes across time or quantifying the opposite impact of various legislative changes to the relevant levels of protection.

While the non-regression provision in Article 387.2 sets out a strict binding obligation ("shall not"), there are, however, two key limitations relating to (i) the material and temporal scope of the non-regression provision (section 1) and (ii) the necessary link between the effect of the regression on trade and investment between the contracting parties (section 2).

1.Scope of non-regression provision

Article 387 sets out both material and temporal scope of the non-regression provision. Pursuant to the express definition of the term 'labour and social levels of protection' in Article 387.1, the material scope of the non-regression clause in Article 387.2 is limited to domestic labour and social law and standards in the following five areas:

(a) fundamental rights at work;

(b) occupational health and safety standards;

(c) fair working conditions and employment standards;

(d) information and consultation rights at company level; and

[11] See below Article 388 on Enforcement.

(e) restructuring of undertakings.[12]

The list of areas appears to be an exhaustive list and thus it may not include all labour and social laws and regulations. For example, footnote 62 in Article 386 expressly excludes from the coverage of Chapter 6 "law and standards relating to social security and pensions."

While the TCA does not provide an express definition of these various terms, reliance on relevant international conventions (referred to in other parts of the Agreement) would seem appropriate. For example, the reference to 'fundamental rights at work' can be defined on the basis of the ILO Declaration on Fundamental Principles and Rights at Work of 1998, which refers to 'specific rights and obligations in Conventions recognized as fundamental' and including:

(i) freedom of association and the effective recognition of the right to collective bargaining;

(ii) the elimination of all forms of forced or compulsory labour;

(iii) the effective abolition of child labour; and

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

These various fundamental rights at work have been defined further in various specific ILO Conventions. For example, according to Professor Ewing, drawing on ILO Conventions 87 and 98, freedom of association would include a wide range of matters such as (1) the right of workers to form and join trade unions, (2) the right to trade union autonomy in terms of trade union internal governance, (3) the right of trade unions to organise their administration and activities, and to formulate their programmes,[13] as well as (4) the right of workers not to suffer discrimination by their employer because of their trade union membership and activities (provided the latter were conducted at an appropriate time), (5) the prohibition of employer domination of or interference with trade unions, and (6) the duty of States to promote collective bargaining.[14]

Aside from 'fundamental rights at work', the other four terms expressly mentioned in Article 387.1 appear to extend the non-regression provision to a wide set of domestic labour and social legislation as argued by Ewing in the following terms:

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[12] Several free trade agreements do limit non-regression provisions to a particular subset of labour laws or standards such as the NAALC's non-enforcement provision, for example, which was limited to domestic labour laws in eleven specific areas including: "... laws and regulations, or provisions thereof, that are directly related to: (1) Freedom of association and protection of the right to organize, (2) The right to bargain collectively, (3) The right to strike, (4) Prohibition of forced labour, (5) Labour protections for children and young persons, (6) Minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements, (7) Elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party's domestic laws, (8) Equal pay for men and women, (9) Prevention of occupational injuries and illnesses, (10) Compensation in cases of occupational injuries and illnesses, (11) Protection of migrant workers."

[13] Ewing K. (2021). 'The EU-UK Trade and Cooperation Agreement: Implications for ILO Standards and the European Social Charter in the United Kingdom' *King's Law Journal*, p.306, referring to ILO Convention 87, Articles 2 and 3.

[14] ibid p.309, referring to ILO Convention 98, Articles 1-4.

- "occupational health and safety standards would cover the substance of a wide range of general and sectoral health and safety directives, but also – and perhaps controversially – the Working Time Directive;
- fair working conditions and employment standards are wide enough to cover the various provisions introduced for part-time, fixed-term and agency workers, and perhaps also the statutory minimum wage;[15]
- information and consultation rights at company level would cover the information and consultation procedures required by the Collective Redundancies Directive, the Acquired Rights Directive; and the Information and Consultation Directive; and
- restructuring of undertakings would cover the transfer of undertakings, and redundancy payments (though the latter is not a requirement of EU law); but it is unclear whether it would extend to protection in the event of the employer's insolvency."[16]

Based on the definition of 'labour and social levels of protection' to mean "the levels of protection provided overall in a Party's law and standards, in each of the following areas", it is not clear whether the material scope of the non-regression provision is limited to employment-specific legislation or it extends more broadly to laws and standards applicable to employees and employers and falling in one of the five areas specified in Article 386.1. On the one hand, the concept of 'labour and social levels of protection' is potentially quite broad, and 'law and standards in each of the following area' may include law and standards 'relating to' or 'affecting' any of those areas.[17] Based on such interpretation, it could be argued, for example, that personal data protection legislation in force at the relevant time does come under the scope of the non-regression provision (possibly as part of 'occupational health and safety standards', 'fair working conditions and employment standards' or 'information rights' areas) even if it is not an employment-specific legislation.

On the other hand, such a broad interpretation may be seen as risking an overextension of the material scope of the non-regression provision and be rejected on that basis.

Furthermore, Article 387.2 includes a temporal limitation to the scope of the non-regression provision by requiring each contracting party not to weaken or reduce its labour and social levels of protection "below the levels in place at the end of the transition period". This appears to be a novel approach (and one germane to the particular circumstances of the UK-EU relationship) as normally these types of provisions do not include a temporal element identifying the contracting parties' relevant level of protection. For example, Article 23.4.1 of EU-Canada CETA states that "it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards." While some have suggested that provisions such as the one in Article 23.4.1

[15] On which see at EU level, Proposal for a Directive of the European Parliament and the Council on adequate minimum wages in the European Union, COM/2020/682/final [original footnote].
[16] Ewing (2021) pp.309-10.
[17] In order to expressly exclude a specific set of 'law and standards', Footnote 62 to Article 386.1 employs the term 'relating to': "Parties' law and standards relating to social security and pensions".

CETA are aimed at ensuring compliance with the level of domestic labour standards "in effect at the time of the treaty's ratification",[18] a more plausible interpretation would see a provision such as Article 23.4.1 as encapsulating a sort of 'ratchet clause' according to which the level of protection bound in such non-regression clause would not be static as it could be (unilaterally) raised over the lifetime of the agreement. Notwithstanding the question of how the non-regression provision in Art 23.4 CETA should be interpreted, it is clear that the non-regression provision in Article 387.2 TCA is definitely not a ratchet clause as the relevant 'level of protection' is expressly pegged at the level in place at the end of the transition.

2. "Affecting trade and investment between the Parties"

The second key limitation of the non-regression provision in Article 387 stems from the requirement that the weakening or reduction in the labour and social levels of protection be "in a manner affecting trade or investment between the Parties". This phrase is often found in free trade agreements linking some of the labour obligations to trade (and investment). For example, Article 13.7 of the 2010 EU-Korea FTA provides a good example of non-regression clauses using the same relevant phrase 'in a manner affecting' trade or investment:

> 1. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.
>
> 2. A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties.

The meaning of 'in a manner affecting trade' has been the subject of much discussion recently, particularly following the decision by a panel rejecting the United States' complaint brought against Guatemala.[19] Relying on a relatively narrow interpretation of the relevant phrase – 'in a manner affecting trade' – the Panel concluded that the United States had, for the most part, failed to demonstrate the required link between Guatemala's failures to enforce its labour standards effectively and trade between the CAFTA-DR parties (US-Guatemala Panel Report 2017).[20] The US-Guatemala Panel focused its analysis under 'in a

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[18] Zandvliet (2019) p.211.

