LABOUR CLAUSES IN THE TPP AND TTIP: A COMPARISON WITHOUT A DIFFERENCE?

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This article provides a critical analysis of the labour clauses in trade agreements, including the Trans-Pacific Partnership *('TPP'). This analysis is based on four dimensions of labour clauses in trade agreements: their purposes, the legal nature of the clauses (whether binding or not), the substance of legal obligations imposed and the institutional processes provided for. The analysis is also grounded in the two dominant approaches to these clauses, the European Union and the pre-Trump United States approaches: the former can be understood as proposing a broad agenda based on promotional measures while the latter is underpinned by a narrow agenda based on conditional measures. The TPP's labour clause clearly adopts a pre-Trump US approach and the divergence between the EU and pre-Trump US approaches is highlighted by the labour clauses of the TPP and the proposed* Transatlantic Trade and Investment Partnership*. However, it is unclear whether this (possible) difference in approach will translates into a difference of impact on domestic labour standards. We argue that, for a number of reasons, there may be a general orientation to non-application of labour clauses in free trade agreements such as the TPP.*

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I A NEW ERA OF LABOUR PROTECTION THROUGH TRADE?

This article tackles the topic of labour clauses in trade agreements through an analysis of the labour clauses of the *Trans-Pacific Partnership* ('TPP')[1] and the

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1 *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force) ('TPP').

possible labour clauses for the now stalled *Transatlantic Trade and Investment Partnership* ('TTIP') between the European Union and the United States.[2] Both are key instances of 'mega-regional trade agreements' — the term the World Bank has adopted for 'regional agreements that have systemic, global impact'.[3] And in both cases, labour clauses have assumed significant importance. The European Commission proposed a chapter on 'trade and sustainable development' for TTIP — which centrally includes labour clauses — that it says 'offers the most ambitious provisions ever put forward on these issues to any trading partner'.[4] Referring to the labour clauses in TTIP, the United States government has said that:

> The United States and Europe already maintain high levels of protection for their workers. T-TIP should reflect this shared commitment, which may become a model for others to follow, and encourage even greater transatlantic cooperation.[5]

For its part, the Labour Chapter of the TPP is the most significant labour clause in a trade agreement concluded to date. After five years of negotiation, the TPP was concluded on 4 October 2015 amongst 12 countries (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam) representing 40 per cent of global GDP.[6] The TPP is significant not only for the amount of global trade and investment it (potentially) covers, but the approach it is said to have adopted in relation to international trade. Critics noted the significance of the TPP — a trade agreement that has been characterised as 'no ordinary deal' underpinned by a 'neoliberal market model'.[7] On the other side, the leaders of the TPP countries have said that the agreement provides 'a new and compelling model for trade in one of the world's fastest growing and most dynamic regions'.[8]

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[2] At the time of writing, there is a significant prospect that TTIP may not be concluded: see Arthur Nelsen, 'Leaked TTIP Documents Cast Doubt on EU–US Trade Deal', *The Guardian* (online), 2 May 2016 <https://perma.cc/8ZTA-ZTZU>. The TPP may also not come into effect as both the US presidential candidates have signalled opposition to the agreement: see Dan Roberts and Ryan Felton, 'Trump and Clinton's Free Trade Retreat: A Pivotal Moment for the World's Economic Future', *The Guardian* (online), 21 August 2016 <https://perma.cc/3E2M-R8NZ>.

[3] World Bank Group, 'Global Economic Prospects: Spillovers amid Weak Growth' (Report, International Bank for Reconstruction and Development, January 2016) 221.

[4] European Commission, 'EU to Pursue the Most Ambitious Sustainable Development, Labour and Environment Provisions in TTIP' (Media Release, IP/15/5993, 6 November 2015) <https://perma.cc/8H3W-HMDM>.

[5] Office of the United States Trade Representative, *Labor* <https://perma.cc/2GL4-E373>.

[6] Office of the United States Trade Representative, 'Trans-Pacific Partnership Ministers' Statement' (Press Release, 4 October 2015) <https://perma.cc/9VEY-KMV2>. The TPP has not yet entered into force. Parties have two years after the signing of the TPP to ratify the agreement: TPP art 30.5. The Parties have signed the TPP: New Zealand Ministry of Foreign Affairs and Trade, 'Trans-Pacific Partnership Ministers' Statement' (Press Statement, 4 February 2016) <https://perma.cc/8S2D-599U>. To enter into force, it has to be ratified by at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product of the original signatories in 2013: TPP art 30.5.

[7] Jane Kelsey, 'Introduction' in Jane Kelsey (ed), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Allen & Unwin, 2010) 9, 9.

[8] Australian Government, Department of Foreign Affairs and Trade, 'TPP Leaders' Statement — 18 November 2015' <https://perma.cc/6D4N-NJFE>.

Central to this 'new and compelling model for trade' is the improvement of labour standards. As a joint statement of the trade ministers of the TPP countries put it, '[w]e expect this historic agreement to promote … *strong labor* … protections'.[9] Key TPP signatories have echoed these sentiments. The US Government has said that the TPP 'will create a fairer and more level playing field for American businesses and American workers by raising labor standards across the Asia-Pacific';[10] the Australian Minister for Trade and Investment, has similarly said that '[t]he TPP's labour … [chapter] will support efforts to … improve labour rights'.[11] The significance of the Labour Chapter has also been underlined by the Legal Director of the International Trade Union Confederation who observed that '[t]he [TPP] labor chapter … will create a new template with broad geographic coverage and is likely to be used as a model elsewhere'.[12]

But despite the ambitions of their authors and the promise of their content, it is clear that both the TPP and TTIP are in serious trouble. There appears at least initially to have been a seismic shift in the approach to free trade and the manner of its delivery. TTIP was already foundering in the face of popular resistance in the European Union, even before the election of Donald Trump as President of the United States on a populist protectionist platform, hostile to free trade and the TPP. At the time of writing, it is unknown how this hostility will be reflected in US trade policy, and its implications for the TPP. In the same way it is unknown at this stage whether the new wave of populist protectionism marks the permanent end to the 'mega-trade deal', or whether it is simply a hiccup along the way. Nor is it clear what impact this hostility (whether temporary or permanent) will have on bilateral trade deals.

