

SÚLAD MEDZINÁRODNÝCH OBCHODNÝCH ZMLÚV SO ŠTANDARDMI MOP: AKÉ REFORMY BY MALI BYŤ PODSTÚPENÉ V NAJBLIŽŠEJ DOBE?

THE COMPLIANCE OF INTERNATIONAL TRADE AGREEMENTS WITH THE ILO STANDARDS: WHAT REFORMS SHOULD BE UNDERTAKEN IN THE NEAREST FUTURE? ¹

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ABSTRACT

For purposes of this paper the bulk of the commentary has been directed toward the limitations of labour provisions included in free trade agreements and towards the ways in which they may be strengthened to better promote ILO fundamental labour rights. The article focuses on different approaches to labour standards in the US and the EU, free trade agreements concluded by the US and the EU. It also tackles the question of the Transatlantic Trade and Investment Partnership. Focusing specifically on the need to ensure compliance with international trade agreements in relation to ILO standards, this article has articulated a series of goals that should animate reforms and has offered a set of proposals.

ABSTRAKT

Za účelom spracovania tohto príspevku väčšina jeho komentára bola zameraná na limitáciu pracovných ustanovení zahrnutých v dohodách o voľnom obchode a na spôsoby, v rámci ktorých môžu byť posilnené, a to v záujme lepšieho podporenia základných pracovných práv MOP. Článok sa zameriava na rôzne prístupy vo vzťahu k pracovným štandardom v USA a EÚ, a na dohody o voľnom obchode uzavreté zo strany USA a EÚ. Taktiež sa dotýka otázky Transatlantického obchodného a investičného partnerstva. Zameriavajúc pozornosť obzvlášť na potrebu zabezpečenia súladu s medzinárodnými obchodnými dohodami vo vzťahu k štandardom MOP, tento článok obsahuje rad cieľov, ktoré by oživil reformy, ako aj ponúka niekoľko návrhov.

I. INTRODUCTION

According to the International Labour Organization, labour provisions in trade agreements have proliferated over the last two decades - from only four in 1995, the number of trade agreements that include labour provisions increased to 21 in 2005, and to 58 in June 2013². As of December 2015, there were 76 such trade agreements³. The purpose of this paper is to

¹ The project was financed by the National Science Centre in Poland pursuant to the decision number DEC-2016/21/D/HS5/03849. The project's registration number is: 2016/21/D/HS5/03849.

² INTERNATIONAL LABOUR ORGANIZATION: Social Dimensions of Free Trade Agreements. Studies on Growth with Equity, Geneva, 2013, p. 5.

³ INTERNATIONAL LABOUR ORGANIZATION: Assessment of Labour Provisions in Trade and Investment Arrangements. Studies on Growth with Equity, Geneva, 2016, p. 1.

reflect on the compliance of international trade agreements with the ILO standards, and to discuss possible means of improvement of the current situation in the field. Before scrutinizing this in more detail, let me first compare the approaches to labour standards in the US and the EU, as the article concentrates on the FTAs concluded by these countries.

The EU and the US approaches to labour provisions in trade agreements show some significant differences. Indeed, the US model mostly refers to the ILO 1998 Declaration and involves FTAs that use a conditional approach. This amounts to the fact that FTAs contain labour provisions that make the conclusion of a trade agreement conditional upon respect for particular labour standards (pre-ratification conditionality) and/or provisions in the concluded trade agreements that authorise sanctions if labour standards are infringed (post-ratification conditionality)⁴.

The EU relies more on the ILO agenda, including a commitment towards ratifying its core conventions. The EU model involves a promotional approach. It means that labour provisions included in FTAs "do not link compliance to economic consequences but provide a framework for dialogue, cooperation, and/or monitoring (...)"⁵.

EU countries have all ratified the eight core labour conventions in full, while the US has ratified only two and its labour law and practice deviate considerably from the core labour conventions in several respects. The US ratifications do not include Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise and Convention No. 98 on the Right to Organise and Collective Bargaining.