[19] The more recent report of the Panel of experts in the EU-Korea FTA dispute did not deal with the non-regression provision but with the obligation to effectively implement multilateral labour standards, which does not contain (at least expressly) the 'trade effect' condition. See: Novitz T. (2021).'Enforceable social clauses in trade agreements with 'bite'? Implications of the EU–South Korea Panel of Experts Report of 20 January 2021', *ETUI Policy Brief*

[20] The Guatemala Panel did find one instance where the failure to enforce labour laws did have the required effect on trade. However, the Panel eventually found that Article 16.2.1(a) CAFTA-DR had not been breached because the only failure to effectively enforce labour laws that did affect trade was not enough to meet the additional requirement imposed by Article 16.2.1(a) that such a failure be 'through a sustained or recurring course of action or inaction'. As it will be explained later, this additional requirement is not

manner affecting trade' on the actual impact of the respondent's conduct on the conditions of competition in international trade. In particular, the Panel appeared to require the complaining Party to show that (1) certain enterprises had actually been involved in trade among the FTA Parties and (2) the respondent's failure to effectively enforce labour laws had actually conferred some competitive advantage on such enterprises.

It is difficult to assess what impact the US-Guatemala panel report is going to have on how the same (or similar) phrase found in other trade agreements (such as the UK-EU TCA) will be interpreted in future disputes. Formally speaking, the US-Guatemala decision does not constitute a binding precedent for future dispute settlement panels, whether interpreting the same language in Article 16.2.1(a) CAFTA-DR or similarly worded provisions in other FTAs, as there is no rule of stare decisis (or binding precedent) in international law (Acquaviva and Pocar 2012). It will, however, have the potential of representing a persuasive precedent which (at least one of) the disputing parties may rely on and which the adjudicator may in turn need at least to consider. Accordingly, the potential impact of the US-Guatemala panel report will depend on the perceived strength of its underlying reasoning.

The US-Guatemala Panel's narrow interpretation excluding the relevance of the potential impact of the respondent's conduct on the conditions of competition in international trade, does not appear convincing. First, it does not conform with the ordinary (ie., dictionary) meaning of the term 'affecting', which is 'having an effect on' or 'making a different to', as this appears to leave open the question of whether the existence of actual effects on one or more employer(s) is indeed a necessary condition.[21] Second, the US-Guatemala Panel's narrow interpretation does not conform with the object and purpose of the CAFTA-DR, which the Panel identified as including "the promotion of fair competition in the free trade area" and "the enforcement of basic worker rights". With regard to the former, safeguarding conditions of competition in international trade cannot be restricted to instances where a competitive advantage has actually been conferred to an individual employer, but it needs to include any conduct that has only the potential to modify the conditions of competition in the free trade area. Conditions of competition in international trade may be affected by a particular governmental conduct even if there is no actual trade at the time of the conduct itself. In other words, protecting 'conditions of competition' in international trade is not aimed simply at protecting existing trade flows, but also includes potential trade flows.[22]

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present in the non-regression provision of the TCA. See: Ortino F. (2022 forthcoming): 'Trade and labour linkages and the US–Guatemala panel report: Critical assessment and future impact' ETUI Working Papers (11, 2021)

[21] The ordinary (i.e. dictionary) meaning of the term 'affecting', which is 'having an effect on' or 'making a difference to', appears to leave open the question of whether the existence of actual effects on one or more employer(s) is indeed a necessary condition. The phrase 'in a manner affecting trade between the Parties' neither specifies that the effects (for example, of the failure to effectively enforce labour laws) should have actually materialised nor refers to an effect on any individual employer.

[22] In the context of Article III GATT, the broad reading of the term 'affecting' is linked to the drafters' intent to provide 'equal conditions of competition' to domestic and imported products and thus includes the protection of 'competitive opportunities' for imported products rather than existing 'trade flows'. '[I]t is well established that WTO rules protect competitive opportunities, not trade flows'. Appellate Body, US–Tuna, WT/DS381/AB/R, 16 May 2012, para 239.

Furthermore, the US-Guatemala Panel's interpretation of 'in a manner affecting trade' that requires actual effects on specific employers also appears to go against the other relevant objective of CAFTA-DR, namely 'enforcing basic worker rights'. As an instrument for enforcing basic workers' rights, Article 16.2.1(a) should be seen principally as addressing 'failures to effectively enforce labour laws'. That is the key object of the provision under review. The provision does limit the prohibition through the reference to 'a sustained or recurring course of action or inaction' and 'in a manner affecting trade between the Parties'; however, a narrow interpretation of those two phrases may excessively limit the key objective of addressing failures to effectively enforce labour laws. Conversely, an interpretation of the phrase 'in a manner affecting trade' that includes both actual and potential impact on trade between CAFTA-DR Parties would also be in line with the additional, key objective of enforcing basic labour rights.

It is submitted that the interpretation of the phrase 'in a manner affecting trade' in Article 387.2 UK-EU TCA should focus, as in the US-Guatemala panel report, on the effect that the 'weakening or reduction of the labour and social levels of protection' has on the conditions of competition of trade and investment between the parties rather than on trade and investment flows. However, the US-Guatemala panel's apparent reliance on 'actual' effects should be rejected in favour of allowing both actual and potential effect on the conditions of competition. As noted above, this broader interpretation would be in line, in particular, with the ordinary meaning of the relevant phrase ('affecting'). Such interpretation would also be in line with the relevant object and purpose of the labour disciplines in the UK-EU TCA, which is similar to the objective and purpose of the labour disciplines in CAFTA-DR. As noted above, the two key objectives of Title XI are "to ensure a level playing field for open and fair competition between the Parties" and "to ensure that trade and investment take place in manner conducive to sustainable development" (Art 355.1).

What would a complaining party have to prove in order to establish that, for example, a 'derogation from' or 'failure to enforce' its labour laws has an effect on the conditions of competition in the trade or investment between the contracting parties? There appear to be two key elements in applying the 'actual or potential effect on conditions of competition' test identified above. First, a complaining party would need to establish that a conduct (such as the modification of, or failure to enforce, an existing law) of the other party weakening or reducing the relevant levels of protection has the potential to modify the conditions of competition in the trade or investment between the parties. For example, in the US-Guatemala dispute, the United States had argued that it had demonstrated such modification of the conditions of competition by showing, for example, that Guatemala's failure to compel compliance with court orders for reinstatement had permitted certain Guatemalan employers to evade the payment of back wages, economic benefits and fines ordered by the domestic labour courts. The focus should thus be on the specific conduct under review (ie the weakening or reducing levels of protection existing at the end of transition) and its ability to affect, actually or potentially, the conditions of competition of between the parties.

Second, a complaining party would also need to show that such weakening or reduction of the relevant levels of protection has modified the conditions of competition on trade or investment between the parties. For example, if the employer (benefitting from the modification of, or failure to enforce, labour laws) produces goods or provides services that

are exported abroad or that compete with imports, such a second requirement would easily be met.[23] This would arguably also include the case of products and services that are components of products and services that are actually traded as the alleged modification of, or failure to enforce, labour laws with regard to the components may affect the entire supply chain. Furthermore, it is argued that a weakening or reduction of the relevant levels of protection can also modify the conditions of competition on trade between the parties even if the products or services affected have not yet been traded (as imports or exports), as long as those products or services could be lawfully traded. Accordingly, a derogation from or failure to enforce labour laws may 'affect trade' simply by (contributing to) preventing the importation of a competing product or service from abroad (which has not yet been imported/exported).

3. Additional considerations

Two additional considerations should be advanced here.

First, unlike other trade agreements (such as CAFTA-DR or the EU-Canada CETA), Article 387 does not require that the 'regression' follow from a 'sustained or recurring action or inaction'. In the US-Guatemala dispute, this was a key element in the Panel's rejection of the United States' claim. Because the Panel had only found one instance in which the respondent's failure to effectively enforce labour laws had an effect on international trade, the Panel concluded that that one instance was not enough to meet the additional requirement imposed by Article 16.2.1(a) CAFTA-DR that such failure was 'through a sustained or recurring course of action or inaction' (US-Guatemala Panel Report, 2017, para 505).

Accordingly, given the absence of such an additional requirement, it can be argued that one individual event of regression (whether through the modification of an existing labour law or the failure to enforce such law) would be sufficient to support a finding of violation of Article 387.2. In other words, if Article 387.2 was at issue in the US-Guatemala dispute, the Panel would have found, at least in one instance, a violation of the CAFTA-DR non-regression obligation.

Second, Article 387.3 UK-EU TCA clarifies that each party "retains the right to exercise reasonable discretion and to make bona fide decisions regarding the allocation of labour enforcement resources with respect to other labour law determined to have higher priority". The reference to 'labour enforcement resources' would seem to indicate that Art 387.3 only applies to enforcement-related claims (such as the alleged failure to enforce labour laws).

A similar provision is found in Art 16.2 CAFTA-DR and the US-Guatemala Panel read it as providing an exception to an otherwise prohibited failure to enforce labour laws, as long as such failure results from a "reasonable exercise of discretion or a bona fide decision

[23] This is the definition of 'in a manner affecting trade' that has recently been included in the USMCA: "For greater certainty, a failure is "in a manner affecting trade or investment between the Parties" if it involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party."

regarding the allocation of resources" (para. 150) with the burden of proof lying with the respondent party.[24]

However, unlike Article 16.2 CAFTA-DR, Article 387.3 UK-EU TCA appears to limit the availability of such 'exception' as it further requires that "the exercise of that discretion, and those decisions, are not inconsistent with its obligations under this Chapter."[25] Thus, one wonders whether this further requirement leaves any scope for the exception. Given that the reasonable exercise of discretion has resulted in an enforcement failure prohibited by Article 387.2, it is unclear how the exercise of that discretion be consistent with any of the obligations in chapter 6.[26]

[24] "[…] in the dispute settlement context, we see no basis for imposing on the complaining Party the burden of proving that the responding Party has exercised its discretion unreasonably or that its course of action does not result from a bona fide decision regarding the allocation of resources. As a practical matter, allocating the burden of proof this way would require the complaining Party to prove a negative based on evidence we generally would expect to be in the possession of the responding Party. Exercises of discretion and rationales for the allocation of resources are matters that we understand to relate to the deliberative and decision making process of a government. In our experience, it would be unusual for a foreign government to be privy to such matters." US-Guatemala Panel Report, para. 211.

[25] For a similar requirement see Article 17.3.1(b) of the United States-Peru FTA: "A decision a Party makes on the distribution of enforcement resources shall not be a reason for not complying with the provisions of this Chapter. Each Party retains the right to the reasonable exercise of discretion and to bona fide decisions with regard to the allocation of resources between labor enforcement activities among the fundamental labor rights enumerated in Article 17.2.1, provided the exercise of such discretion and such decisions are not inconsistent with the obligations of this Chapter."

[26] Zandvliet (2019), p.225 "The requirement that enforcement decisions may not be inconsistent with the substantive obligations under the labour provision renders this provision meaningless."

Section C

Obligations to improve workers' rights

Main findings

- The TCA contains a weak obligation to increase the contracting parties' respective labour and social levels of protection
- The TCA contains various, legally binding substantive obligations to implement and promote multilateral standards, in particular those stemming from the work of the ILO
- The TCA contains three sets of legally binding procedural obligations addressing domestic governance issues including the requirements to 'protect and promote social dialogue on labour matters' and to have in place a 'system for effective domestic enforcement' (as it is included in Chapter 6, the latter obligation benefits from the availability of 'temporary remedies')

Recent FTAs concluded by the EU and the UK regularly contain so called 'improvement provisions', as they are generally aimed at strengthening labour protection through:

(i) the requirement to increase the contracting parties' respective labour and social levels of protection (obligations to increase labour protection);

(ii) the requirement that domestic laws and regulations comply with a baseline set by reference to specific multilateral standards (obligations to implement multilateral standards); and

(iii) certain procedural and governance requirements (procedural obligations)

All three sets of obligations are found in the UK-EU TCA, in particular in Chapter 6 (Articles 387.4 and 388) and in Chapter 8 (Articles 398 and 399).

1.Obligations to increase the level of protection

While the obligations in Article 387.4 is couched in soft language – "the Parties shall continue to strive to increase" - it has been argued that even such best endeavour provisions do have some legal effect, at least in cases where a party manifestly fails to comply with such obligations (Bartels, 2017, p.206). With regard to these types of obligations, one scholar has similarly argued that "the phrase 'shall strive to ensure' is placed somewhere between 'shall' and 'should', indicating a weak obligation of conduct" (Zandvliet, 2019, p.238) It has been argued that an obligation to increase the level of protection should be interpreted in light of the expressed recognition (often included in FTAs) of the contracting parties' "right to determine the levels of protection it deems appropriate" (see Article 356.1 TCA),27 which in itself may further weaken such an obligation.

[27] Schacherer, S. (2021). *Sustainable Development in EU Foreign Investment Law,* Brill, p. 239.

2. Obligations to implement multilateral standards

Article 399 includes several substantive obligations. Despite the fact that the obligations in Chapter 8 are aimed "to enhance the integration of sustainable development, notably its labour […] dimensions, in the Parties' trade and investment relationship" (Art 397.2), it appears that these various obligations are not conditional on their impact on trade and investment (Ewing, 2021; see EU-Korea Panel of Expert, 2021) unlike the non-regression provisions examined above.

There are three key substantive obligations. First, Article 399.2 commits the contracting parties "to respecting, promoting and effectively implementing the internationally recognised core labour standards, as defined in the fundamental ILO Conventions". The core labour standards are expressly listed in the provision as follows:

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.

Second, in addition to the obligation "to make continued and sustained efforts to ratify the fundamental ILO Conventions" (399.3) and "to exchange information" on the progress of the ratification of ILO Conventions or protocols and of other relevant international instruments (399.4), Article 399.5 commits the contracting parties "to implementing" all the ILO Conventions (that have been ratified respectively by the contracting parties) and the different provisions of the European Social Charter (that the contracting parties, as members of the Council of Europe, have respectively accepted).

Third, Article 399.6 requires each contracting party "to continue to promote, through its laws and practices, the ILO Decent Work Agenda as set out in the 2008 ILO Declaration on Social Justice for a Fair Globalization (the "ILO Decent Work Agenda") and in accordance with relevant ILO Conventions, and other international commitments." Article 399.6 provides an indicative list of the areas covered by the duty to promote labour standards, which include the following:

- decent working conditions for all, with regard to, inter alia, wages and earnings, working hours, maternity leave and other conditions of work;
- health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; and
- non-discrimination in respect of working conditions, including for migrant workers.

All three sets of obligations embody legally binding obligations. The EU-Korea Panel of experts interpreted the expression 'commit to' (in article 13.4.3 of the EU-Korea FTA) as a "legal binding obligations of commitment to respecting, promoting and realising the obligations arising from membership of the ILO and the 1998 ILO Declaration in relation to the principles concerning the fundamental rights" (EU-Korea Panel report, para. 127).