As regards the methods used, critical reasoning is applied with a view to showing that the solemn reaffirmation of the commitment to the core labour standards and the ILO 1998 Declaration does not go hand in hand with the assurance of mechanisms enabling effective enforcement of labour provisions. The examination of law, trade agreements, and ILO standards from the perspective of the need for realisation of fundamental workers' rights is an added value of the paper. An important role has been assigned to a logical-linguistic method which allows the exegesis and interpretation of the content of norms or agreements and the removal of emerging doubts. The analysis applies a comparative method, which facilitates the formulation of *de lege ferenda* postulates. An axiological and historical method have been also used. Moreover, the investigative technique involves building a synthesis of the accumulated literature.

The article proceeds in 5 parts, including introduction. Part 2 focuses on free trade agreements concluded by the US. Part 3 explores the EU agreements. Part 4 tackles the question of the Transatlantic Trade and Investment Partnership (TTIP). Finally, part 5 includes some concluding remarks and suggests what can be done in order to make labour chapters more effective.

II. THE US FREE TRADE AGREEMENTS

The NAALC (1994) was the first trade agreement to include a binding labour provision. However, when it comes to the US, The US-Jordan agreement (2000) for the first time incorporated ILO standards, referring to the 1998 Declaration on Fundamental Principles and Rights at Work, and obligated the parties to "strive to ensure" that ILO core standards are reflected in national law. From that time, the US negotiated several trade agreements which maintained the "strive to ensure" clause (CAFTA-DR, agreements with Chile, Singapore,

4 INTERNATIONAL LABOUR ORGANIZATION: *Social...*, p. 1; CAMPLING L., HARRISON J., RICHARDSON B., SMITH A.: Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements. In: *International Labour Review*, 2016, Vol. 155, No. 3, pp. 360-361.

5 INTERNATIONAL LABOUR ORGANIZATION: *Social...*, p. 1.

Australia, Morocco, Bahrain, Oman). These seven agreements were negotiated pursuant to the trade objectives enumerated in the Bipartisan Trade Promotion Authority Act of 2002. This Act embraced the promotion of "worker rights and the rights of children consistent with the core labor standards of the ILO" and "universal ratification and full compliance with ILO Convention No. 182"⁶.

A year after the US Democrat Party won a majority in the House and Senate in November 2006, the Bipartisan Agreement on Trade Policy (10 May Agreement) between Congress and the White House was reached. According to its new trade template, each party was required to "adopt and maintain in its statutes, regulations, and practices" the "rights as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)"⁷. It constituted an important progress in comparison to the prior "strive to ensure" formulation. Effective enforcement of laws reflecting the ILO core labour standards was required. The US renegotiated labour chapters of trade agreements with Peru, Panama, Colombia, and Korea. These standards had to be achieved in future trade agreements as well.

In spite of the above, the compliance with international trade agreements in relation to ILO standards is not satisfactory (the few optimistic examples include Panama which eliminated restrictions on collective bargaining and Cambodia where a significant increase in the possibility of forming trade unions has been noted)⁸. While the US has made the commitments, they exist only in writing. Employers still have permission to replace workers who exercise their right to strike with new personnel. They can also aggressively campaign against workers to prevent them from exerting their right to organise⁹.

The implication of the US position seems to be that restricting trade unions' rights in some parts of a free trade area may result in unfair competition for other parts. As a consequence, it may further aggravate the weakening of trade unions' bargaining power. It is hard to disagree with De Ville et al.¹⁰ that if there is no request for ratification of ILO core conventions, the benchmarking and monitoring of labour conditions can be restrained in the case of non-ratification by partner countries all core conventions.

Referring to the experience of the labour provisions under the Central America Free Trade Agreement (CAFTA) and the Trans-Pacific Partnership (TPP), the former does not require labour law of states parties to be consistent with the rules laid down in the basic ILO conventions. Trade unions, human and labour rights organisations have criticised its labour chapter for doing little to improve labour laws and law enforcement or to restrain future abuses¹¹. In relation to the TPP, the president of the AFL-CIO has pointed out that: "After much talk about labor standards, the TPP falls woefully short. It retains the totally discretionary nature of enforcement and does nothing to streamline the process so labor cases will be addressed without delay, leaving workers with no assurance of improved

6 INTERNATIONAL LABOUR ORGANIZATION: Assessment..., p. 43.

7 VOGT J.S.: The Evolution of Labor Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership. In: *Journal of International Economic Law*, 2015, Vol. 18, p. 833, doi: 10.1093/jiel/jgv046.