With regard to the obligation 'to continue to promote' in Article 399.6, it may be relevant to point again to the interpretation of the EU-Korea Panel of experts: based on the ordinary meaning of to 'promote' (meaning to 'further the development, progress, or establishment of (a thing), encourage, help forward, or support activity'), the panel concluded that the relevant provision implied "a positive obligation on States", which, applied to the freedom of association, "means that States should ensure third parties do not disrupt workers engaging in their right to freedom of association [and] States should create a 'climate' in which the civil rights of workers and employers allow them to freely exercise their rights to freedom of association." (EU-Korea Panel report, para. 132).

It should be emphasised that each of the substantive obligation included in Article 399 have a different material scope. Article 399.2 focuses on effectively implementing the four core labour standards; Article 399.5 focuses on implementing all the ILO Conventions and the different provisions of the European Social Charter ratified or accepted by each contracting party;[28] Article 399.6 focuses on promoting the 'ILO Decent Work Agenda'. While there will be in terms of coverage some overlap between the various provisions, the overall scope is quite impressive. In the words of Professor Ewing, "It is hard to deny that this is an impressive list of obligations, which if taken seriously and given effect would help potentially to transform British labour law."[29] A finding that either contracting party is not complying with any of the above-mentioned international labour standards will entail a violation of the improvement obligations in the TCA (see Table 1), albeit a finding of violation by a panel of experts will not be binding and actual compliance will rely exclusively on the goodwill of the respondent party (see below the section on enforcement).

[28] The United Kingdom has ratified 88 Conventions in total (although only 53 of these are still in force). See: Ewing (2021) p.312.
[29] ibid p.313.

Table 1

UK compliance with the TCA obligation to implement all ratified (non-fundamental) ILO Convention (Article 399(5))

"Having ratified 53 ILO Conventions and Protocols currently in force, the United Kingdom is neither exceptionally high nor exceptionally low compared to other EU Member States. […] In terms of compliance, the ILO Committee of Experts has highlighted concerns with a number of the non-fundamental Conventions ratified by the UK, despite its duty under the TCA to implement 'all the ILO Conventions' that the UK and the EU Member States respectively have ratified. […] in the ten years from 2011 to 2020 concerns have also been expressed about the following eight non-fundamental ratified Conventions:

- Workmen's Compensation (Accidents) Convention, 1925 (No 17)
- Migration for Employment Convention (Revised), 1949 (No 97)
- Labour Inspection Convention, 1947 (No 81)
- Radiation Protection Convention, 1960 (No 115)
- Employment Policy Convention, 1964 (No 122)
- Labour Relations (Public Service) Convention, 1978 (No 151)
- Social Security (Minimum Standards) Convention, 1952 (No 102)
- Tripartite Consultation (International Labour Standards) Convention, 1976 (No 144)

[…]

Related also to the resources the British state is not now prepared to direct to the protection of workers and their families are the concerns about labour inspection and the standards required by ILO Convention 81. This is an issue that has arisen specifically in the context of health and safety, the Committee of Experts expressing concern that the 'the number of labour inspectors decreased from 1432 to 990 between 2011–12 and 2018–19', these official figures under-estimating the steep decline in view of the fact that 'managers and technical experts are included in the Government's figures'. The anxiety here related to the government's obligation under ILO Convention 81 to ensure that 'the number of labour inspectors shall be sufficient to secure the effective discharge of their duties'."

Ewing, K. (2021). 'The EU-UK Trade and Cooperation Agreement: Implications for ILO Standards and the European Social Charter in the United Kingdom', King's Law Journal, p.326 and 329.

3. Procedural obligations

Chapters 6 and 8 also include three legally binding procedural obligations addressing domestic governance issues, although only the obligations in Chapter 6 will benefit of the availability of 'temporary remedies' (including suspension of obligations) (see Article 410 TCA and the discussion below on 'Enforcement').

With regard to Chapter 8, there are two relevant provisions. First, Article 398 provides several obligations enhancing transparency and participation in the law-making process. For example, Article 398 requires the contracting parties to

> "ensure that any measure of general application pursuing the objectives of this Chapter is administered in a transparent manner, including by providing the public with reasonable opportunities and sufficient time to comment, and by publishing such measures" and
>
> "encourage public debate with and among non-state actors as regards the development and definition of policies that may lead to the adoption of law relevant to this Chapter by its public authorities"

Second, Article 399.7 requires each contracting party to "protect and promote social dialogue on labour matters among workers and employers, and their respective organisations, and with the relevant government authorities." According to Professor Ewing, this is a "hugely significant" obligation: while it is different from (but is possibly informed by) the Social Dialogue procedure in the TFEU, it requires both Parties "to bring trade unions and employers into the process of government, in terms flexible enough to require dialogue about policy proposals, legislative initiatives, and policy implementation."[30]

With regard to Chapter 6, Article 388 specifies the domestic enforcement mechanisms that the contracting parties "shall have in place", including "a system for effective domestic enforcement", "an effective system of labour inspections in accordance with its international commitments", "administrative and judicial proceedings […] that allow public authority and individuals with standing to bring timely actions against violations of the labour law and social standards", "appropriate and effective remedies, including interim relief, as well as proportionate and dissuasive sanctions".

Accordingly, Article 388 seems to focus principally on the substance of enforcement mechanisms as they exist in the legislative texts of either contracting parties. In order to determine whether such mechanisms comply with the various requirements in Article 388 (for example, whether each contracting party's domestic law provides for 'appropriate' and 'effective' remedies) reliance on international labour standards as well as empirical evidence on the actual performance of such mechanisms will be crucial.

[30] Ewing (2021) p.314.

Section D

Enforcement of labour provisions

Main findings

- For implementation and monitoring purposes, the TCA provides for a standard institutional framework including, from the top, the 'Partnership Council', the 'Trade Partnership Committee', and the 'Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development'
- Civil society participation takes place principally through the 'Civil Society Forum' at the international level and 'domestic advisory groups' at the national level (Parties are required to consider views or recommendations submitted by its domestic advisory group(s) and representatives of each contracting party shall aim to consult with their respective domestic advisory group(s) at least once a year)
- The TCA provides for a special dispute settlement procedure to address any matter concerning labour obligations; only the two contracting parties can formally activate this procedure, which involves both a consultation phase and an adjudication phase (the latter, centred around the establishment of a Panel of Experts)
- Unlike the case of the general dispute settlement procedure, the decision of the panel of experts is not binding on the respondent party; however, the TCA does provide for the availability of 'temporary remedies' (including suspension of obligations) but only in the case of disputes concerning the interpretation and application of Chapter 6 (including, in particular, the non-regression obligation in Article 387 and the requirement to put in place a system for effective domestic enforcement in Article 388).

When it comes to the enforcement of labour provisions, the TCA provides for an institutional framework entrusted with implementation and monitoring functions, as well as a special dispute settlement procedure, which is different from the general dispute settlement procedure found in Title I of Part Six of the TCA. Civil society has a formal place in the overall institutional structure, which could be used to suggest that the contracting parties consider initiating dispute settlement procedure. Furthermore, EU-based civil society organisations including the European Trade Union Confederation can use the EU's Single Entry Point to raise complaints and of course civil society organisations, including trade unions, can use political means to encourage the European Commission or United Kingdom government to launch dispute settlement proceedings. (See Table 2).