8 See: CHURCH ALBERTSON P., COMPA L.: Labour rights and trade agreements in the Americas. In: A. BLACKETT, A. TREBILCOCK (eds.), *Research Handbook on Transnational Labour Law*. Cheltenham-Northampton: Edward Elgar Publishing, 2015, pp. 478-479, 485-486; MYANT, M.: The impact of trade and investment agreements on decent work and sustainable development, European Trade Union Institute (ETUI), Brussels 2017, passim.

9 COMPA, L.: Labor rights and labor standards in transatlantic trade and investment negotiations: A US perspective. In: *Economia & Lavoro*, 2015, Vol. 2, p. 94.

10 DE VILLE F., ORBIE J., VAN DEN PUTTE L.: TTIP and labour standards. Study for the EMPL Committee. Directorate- General for Internal Policy. Policy Department A. Economic and Scientific Policy. European Parliament, June 2016, p. 47. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578992/IPOL_STU\(2016\)578992_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578992/IPOL_STU(2016)578992_EN.pdf).

11 VOGT J.S.: The Evolution..., p. 831-832.

conditions"¹². The TPP's chapter 19 on labour follows the US approach to labour provisions in trade agreements¹³ and it reiterates the above-mentioned 10th May model. The AFL-CIO has declared its opposition to the TPP, emphasising the lack of enforceable labour provisions¹⁴.

According to the recent US' FTAs with the Republic of Korea, Colombia, and Peru: "each party shall adopt and maintain its statutes and regulations, and practices thereunder" the rights stated in the 1998 Declaration. Nonetheless, caution is required as regards the footnote included in the FTAs which states that "the obligations set out in [this Article], as they relate to the ILO, refer only to the ILO Declaration". As rightly stated by Plasa: "While this declaration lists the CLS, it does not specify the conventions defining them. Apparently, the purpose of this footnote is to clarify that the FTAs do not commit the signatories to respect the terms of these conventions"¹⁵.

III. THE EU AGREEMENTS

Core labour standards, i.e. respect for basic social rights through the promotion of cooperative activities related to international labour standards, appear for the first time in the 1999 Trade, Development and Cooperation Agreement (TDCA) with South Africa. However, explicit commitments to labour standards have been included in the 2000 Cotonou Partnership Agreement with the African, Caribbean and Pacific states¹⁶. The important status attained by the Cotonou Agreement is due to the fact that both the EU and the African, Caribbean and Pacific countries have equally committed themselves to respect core labour standards and to enhance cooperation in this area¹⁷. Clear commitments to labour standards have been also included in the FTA with Chile (2003)¹⁸.

Concluded in 2008, the economic partnership agreement between the EU and the Forum of Caribbean Group of African, Caribbean and Pacific States (the EU-Cariforum EPA) is treated as a special category of agreements because of its different rationale, which goes beyond traditional free trade agreements. This EPA is the first in which the parties reaffirm their commitment to core labour standards, as defined by the relevant ILO Conventions. Moreover, the parties commit themselves to the respect of fundamental principles and rights at work, as recognised by the 1998 ILO Declaration. Besides, the EU-Cariforum EPA includes labour provisions relating to foreign investors in the investment chapter. It is also the only EU agreement that submits labour provisions to sanction-based arbitral dispute settlement, and establishes the first *ad hoc* dispute settlement mechanism for labour provisions in an EU trade agreement¹⁹.

The EU-South Korea FTA which was adopted in 2009, and has been in force since 2011, gave rise to the EU's current (fourth) generation of trade agreements. It is not in dispute that the main characteristic of the fourth generation of trade agreements is that they contain a "trade and sustainable development" chapter which aims at integrating labour provisions into them. For example, Article 13.4.3 of the EU-South Korea FTA highlights "respecting, promoting and realising, in their laws and practices, the principles concerning the

12 TRUMKA R.: TPP: A new low. Available at: <http://thehill.com/opinion/op-ed/267968-tpp-a-new-low>.

13 DE VILLE F., ORBIE J., VAN DEN PUTTE L.: TTIP..., p. 39.

14 VOGT J.S.: The Evolution..., p. 835-836.

15 PLASA, W.: Reconciling International Trade and Labor Protection. Why We Need to Bridge the Gap between ILO Standards and WTO Rules. Lanham-Boulder-New York-London: Lexington Books, 2015, pp. 115-116.