Table 2

Role of civil society (including trade unions) in the implementation of TCA labour obligations

- Civil society, including trade unions, has a formal place in the TCA institutional structure, through the establishment of the 'domestic advisory groups', at the national level, and the Civil Society Forum, at the international level (Articles 12-14 TCA)
- Domestic advisory groups (DAGs) comprise "a representation of independent civil society organisations including non-governmental organisations, business and employers' organisations, as well as trade unions" (Article 13.1)
- The Civil Society Forum "shall be open for the participation of independent civil society organisations established in the territories of the Parties, including members of the domestic advisory groups" and each contracting party "shall promote a balanced representation, including non-governmental organisations, business and employers' organisations and trade unions"
- Contracting parties "shall consider views or recommendations submitted by its domestic advisory group(s)" and representatives of each contracting party "shall aim to consult with their respective domestic advisory group(s) at least once a year" (Art 13.2 TCA)
- In the context of the contracting parties' cooperative activities on trade-related aspects of labour policies, the contracting parties "shall consider any views provided by representatives of workers, employers, and civil society organisations" (Article 399.9 TCA)

***

- While there is no express reference to the ability of civil society to contribute to the initiation of a dispute settlement procedure, nothing would prevent a domestic advisory group, for example, to raise an issue concerning the non-compliance of any of the labour provisions in the FTA (although each contracting party is only required 'to consider' such issues pursuant to Article 13.2 TCA)
- The European Trade Union Confederation and other EU-based stakeholders can avail themselves of the recently established EU Single Entry Point in order to submit a complaint to the European Commission alleging non-compliance with any of the labour obligations in the TCA
- In the context of consultation between the contracting parties regarding any matter arising under the labour provisions of the TCA, each contracting party "may seek, when appropriate, the views of the domestic advisory groups referred to in Article 13 or other expert advice" (Article 408.4 TCA)
- In the context of the Trade Specialised Committee on Level Playing Field's obligation to monitor the follow-up to the report of the panel of experts, "domestic advisory groups of the Parties […] may submit observations" to the Trade Specialised Committee on LPF (Article 409.17 TCA)
- Civil society organisations can use political means to encourage the European Commission or United Kingdom government to launch dispute settlement proceedings

1.Implementation and monitoring framework

In terms of institutional framework, while the 'Partnership Council', comprising representatives of the two contracting parties, has general powers over the agreement (Article 7), the TCA establishes several specialised committees including the 'Trade Partnership Committee', addressing various trade-related matters in the Agreement, and more importantly the 'Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development' which "addresses matters covered by" the LPF Title (Article 8).

The LPF Committee held its first meeting on 12 October 2021 discussing several matters including issues related to labour and social standards such as (1) the UK intention to denounce Art 18, para 2 of the European Social Charter in order to remove certain existing visa fees discounts from February 2022; (2) the UK initiative for a Single Enforcement Body; and (3) the EU's Occupational Health and Safety Strategy 2021.[31]

In line with previous EU FTAs, the TCA provides a certain level of institutionalisation of the participation of civil society, in particular through the establishment of 'domestic advisory groups' and the Civil Society Forum (Article 12).

Domestic advisory groups are established by each contracting party and may be convened in different configurations to discuss the implementation of difference provisions of the Agreement. These groups comprise "a representation of independent civil society organisations including non-governmental organisations, business and employers' organisations, as well as trade unions, active in economic, sustainable development, social, human rights, environmental and other matters." (Article 13.1) Each contracting party "shall consider views or recommendations submitted by" its domestic advisory group(s) and representatives of each contracting party "shall aim to consult with" their respective domestic advisory group(s) at least once a year (Article 13.2). The expression 'shall aim to' appears to weaken this obligation of consultation, particularly with regard to the minimum timeframe. However, omitting to consult with the domestic advisory group(s) for, say, up to two years may entail a breach of the Article 13.2 obligation.

Furthermore, the contracting parties are to facilitate a 'Civil Society Forum' which is to meet at least once a year and is to conduct a dialogue on the implementation of Part Two on 'Trade, Transport, Fisheries and other Arrangements' (Article 14.1-2). The Civil Society Forum shall be composed of "independent civil society organisations established in the territories of the Parties, including members of the domestic advisory groups" and providing "a balanced representation, including non-governmental organisations, business and employers' organisations and trade unions, active in economic, sustainable development, social, human rights, environmental and other matters" (Article 14.3)

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[31] For the minutes of the meeting see the EU website: https://ec.europa.eu/info/sites/default/files/minutes_-_first_meeting_of_tsc_on_lpfs.pdf or the UK website: https://www.gov.uk/government/publications/trade-specialised-committee-on-level-playing-field-for-open-and-fair-competition-and-sustainable-development/minutes-first-trade-specialised-committee-meeting-on-level-playing-field-for-open-and-fair-competition-and-sustainable-development

Aside from domestic advisory groups and the Civil Society Forum, a role of stakeholders is found in the context of the contracting parties' cooperative activities on trade-related aspects of labour policies as envisioned in Article 399.8. The TCA requires the contracting parties to "consider any views provided by representatives of workers, employers, and civil society organisations" (Article 399.9).

Recent analysis carried out on the extent of civil society participation in the implementation of EU FTAs has found that "civil society is largely included at the level of logistics and partly at the level of information sharing, whereas monitoring capacities remain limited and impact on policy-making is quasi-absent."[32]

2. State-State dispute settlement

The special dispute settlement procedure reserved for labour obligations (to the exclusion of the general procedure)[33] involves, first, a consultation phase (Article 408) and, then, an arbitration phase centred around the establishment of a Panel of Experts (Article 409). Crucially, only the two contracting parties can formally activate these phases.[34] Differently from certain earlier FTAs,[35] there is no express reference to the ability of other stakeholders (whether any member of the public or any of the civil society institutions referred to above) to contribute to the initiation of a dispute settlement procedure.[36] However, nothing prevents a domestic advisory group, for example, to raise an issue concerning the non-compliance of any of the labour provisions in the FTA (although each contracting party is only required 'to consider' such issue pursuant to Article 13.2).

Particularly important is Article 409.6 which provides that with regard to matters related to multilateral labour standards or agreements, the panel of experts "should seek information"

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[32] Drieghe L. et al (2021). 'Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion?', *New Political Economy*
See also: European Economic and Social Committee, (2021). 'The role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements' REX/510, online at: https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/role-domestic-advisory-groups-monitoring-implementation-free-trade-agreements

[33] While the contracting parties have agreed to "make all efforts through dialogue, consultation, exchange of information and cooperation to address any disagreement on the application of" Chapters 6 and 8 (Articles 389.1 and 407.1), in the event of a dispute regarding the application of either chapter, the contracting parties "shall have recourse exclusively to" the specific procedures set out in Chapter 9, instead of the general dispute settlement procedures in Title I of Part Six.

[34] The establishment of a panel of experts can be requested after 90 days from the request for consultations.

[35] See Article 23.8.5 EU-Canada CETA "Each Party shall be open to receive and shall give due consideration to submissions from the public on matters related to this Chapter, including communications on implementation concerns." Also Article 13.14.1 EU-Korea FTA "A Party may request consultations with the other Party regarding any matter of mutual interest arising under this Chapter, including the communications of the Domestic Advisory Group(s) referred to in Article 13.12 […]".

[36] Article 408.4 does recognise that, in the consultation phase, "[e]ach Party may seek, when appropriate, the views of the domestic advisory groups referred to in Article 13 or other expert advice." Moreover, Article 409.17 provides that the "domestic advisory groups of the Parties […] may submit observations to the Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development" in the context of the Committee's obligation to monitor the follow-up to the report of the panel of experts.

from the ILO and relevant bodies established under those agreements, including any pertinent available interpretative guidance, findings or decisions adopted by the ILO and those bodies. In other words, in ascertaining whether a contracting party has not complied with any ILO labour standards, the Panel of experts will very likely rely heavily (although it is not under a strict obligation to do so) on any relevant ILO materials including the work of ILO bodies that have addressed concerns with regard to ILO Members' compliance (see for example, Table 1 above on Article 399(5))

If, in its final report, the panel of experts determines that a Party has not conformed with its obligations under Chapters 6 and/or 8, "the Parties shall, within 90 days of the delivery of the final report, discuss appropriate measures to be implemented taking into account the report of the panel of experts." (Article 409.16). In case the "Parties disagree on the existence of, or the consistency with, the relevant provisions of any measure taken to address the non-conformity", the complaining Party may request the original panel of experts to decide on the matter (Article 409.18).