16 CAMPLING L., HARRISON J., RICHARDSON B., SMITH A.: Can labour..., p. 362. See the cited literature.

17 VELLUTI, S.: The EU's social dimension and its external trade relations. In: A. MARX, J. WOUTERS, G. RAYP, L. BEKE (eds.), Global Governance of Labour Rights. Assessing the Effectiveness of Transnational Public and Private Policy Initiatives. Cheltenham-Northampton: Edward Elgar Publishing, 2015, p. 57.

18 CAMPLING L., HARRISON J., RICHARDSON B., SMITH A.: Can labour..., p. 362.

19 INTERNATIONAL LABOUR ORGANIZATION: Assessment..., p. 40.

fundamental rights", "the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the EU have ratified respectively", and making "continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO". Not only the agreement with the Republic of Korea, but also agreements with Central America, Colombia and Peru, Georgia, Moldova, and Ukraine, they all refer to the 1998 ILO Declaration, the UN Declaration on Full Employment and Decent Work, the goal of achieving high levels of labour protection, commitments with regard to the fundamental principles and rights at work, and the eight fundamental ILO Conventions²⁰ (in terms of substantive standards). When it comes to institutional structures, the "trade and sustainable development" chapters establish the Committee on Trade and Sustainable Development²¹. For example, such a Committee has been created under the agreement with Korea in order to monitor implementation of the trade and sustainable development chapter²². Besides, according to the Article 13.12.4 of the EU-Korea FTA, the parties are required to "establish a Domestic Advisory Group(s) on sustainable development (environment and labour) with the task of advising on the implementation of this Chapter", and with the aim of making national and EU civil society actors participate in its structure. If there is a dispute that the parties are not able to resolve themselves, they can involve a Panel of Independent Experts, the conclusions of which are, however, non-binding. Furthermore, there is no provision for sanctions. As rightly stated by Campling *et al.*: "There is some initial evidence suggesting that the combination of weak domestic advisory groups, "a trade and sustainable development" chapter that lacks any mechanism to arbitrate disputes or impose penalties, and the absence of political will on the part of the EU means that the EU-South Korea FTA does not thus far provide a particularly effective mechanism for resolving labour disputes"²³. Given this context, it should be highlighted that the standard dispute settlement procedure for dealing with complaints does not appear in any of the FTAs. For this reason, one party cannot bring an action that would result in the suspension of trade preferences against the other party²⁴.

As pointed out by Van Roozendaal, with respect to the ratification, there is no intermediate impact of the FTAs. In fact, the Republic of Korea has not ratified the following fundamental Conventions: Forced Labour Convention, 1930 (No. 29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Abolition of Forced Labour Convention, 1957 (No. 105)²⁵. Van Roozendaal stresses that - what refers to other kinds of impact - the FTAs have not made a difference in the field of enabling rights. There are considerable problems connected to the freedom of association, the right to collective action, and the right to strike. She highlights that the lack of impact is due to the absence of political willingness on the part of the Korean side, and an equal absence of "readiness on the trade partners' sides

20 INTERNATIONAL LABOUR ORGANIZATION: Assessment..., p. 41.

21 CAMPLING L., HARRISON J., RICHARDSON B., SMITH A.: Can labour..., p. 363.

22 Analyzing the EU-Colombia trade agreement, Marx, Lein and Brando highlight that there is no monitoring mechanism to track compliance with the human rights clause, nor a Subcommittee dedicated to human rights. The authors point out that because of the lack of a specialized human rights Subcommittee, human rights and democracy issues would fall under the auspices of the Trade Committee which excludes any participation of civil society. See: MARX, A., LEIN, B., BRANDO, N.: The Protection of Labour Rights in Trade Agreements: The Case of the EU-Colombia Agreement. In: Journal of World Trade, 2016, Vol. 50, No. 4, p. 591.

23 CAMPLING L., HARRISON J., RICHARDSON B., SMITH A.: Can labour..., p. 370-371.

24 CAMPLING L., HARRISON J., RICHARDSON B., SMITH A.: Can labour..., p. 363-364.

25 Available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:103123.

to either include strong wording and a strong instrument to back up any commitment, or to actually use the available instruments in a way which would lead to improvement"²⁶.

In 2014, the EU and Canada concluded negotiations on the Comprehensive Economic and Trade Agreement (CETA) which, if we speak about adopted labour norms, is very similar to the EU-Korea FTA. Already at the beginning of Chapter 23 entitled "Trade and Labour", we can read: "Affirming the value of greater policy coherence in decent work, encompassing core labour standards, and high levels of labour protection, coupled with their effective enforcement, the Parties recognise the beneficial role that those areas can have on economic efficiency, innovation and productivity, including export performance. In this context, they also recognise the importance of social dialogue on labour matters among workers and employers, and their respective organisations, and governments, and commit to the promotion of such dialogue". What is more, the parties have agreed to ensure that their national laws conform to the ILO core labour standards and commit themselves to the respect of fundamental principles and rights at work, as recognised by the 1998 ILO Declaration, the 2008 ILO Declaration on Social Justice for a Fair Globalisation, the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, and the OECD Guidelines for Multilateral Enterprises.

However, all the lofty phrases, the reaffirmation of the parties' commitment to the ILO 1998 Declaration and to the core labour standards are perceived as seriously undermined if, the "Trade and Labour" Chapter lacks effectiveness and "is not able to automatically ensure a protection of labour rights among the two sides of the Atlantic Ocean"²⁷.

As in case of the EU-Korea FTA, the Committee on Trade and Sustainable Development - established under Article 26.2.1(g) (Specialised committees) - shall, inter alia, oversee the implementation of the Chapter entitled "Trade and Labour" and review the progress achieved under it, including its operation and effectiveness. Besides, the CETA establishes a "Civil Society Forum" to conduct a dialogue on the sustainable development aspects of the agreement. A party may request consultations with the other party regarding any matter arising under the "Trade and Labour" Chapter by delivering a written request to the contact point of the other party. For any matter that is not satisfactorily addressed through such consultations, a party may request that a "Panel of Experts" be convened to examine that matter. Unfortunately, mechanisms to ensure effective enforcement are absent for disputes concerning labour rights infringements. There is no possibility to access the national jurisdiction²⁸. The CETA excludes access to its regular dispute settlement mechanism, which allows for the imposition of sanctions. In addition, no trade or other sanctions are projected. Consequently, compliance with any panel findings is, to a great extent, left to the discretion of the party concerned²⁹.

26 VAN ROOZENDAAL, G.: Where Symbolism Prospers: An Analysis of the Impact on Enabling Rights of Labour Standards Provisions in Trade Agreements with South Korea. In: *Politics and Governance*, 2017, Vol. 5, Issue 4, pp. 24-25 and 27.

27 BOLOGNA, S.: The Comprehensive Economic and Trade Agreement (CETA): What Kind of Space is Given to Fair Trade and Labour Rights? In: *Temilavoro.it Sinossi Internet di Diritto del Lavoro e della Sicurezza Sociale*, 2017, Vol. 9, No. 1, p. 10 and 4, https://iris.unipa.it/retrieve/handle/10447/241968/452354/CETA_Temilavoro.pdf.

28 See: FERRANTE V.: Social Concerns in Free Trade Agreements. In: *E-Journal of International and Comparative Labour Studies*, 2016, Vol. 5, No. 2 May-June, p. 8; FAIOLI, M.: Atlantic Transitions for Law and Labor: CETA First and TTIP Second? In: A. PERULLI, T. TREU (eds.), *Sustainable Development, Global Trade and Social Rights*. Alphen aan den Rijn: Wolters Kluwer, 2018, p. 88; BARTELS, L.: Human Rights, Labour Standards, and Environmental Standards in CETA. In: S. GRILLER, W. OBWEXER, E. VRANES (eds.), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA. New Orientations for EU External Economic Relations*. Oxford: Oxford University Press, 2017, p. 208.