Crucially, unlike the general dispute settlement procedure, the decision of the panel of experts is not binding on the respondent party. However, for the first time in a EU trade agreement, Article 410 extends the availability of certain 'temporary remedies' in the event the respondent party fails to take any action to conform with the report of the panel of experts or the panel of experts finds that the measure taken by the respondent party to comply is still inconsistent with its obligations. These remedies include:

> (i) "an offer for temporary compensation" made by the respondent party if the respondent party does not comply with the decision of the panel of experts (Article 749.1) and
>
> (ii) the "suspension of obligations" by the complaining party if the respondent party does not offer compensation or the parties fail to agree on the level of compensation (Article 749.2)

However, 'temporary remedies' are only available in the case the dispute concerns the obligations in Chapter 6, that is the non-regression obligation in Article 387 and the requirement to put in place a system for effective domestic enforcement in Article 388. These remedies are not available in the case of a dispute concerning Chapter 8.

There are complex limitations on the obligations that can be suspended (Article 749.3-4 and 7-9) and in any event the suspension of obligation "shall not exceed the level equivalent to the nullification or impairment caused by the violation" (Article 749.5). The 'temporary' nature of these remedies emphasises the key objective of the dispute settlement mechanism, which is for the contracting parties to find a mutually agreed solution to the dispute or for the respondent to comply with its obligations under the agreement (Article 749.13 and Article 750).

Section E

Rebalancing mechanism

Main finding

- The rebalancing mechanism included in the TCA provides for a novel remedy in case of future 'substantial' divergences, which is however subject to strict substantive and procedural requirements

Article 411 of the TCA establishes a novel mechanism to address the case of future "significant divergences" in certain areas, including labour and social policies, impacting on trade or investment between the Parties in a manner that "changes the circumstances" that have formed the basis for the conclusion of the TCA (Article 411.1). This mechanism finds its origin in an attempt to address future regulatory divergences between the two contracting parties stemming from a contracting party's improving, say, its labour standards.[37] During the negotiations, this was the controversial issue of 'dynamic alignment' or, in other words, whether or not the two contracting parties should commit to keep equivalent standards over time. The rebalancing mechanism represents a compromise providing a remedy in case of future 'substantial' divergences, but subjecting it to strict substantive and procedural requirements.

Interestingly, Article 411 does not expressly limit the availability of rebalancing measures to the contracting party that has improved its labour standards (and such improvement has negatively impacted on, say, its exporters). Accordingly, this would theoretically leave open the possibility that the other contracting party may also make use of rebalancing measures (for example, on the basis that the other party's improved labour standards have had an adverse impact on, say, its own investors). While textually possible, this interpretation seems to go against one of the principles of the Level Playing Field title, which is to "maintain and improve [the Parties'] respective high standards in the areas covered by this Title" (Article 355.4).

Article 411.2 sets out the relevant substantive and procedural requirements in order for any of the contracting party to take appropriate rebalancing measures:

If material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in paragraph 1, either Party may take appropriate rebalancing measures to address the situation. Such measures shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement. A Party's assessment of those impacts shall be based on reliable evidence and not merely on conjecture or remote possibility.

First, Article 411.2 TCA requires that "significant divergences" in labour and social laws have 'material impacts on trade or investment'. One plausible interpretation is that, similar to the

[37] The divergence stemming from one contracting party's weakening its labour standards would be caught by the non-regression provision in Chapter 6.

linkage clauses in the more traditional labour disciplines examined above, the rebalancing provision in the EU-UK TCA focuses on whether significant divergences (it is not clear whether one divergence only is enough)[38] in labour laws are having an impact on the conditions of competition on trade or investment between the two parties.

However, different from the linkage clauses in more traditional labour disciplines, the rebalancing provision in the EU-UK TCA specifies that the impacts be 'material' (that is, 'significant'), and that it be 'based on reliable evidence and not merely on conjecture or remote possibility' (Article 9.4.2 EU-UK TCA). These two additional requirements seem to impose a higher threshold for establishing the required link between 'impacts on trade or investment' and 'regulatory divergences' compared with the 'affecting' language in Chapter 6, examined above. However, it is submitted that the nature of the analysis does not appear to be fundamentally different. Even the express reference to 'reliable evidence' and rejection of 'conjecture' do not appear to exclude reliance on the potential impact on trade or investment stemming from such regulatory divergences. In fact, one may argue that based on the structure of the last sentence of Article 411.2, each contracting party enjoys a margin of discretion in assessing the impacts on trade or investment as the 'based on reliable evidence' and 'not merely on conjecture or remote possibility' requirements are imposed on a "Party's assessment of those impacts".

Second, while Article 411 does not specify the type of rebalancing 'measures' that can be taken by either contracting party, it does specify that such measures "shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation". These strict necessity and proportionality requirements apply to the 'scope' and 'duration' of any balancing measures and they appear to demand a very tight relationship between the envisaged rebalancing measures and the substantial divergences with material impacts on trade or investment. In other words, assuming the objective of the rebalancing measures is to remedy future regulatory divergences between the two contracting parties (with substantial impacts on trade or investment),[39] any rebalancing measure will be deemed strictly necessary and proportionate if:

> (a) there are no other alternative measures that are capable of achieving the relevant objective and that are consistent or less inconsistent with the TCA40 and
>
> (b) the costs imposed by the rebalancing measures do not (excessively) outweigh the benefits that such measures are trying to achieve (ie., to address the trade impacting divergences).

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[38] Whether divergences are 'significant' will principally depend on whether they have linked with a 'significant' impact on trade and investment between the parties.

[39] Lydgate E. et al (2021). 'Taking Stock of the UK-EU Trade and Cooperation Agreement: Governance, State Subsidies and the Level Playing Field', *UK Trade Policy Observatory*, p.6: "The tribunal would also need to decide what the situation was that required 'remedy'. If the perceived 'remedy' were to force the UK to follow the EU to a higher standard, targeted and swingeing trade barriers by the EU would be the presumptive solution and hence might well be ruled acceptable. If, on the other hand, the remedy was seen to be to try to offset the UK's competitive advantage from not adopting the new measures, the proportionate measures would be smaller tariffs on selected, or even, many UK exports to the EU."

[40] Article 411.2 specifies that "[p]riority shall be given to such measures as will least disturb the functioning of this Agreement."

For example, balancing measures that impose superfluous costs on the other party or do not terminate as soon as they have achieved their objective will not meet the necessity and proportionality tests. However, it is well known that these tests, in particular those based on 'proportionality', entail a high level of indeterminacy.[41]

Third, Article 411.3 sets out a detailed procedure to be followed in order take any rebalancing measures, which involves notification, consultation, and possible recourse to arbitration in order to decide whether the notified rebalancing measures are consistent with Article 411.2.

[41] Franck T. (2008). 'On Proportionality of Countermeasures in International Law', *American Journal of International Law*, p.717

Section F

Options for future improvements in the 2026 review

Main findings

- The TCA requires the contracting parties to carry out a joint review in 2026
- There exist various options to strengthen the labour disciplines in the TCA including (i) addressing the 'trade effect' limitation included in particular in the non-regression obligation, for example, by endorsing a broader interpretation in the text of the agreement or by eliminating the limitation altogether, (ii) including a commitment to dynamic alignment with regard to labour policies which would require the contracting parties to maintain equivalent standards to each other in the future, (iii) strengthening the dispute settlement process by making panel decisions binding and trade sanctions available in all cases of non-compliance with labour obligations, and (iv) expanding the role of civil society in monitoring and enforcing labour obligations, for example, by permitting civil society (including trade unions) to trigger investigations into violations of labour obligations.

As the TCA provides for a joint review of its implementation and of any matters related thereto after five years from the entry into force of the agreement (Article 776 TCA), this section explores some of the options that should be considered to strengthen the labour disciplines in the TCA. While there is a broader debate regarding how best to use trade agreements in order to strengthen workers' protection,[42] some of the key issues include (i) addressing the 'trade effect' limitation included in particular in non-regression obligations, (ii) including a commitment to 'dynamic alignment' with regard to labour policies, (iii) strengthening the dispute settlement process by making panel decisions binding and trade sanctions available in case of non-compliance, and (iv) expanding the role of civil society in monitoring and enforcing labour obligations.

1.Addressing the 'trade effect' requirement

The US-Guatemala Panel's narrow interpretation of the relevant phrase – 'in a manner affecting trade' – has been criticised as making more difficult for a complaining party to establish a violation of the non-regression obligation. While I have put forward above the reasons why the US-Guatemala Panel's interpretation is not convincing and should thus not

[42] See Kathleen Claussen 'Reimagining Trade-Plus Compliance: The Labor Story' 23 *Journal of International Economic Law* 25 (2020) who offers "an original challenge to the jumbled consensus that including trade-plus provisions in trade agreements and treating them like 'ordinary' trade issues subject to dispute settlement is all positive"; and Marco Bronckers and Giovanni Gruni 'Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously' 56 *Common Market Law Review* 1591 (2019) who argue that "Labour and environmental standards ought to be tighten. […] Compliance ought to be subject to regular dispute settlement between governments. Sanctions must be added to the EU's toolbox, going beyond trade retaliation. Private stakeholders should become more involved in monitoring and enforcement, both at the international and at the domestic level."

be followed by future panels, some policy makers have opted to clarify the relevant phrase ensuring a broader definition of the meaning of 'affecting trade'.

The United States, Mexico and Canada have clarified the term 'in a manner affecting trade' in the USMCA 'non-enforcement' provision with the addition, in a footnote, of the following language:

> For greater certainty, a 'course of action or inaction' is 'in a manner affecting trade or investment between the Parties' if the course involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party. (Article 23.5.1 footnote 11)[43]

The new USMCA language clearly challenges the strict interpretation given to 'in a manner affecting trade' by the US-Guatemala panel (Zandvliet 2019: 221), and adopts a broader understanding of the required linkage between the responding party's conduct (ie the failure to effectively enforce labour laws) and trade between the parties. In particular, the choice of the verb 'to involve' seems to exclude the need to demonstrate an actual impact on trade (as required by the US-Guatemala panel), and to point instead to conduct that may more simply 'concern' or 'relate to' trade. Furthermore, the new language also clarifies the meaning of 'trade between the parties' by specifying that the relevant conduct under review involves 'a person or industry producing a good or supplying a service that is traded between the Parties' or is 'in competition with a good or service of another Party'.

While not altogether clear, a reading of the new language does not seem to require that the employer benefitting from the responding party's failure to effectively enforce its labour laws be directly involved in international trade. Consequently, a failure to enforce labour laws taking place along the supply chain (whether upstream or downstream) could be said to be indirectly involving a person or industry producing a good or supplying a service that is traded or in competition with a good/service of another party.

The USMCA also makes it easier for the complaining party to satisfy the trade linkage requirement by establishing a presumption in favour of an effect on trade in the following terms:

> "For purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise." (Article 23.5.1 footnote 12)

Accordingly, clarifying the meaning of 'affecting trade' by explicitly adopting a broad definition of the required link between the State conduct under review and trade among the contracting parties certainly represents an option in order to strengthen the non-regression provisions in the TCA.

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[43] Same clarification has also been added in other labour obligations in USMCA, such as the non-derogation provision in Art 23.4.

A more clear-cut option would be to eliminate the 'trade effect' requirement altogether and make the non-regression obligation not subject to the existence of a trade effect (whether actual or potential). This would align the non-regression obligation with the various TCA requirements to promote and implement multilateral labour standards, which, as noted above, is not subject to any such trade effect requirement.

2. Introducing a commitment to dynamic alignment

One option to strengthen the labour disciplines in the TCA is to revive the concept of 'dynamic alignment' and make it applicable to labour law and regulations. A dynamic alignment obligation would require the parties to a trade agreement to maintain equivalent standards to each other in the future. Applied in the case of labour standards, if one party increases its labour protections, the other party would need to follow suit. This had been proposed by the EU but only with regard to subsidies (although the European Parliament had suggested a broader application of the concept including labour protections). In the end, dynamic alignment was not included in the final agreement; however, it is indeed present in the Northern Ireland Protocol.

While a commitment to dynamic alignment may be qualified in terms of scope and operation, including dynamic alignment as part of the labour obligations in the TCA would complement the existing non-regression obligation, as it would require both contracting parties to keep pace with future progressions in the labour protections granted by one of contracting parties. In considering this option, a review of how the related 'rebalancing' mechanism in Article 411 has fared in the first five years of the application of the TCA will be indispensable.[44]

3. Strengthening the dispute settlement process

The dispute settlement system applicable to labour obligations in EU FTAs has traditionally followed a more collaborative approach consisting of consultation and dialogue. In particular EU FTAs have excluded (i) the applicability of the general dispute settlement system, (ii) the binding nature of panel decisions and (iii) the availability of sanctions in the case of a non-compliance. However, as noted above, while the first two features remain in the TCA, at least with regard to disputes involving the labour obligations in Chapter 6, the TCA does make 'temporary remedies' available in the case of non-conformity with those obligations. Recent policy makers have gone further, providing valuable options to consider in the context of future review and improvements.

Making the general arbitration procedure applicable to all labour-related disputes (UK-Australia FTA)

The recent FTA between the UK and Australia has strengthened the dispute settlement system with regard to labour provisions in important ways. First of all, while the UK-Australia FTA still provides for a labour-specific consultation procedure (Article 21.16), it

[44] Interestingly, Article 411 envisages a specific review "no sooner than four years after the entry into force of the Agreement [...] in order to ensure an appropriate balance between the commitments made by the Parties in this Agreement" (Article 411.4).

makes the general arbitration procedure (in Chapter 31) applicable also in the case the contracting parties fail to resolve, through consultation, their labour-related matter (Article 21.16.11). In other words, in the UK-Australia FTA there is no special procedure revolving around the Panel of experts as one finds in the TCA.

Two further features follow from making the general arbitration procedure applicable to labour disputes. First, unlike with regard to decisions by the panel of experts in the TCA, the final report of the panel established to hear a complaint based on any of the obligations in the labour chapter of the UK-Australia FTA, "shall be binding on the Parties" (Article 30.12.5). Second, sanctions (in the form of temporary remedies, including the suspension of concessions or other obligations) are available with regard to disputes concerning all labour-related obligations. Accordingly, these remedies are not reserved for disputes concerning the non-regression obligation, only (as in the TCA), but extend to the provisions related to multilateral labour standards, too.[45]

Establishing a 'rapid response labour mechanism'

USMCA provides for two similar mechanisms (one between the United States and Mexico and one between Canada and Mexico) for the enforcement of workers' free association and collective bargaining rights at specific facilities (identified based on economic sector and trade link).[46] While there are certain limitation in terms of scope (for example, agricultural sector is excluded), the mechanisms' key feature is in particular their 'expedited' nature.