29 See: EBERT, F.C.: The Comprehensive Economic and Trade Agreement (CETA): Are Existing Arrangements Sufficient to Prevent Adverse Effects on Labour Standards?. In: *International Journal of Comparative Labour Law and Industrial Relations*, 2017, Vol. 33, No. 2, p. 307.

In line with most of the literature, it is worth stressing that the reaffirmation of the parties' commitment to the core labour standards is not clearly linked to other chapters of the CETA where it should be relevant, e.g. the one concerning regulatory cooperation. This means that labour matters are not treated as generally relevant, but only when consistent with specific sections, e.g. on the liberalisation of trade³⁰.

A recent impact assessment study by Orbie, Van den Putte and Martens shows the poor impact of labour rights commitments in the EU–Peru–Colombia agreement, on the example of the agricultural sector in Peru³¹. Peru has ratified the ILO's eight fundamental conventions. Unfortunately, the authors identify considerable shortcomings with their implementation and indicate that practices of child labour, forced labour, discrimination and breaches of trade union rights still exist in Peru³².

IV. THE EU AND THE US: TTIP

The initiative to establish the TTIP was taken in November 2011, but the negotiations were frozen after the 2016 US presidential election. However, taking into consideration the importance of the TTIP, I will focus here on the EU's initial proposal for legal text on "Trade and sustainable development" which was made public on 6 November 2015. It is important to determine whether the document ensures effective workers' rights protection, and whether it complies with "Directives for the negotiation on a comprehensive trade and investment agreement, called the transatlantic trade and investment partnership, between the European Union and the United States of America", adopted at the Foreign Affairs Council (Trade) on 14 June 2013 (declassified on 9 October 2014), and with the European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the TTIP.

In order to assess the EU's proposal for a legal text on "Trade and sustainable development" through the prism of directives for the negotiation on the TTIP, we need to evaluate those directives themselves. Even if they include lofty phrases, they may not ensure enforcement of labour standards. Indeed, they appear to provide soft, promotional formulations, eg. "the Agreement will include provisions to promote adherence to and effective implementation of internationally agreed standards and agreements in the labour and environmental domain as a necessary condition for sustainable development", and "the Agreement will include mechanisms to support the promotion of decent work through effective domestic implementation of ILO core labour standards, as defined in the 1998 ILO Declaration of Fundamental Principles and Rights at Work".

Directives for the negotiation on the TTIP raise serious concerns not only about the possibility of the implementation and proper enforcement, but also about the ratification by the US of the eight ILO core conventions.

Assessing the EU's proposed chapter on "Trade and sustainable development" from the perspective of the European Parliament resolution of 8 July 2015, it should be mentioned that it fails to observe an important recommendation to the Commission, namely "to ensure that the sustainable development chapter is binding and enforceable and aims at the full and effective ratification, implementation and enforcement" of the eight fundamental ILO conventions and their content, and the ILO's Decent Work Agenda. Rather than complying with the recommendation, the Commission's proposal does not guarantee the enforceability of

30 E.g.: BOLOGNA, S.: *The Comprehensive...*, pp. 4-5. See the cited literature.

31 ORBIE J., VAN DEN PUTTE L., MARTENS D.: *The Impact of Labour Rights Commitments in EU Trade Agreements: The Case of Peru*. In: *Politics and Governance*, 2017, Vol. 5, Issue 4, p. 6-18.

32 ORBIE J., VAN DEN PUTTE L., MARTENS D.: *The Impact...*, pp. 7, 9-10.

the labour provisions, and only states that: "each Party shall continue to make sustained efforts towards ratifying the fundamental ILO Conventions", "each Party shall ensure that its laws and practices respect, promote, and realise within an integrated strategy, in its whole territory and for all, the internationally recognised core labour standards, which are the subject of the fundamental ILO Conventions", or "each Party shall effectively implement in its laws and practices and in its whole territory the ILO Conventions it has ratified". Yet according to the European Parliament resolution, the parties should "ensure that the implementation of and compliance with labour provisions is subjected to an effective monitoring process, involving social partners and civil society representatives and to the general dispute settlement which applies to the whole agreement". No such provisions exist in the submitted proposal.