The rapid response labour mechanism (RRLM) envisages, first, for a country to submit a 'request for review' to the other country to determine whether there is a denial of rights and attempt to remediate any issues it finds. In certain situations, the mechanism also provides for panellists to assess complaints about conditions at specific facilities, and, in cases of non-compliance with key labour obligations, provides for the suspension of USMCA tariff benefits or the imposition of other penalties, such as denial of entry of goods from businesses that are repeat offenders. The time frame for the various steps is accelerated, for example, the initial consultation following the request for review is 10 days (Article 31-A.4.10) and the Panel shall make a determination within 30 days (Article 31-A.8.1).

4. Expanding the role of civil society in monitoring and enforcing labour obligations

As noted above, while in the TCA civil society participation takes place principally through the 'Civil Society Forum' at the international level and 'domestic advisory groups' at the national level, formally civil society is provided with only a small role in enforcing labour obligations in the TCA. One option that has been suggested in the literature to increase the

[45] It should be noted that the provisions in the UK-Australia FTA linked with multilateral labour standards are not as broad as the ones included in the EU-UK TCA.

[46] The 'facilities' covered by the mechanisms are those (1) in a 'priority sector' (ie., a sector that produces manufactured goods, supplies services or involves mining; thus agriculture is excluded) and (2) producing a good or supplying a service (a) that is traded between the contracting parties or (b) that competes in the territory of a party with a good or a service of the other party. Articles 31-A.15 and 31-B.15.

role of civil society is through the establishment of a 'private complaint procedure', whereby a civil society complaint could lead the government authorities to investigate the alleged non-compliance with labour obligations in an FTA and potentially lead to formal consultation and arbitration procedures if the matter is not resolved.[47]

A similar procedure has been recently introduced, for example, in the context of the USMCA rapid response labour mechanisms (RRLMs) as well as in the EU through the creation of the Single Entry Point (SEP) set up by the European Commission in 2020.

While the USMCA RRLMs do not specify how each contracting party determines internally whether/how to invoke the mechanism, the United States implementing legislation,[48] for example, establishes such a process, in particular with the creation of an Interagency Labor Committee to monitor implementation of any labour obligations and to request enforcement actions in case of non-compliance. The Committee is co-chaired by the US Trade Representative (USTR) and the Secretary of Labor and includes representatives of such other Federal departments or agencies with relevant expertise (Article 711 H.R. 5430).

According to the Interim Guidelines for Petitions elaborated by the Interagency Labor Committee, "[a]ny person of a Party may file a rapid response petition with the Committee."[49] Pursuant to Article 717 of the USMCA Implementation Act H.R. 5430, the Bureau of International Labor Affairs (ILAB) (part of the US Department of Labor) has established a web-based hotline to allow for the receipt of confidential information from interested parties regarding labour issues.[50]

Where the Interagency Labor Committee determines, on the basis of information received from the public, that there is "sufficient, credible evidence of a denial of rights" enabling the good-faith invocation of the RRLM ('affirmative determination'), the USTR is then required to submit a request for review pursuant to Article 31-A.4 USMCA with respect to the covered facility. The USTR shall subsequently determine whether or not to request the establishment of a rapid response labour panel not later than 60 days after the date in which the Interagency Labor Committee had made an affirmative determination (Article 716 H.R. 5430). Accordingly, while civil society of the contracting parties can file petitions alleging non-compliance with certain labour obligations in the USMCA, the process is still lead principally by the governments of the USMCA parties: both the initial 'review' phase and the possible 'panel' phase will take place only if there is a decision to act on the part of

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[47] Bronckers M. and Gruni G. (2018). 'Improving the enforcement of labour standards in the EU's free trade agreements' in Denise Prévost et al (eds) *Restoring Trust in Trade: Liber Amicorum in Honour of Peter Van den Bossche*, Hart

[48] H.R.5430 - United States-Mexico-Canada Agreement Implementation Act, 116th Congress Public Law 113.

[49] "Any person of a Party may file a rapid response petition with the Committee". Section C.1. of the Interim Guidelines for Petitions elaborated by the US Interagency Labor Committee: https://www.federalregister.gov/documents/2020/06/30/2020-14086/interagency-labor-committee-for-monitoring-and-enforcement-procedural-guidelines-for-petitions. For the Guidelines for Denial of Rights under the Canada-Mexico Facility-Specific RRLM see: https://www.worldtradelaw.net/document.php?id=usmca/Can-Mex-RRLMGuidelines.pdf.

[50] See https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca

the relevant government (with regard to the United States procedure, the Interagency Labor Committee and USTR, respectively).

The EU Single Entry Point (SEP) is the centralised contact point for all EU-based stakeholders who want to lodge a complaint on market access issues or non-compliance with Trade and Sustainable Development ('TSD') or Generalised System of Preferences ('GSP') system commitments. The objective of the new complaint system is to streamline internal processes to tackle market access issues and non-compliance with TSD/GSP commitments and to be able to better prioritise the EU Commission enforcement action.[51]

The Operating Guidelines for the SEP[52] determine (i) the eligibility to submit a complaint (including EU citizens, EU Member States and trade unions formed in accordance with the laws of any EU Member State),[53] (ii) the relevant online complaint forms,[54] and (iii) the follow-up on complaints.[55] While the SEP applies in the case of the TCA, it will only be available for EU-based stakeholders.

Interestingly, these private complaint mechanisms are not formally required by an underlying trade agreement, but they have been adopted unilaterally by the countries involved. However, it is possible to include the obligation to establish such a mechanism in the relevant trade agreement. For a very embryonic example, one can look at the labour chapter of the recent UK-Australia FTA, which provides that the contracting parties "shall provide a means for receiving and considering the views of interested persons on matters related to this Chapter" (Article 21.15).

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[51] See European Commission Press Release (16 November 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2134.

[52] Operating guidelines for the Single Entry Point and complaints mechanism for the enforcement of EU trade agreements and arrangements (23 June 2021)

[53] Potential complainants must fully disclose if they are acting exclusively on their own behalf or if they are representing other interests as well. In the latter case, they shall fully disclose the identity of that other person/company/association/entity.

[54] Complainants will be required to provide a detailed factual description of the issue at stake and to list any actions already taken to address it. For sustainable development issues, the complainant must give details of the impact and seriousness of the alleged breach.

[55] "After a preliminary analysis, depending on the case at hand and the degree of completeness of the complaint, the Commission services may, if necessary, engage with the complainant in a deficiency process and communicate potentially outstanding information and evidence. […] The complainant will be informed as to whether the complaint leads to an enforcement action accompanied by an enforcement action plan to tackle the barrier/issue raised. The Commission services will inform the complainant about the content of the action plan, which may identify the steps suitable for tackling the issues complained of but also indicate to the extent possible timelines for specific actions." Operating guidelines (2021), p.5.

Conclusions

The EU-UK TCA represents one of the most advanced trade agreements when it comes to the commitments undertaken by the contracting parties with regard to workers' rights protection. Accordingly, it provides opportunities for trade unions and other civil society in the EU and UK to hold their governments to these commitments. However, it remains to be seen what the future impact will be of these commitments, as well as of the broader title on the Level Playing Field, in particular, how these various commitments will be used in practice. In any event, a discussion about how to strengthen the labour protection disciplines in the TCA is already underway and it is hoped that this report offers a valuable contribution to that discussion.

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