If and when negotiations resume, the actual text in any final agreement will be a result of negotiations between the EU and the US. However, particularly in the face of the likely changed climate for labour rights in the US post-November 2016, it is difficult to assume that the final agreement will effectively protect workers' rights if the European Commission, from the very beginning, has proposed the above-mentioned soft formulations. There is also concern that the lack of a sanction mechanism will encourage the US to accept commitments but only in writing, as in the case of other trade agreements³³.

V. WHAT CAN BE DONE?

To gain a better understanding of the compliance of international trade agreements with the ILO standards, this study has examined some of them. Focusing specifically on free trade agreements concluded by the US, the EU agreements and the TTIP, this article has articulated a series of limitations of labour provisions. For example, as pointed out by Brown, the EU-Republic of Korea and EU-Peru/Colombia FTAs have tackled "tough issues associated with trade while capitalizing on economic ones", and have embraced the model of dual commitment - both to the ILO Declaration and to the core ILO labour standards. Therefore, these FTAs were considered stepping stones for the future of globalization³⁴. However, as discussed above, it is not sufficient to accept the model of dual commitment. It seems proved under several different circumstances that the compliance with international trade agreements in relation to ILO standards is not satisfactory. The parties' discretion in applying labour provisions should be limited.

The point here is to concentrate on the ways in which labour provisions may be strengthened to better promote ILO fundamental labour rights. Focusing specifically on the need to ensure compliance with international trade agreements in relation to ILO standards, I would like to articulate a series of goals in order to animate reforms and offer a set of proposals.

As the issues set out in this paper are - to a large extent - the task of governments and the EU's policy, it seems that lack of political will is an important obstacle to compliance. Moreover, there is little doubt that the EU should have pushed more on stronger provisions in the trade and sustainable development chapters. It is clear that language in these chapters should have been stronger, and a more decisive tone should have been used³⁵. However, even

33 More: TYC, A.: Workers' rights and transatlantic trade relations: the TTIP and beyond. In: *Economic and Labour Relations Review*, 2017, Vol. 28, No. 1, p. 113–128, doi: 10.1177/1035304617690971.

34 BROWN, R.C.: Promoting labour rights in the global economy: Could the United States' new model trade and investment frameworks advance international labour standards in Bangladesh? In: *International Labour Review. Special Issue: Enforcing Global Labour Rights*, 2016, Vol. 155, No. 3, p. 396.

35 For example, according to research conducted by Marx, Lein, and Brando, a considerable majority of the stakeholders interviewed in Brussels and Bogotá answered that the EU labour rights language in the EU-Colombia trade agreement is too broad to be meaningful. They added that "labour provisions were not formulated in a Specific Measurable Achievable

if we leave aside the debate over "stronger provisions" and focus on the EU's promotional approach, we come to the conclusion that the EU fails to seriously implement even this. The EU should insist more firmly on realising at least its soft approach³⁶.

Given the need to correct compliance shortcomings, I do not think different approaches to labour standards in the US and the EU can be upheld. On the one hand, the EU should include in its FTAs labour provisions that make the conclusion of a trade agreement conditional upon respect for particular labour standards and/or provisions that authorise sanctions if labour standards are infringed (pre-ratification and/or post-ratification conditionality). As rightly pointed out by Hepple, persuasion and conciliation will not function unless there is ultimately a sanction which can be invoked³⁷. On the other hand, following the EU framework, the US' model should obligate the US to comply with the Declaration and the ILO's core labour standards³⁸. Moreover, the ratification of core labour conventions should be mandatory.

It is also correct to support combining cooperation (e.g. in the form of technical assistance or funding) with binding enforcement and monitoring (e.g. by the partner countries, civil society, organisations such as the ILO, a new body which should be created and which could follow the model of the NAALC Secretariat)³⁹. It is worth noting that the parties to the FTAs should embrace a clear unitary dispute settlement and enforcement mechanism, which allows them to bring a claim⁴⁰.

At the margin, establishing Labour Development Plans as suggested by the ILO, seems too weak. According to this proposal, labour-related development objectives could be included in trade agreements. The idea employs combining, where appropriate, "labour development plans" with economic incentives, rather than sanctions. Thus, the regulatory focus of labour provisions would be placed on positive rather than negative conditionality⁴¹. Nevertheless, as rightly pointed out by Granger and Siroën, in certain circumstances, both types of sanctions - positive, such as preferential concessions or incremental aid to countries improving their labour standards, and negative, such as duties or import prohibition - can be used simultaneously⁴². But, trade sanctions cannot be eliminated.

The article also supports Ebert's claim, resulting from the analysis of the CETA, about the role of stakeholders in CETA's institutional setting. While it is admittedly true that the participation of trade unions is provided for under the chapters on Sustainable Development and Labour, their involvement under other chapters is up to the parties' discretion. However, it appears that the involvement of trade unions and related stakeholders should be integrated into CETA's institutional setting as a whole and should be mandatory for the parties. This is because the relevant risks for labour standards result from a variety of the agreement's chapters, eg. chapters on Cross-Border Trade in Services, on Regulatory Cooperation, on

Relevant and Time-bound (SMART) way, which hampers their monitoring, progress tracking and benchmarking". See: MARX, A., LEIN, B., BRANDO, N.: *The Protection...*, p. 606.

36 See more: ORBIE J., VAN DEN PUTTE L., MARTENS D.: *The Impact...*, p. 15.

37 HEPPLE, B.: *Labour Laws and Global Trade*, Oxford: Hart Publishing, 2005, p. 274.

38 BROWN, R.C.: *Promoting...*, p. 396.

39 See: ENGEN L.: *Labour Provisions in Asia-Pacific Free Trade Agreements*, Background paper no. 1/2017, Ninth Tranche of the Development Account Project. Enhancing the Contribution of Preferential Trade Agreements to Inclusive and Equitable Trade, Economic and Social Commission for Asia and the Pacific, United Nations 2017, pp. 61-63; VOGT J.S.: *The Evolution...*, *passim*.

40 BROWN, R.C.: *Promoting...*, p. 403. Similarly, analyzing the EU-Colombia trade agreement, Marx, Lein, and Brando identify the absence of a binding enforcement mechanism, and the lack of adequate engagement with Civil Society Organizations as factors hampering the agreement's "overall contribution when it comes to following up on, and contributing to, a better de facto compliance with labour provisions". See: MARX, A., LEIN, B., BRANDO, N.: *The Protection...*, p. 606.

41 INTERNATIONAL LABOUR ORGANIZATION: *Social...*, p. 97.

42 GRANGER, C., SIROËN, J.-M.: *Core Labour Standards in Trade Agreements: From Multilateralism to Bilateralism*. In: *Journal of World Trade*, 2006, Vol. 40, No. 5, p. 835.

Financial Services, on International Maritime Transport Services⁴³. The same can apply to other agreements.

Last but not least, to my mind, it is correct to support an interesting view presented by Marx, Brando and Lein who propose to strengthen the labour rights provisions in trade agreements by linking them to existing voluntary sustainability standards. The latter are an instrument to govern transnational supply chains. Most such initiatives have "an organization that defines social and ecological standards, and include a set of procedures to assess conformity with those standards. When products or production processes comply with the standards, a certificate is awarded which may or may not be used for external communication (a label)". It is argued that such a solution would allow the EU to better govern the global protection of labour rights through its trade agreements. It is predicted that this kind of linkage could close a regulatory gap since contracting partners do not have jurisdiction over each other's compliance with the agreed commitments, and it could help enforce labour standards through monitoring, sanctioning and withdrawing certificates. The level of accountability and credibility of these sustainability chapters could noticeably increase as an independent third party would be allowed to monitor and evaluate compliance with trade provisions. Besides, the responsibility for implementing the labour rights provisions in trade agreements - instead of relying only on states - would be expanded to firms as well. On the other hand, the integration of voluntary sustainability standards in trade agreements offers public regulators the opportunity to demand a strengthening of the quality of voluntary sustainability standards in terms of their design and procedures⁴⁴.

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Dohody o voľnom obchode, štandardy MOP, pracovné ustanovenia, súlad.

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43 EBERT, F.C.: *The Comprehensive...*, pp. 302, 328-329.

44 MARX, A., BRANDO, N., LEIN, B.: Strengthening Labour Rights Provisions in Bilateral Trade Agreements: Making the Case for Voluntary Sustainability Standards. In: *Global Policy*, 2017, Vol. 8, Supplement 3, pp. 78-79, 85.

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