Against this dynamic uncertainty, we embark upon a study of labour clauses in free trade agreements, presenting arguments which transcend contemporary politics, using both the TPP and TTIP to illustrate more fundamental points. Our references to the 'US approach' in the pages that follow are to the approach adopted by the United States prior to the election of Donald Trump — the position post-Trump at the time of writing appears to be a work-in-progress.

II LABOUR CLAUSES IN TRADE AGREEMENTS

A *The (Uneven) Increase in Labour Clauses*

There has been a dramatic increase of trade agreements with labour clauses. According to a recent ILO study, only four trade agreements included labour clauses in 1995, but that number had increased to 21 in 2005. By 2013, 58 out of

[9] Office of the United States Trade Representative, 'Trans-Pacific Partnership Ministers' Statement' (Press Release, October 2015) <https://perma.cc/4T64-Q27Q> (emphasis added).

[10] Office of the United States Trade Representative, 'Chapter 19: Labour' on *The Trans-Pacific Partnership* (5 November 2015) <https://perma.cc/4E4N-B2E7>.

[11] Malcolm Turnbull and Andrew Robb, 'Historic Asia-Pacific Trade Agreement Opens New Era of Opportunities' (Media Release, 6 October 2015) <https://perma.cc/3448-BFFG>.

[12] Jeffrey S Vogt, 'The Evolution of Labor Rights and Trade — A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership' (2015) 18 *Journal of International Economic Law* 827, 835.

the 248 trade agreements notified to the WTO contained such clauses.[13] While trade agreements with labour clauses were concentrated in North–South trade agreements, the ILO study also noted an increasing number of South–South agreements that included such clauses.[14] Ronald Brown has similarly noted how, in contrast to US–Asia trade agreements, inter-Asian agreements tended not to include labour clauses.[15]

Such generalisations, however, need to be approached with a degree of care. Even amongst countries of the 'North', there is no uniformity of approach in terms of whether to *include* labour clauses into trade agreements, let alone the content of these clauses. Table 1 lists all the trade agreements to which Australia is a party and which are currently in force, and indicates whether a particular agreement includes labour clauses. This table shows how labour clauses are found only in a minority of the agreements, with only two out of the 10 agreements providing for such clauses (the *Australia–United States Free Trade Agreement* ('*AUSFTA*')[16] and the *Korea–Australia Free Trade Agreement* ('*KAFTA*')).[17]

Table 1: Trade Agreements and Labour Clauses (Australia)[18]

Agreement	Entry into Force	Labour Clauses?
Australia–New Zealand Closer Economic Relations	1 January 1983	No
Singapore–Australia Free Trade Agreement	28 July 2003	No
Australia–United States Free Trade Agreement	1 January 2005	Yes
Thailand–Australia Free Trade Agreement	1 January 2005	No
Australia–Chile Free Trade Agreement	6 March 2009	No
Malaysia–Australia Free Trade Agreement	1 January 2013	No
Korea–Australia Free Trade Agreement	12 December 2014	Yes
Japan–Australia Economic Partnership Agreement	12 January 2015	No

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13 International Labour Organization, International Institute for Labour Studies, *Social Dimensions of Free Trade Agreements* (revised ed, 2015) 19. See also Jordi Agustí-Panareda, Franz Christian Ebert and Desirée LeClercq, *Labour Provisions in Free Trade Agreements: Fostering Their Consistency with the ILO Standards System* (Background Paper, International Labour Office, March 2014) 8.

14 International Labour Organization, International Institute for Labour Studies, *Social Dimensions of Free Trade Agreements*, above n 13, 19–20.

15 Ronald C Brown, 'Asian and US Perspectives on Labor Rights under International Trade Agreements Compared' in Axel Marx et al (eds), *Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edward Elgar, 2015) 83, 103.

16 *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ch 18 ('*AUSFTA*').

17 *Korea–Australia Free Trade Agreement*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014) ch 17 ('*KAFTA*').

18 Table 1 is based on information found at: Australian Government, Department of Foreign Affairs and Trade, *Status of FTA Negotiations* <https://perma.cc/4M9G-DWBH>.

Table 1 (continued)

Agreement	Entry into Force	Labour Clauses?
ASEAN–Australia-New Zealand Free Trade Agreement[19]	1 October 2015	No
China–Australia Free Trade Agreement	20 December 2015	No

Table 2 does the same with the European Union. Of the 36 EU trade agreements to date that are presently in force, 16 contain labour clauses. While the frequency of these clauses increased in the 21st century, it is clear from Table 2 that not all of the agreements made during this time contain such clauses.

Table 2: Trade Agreements and Labour Clauses (European Union)

Agreement	Entry into Force[20]	Labour Clauses?
Switzerland	1 January 1973	No
Iceland	1 April 1973	No
Norway	1 July 1973	No
Syria	1 July 1977	No
Faroe Islands	1 January 1997	No
Palestinian Authority	1 July 1997	No
Tunisia	1 March 1998	No
South Africa	1 January 2000	Yes
Morocco	1 March 2000	No
Israel	1 June 2000	Yes
Mexico	1 October 2000[21]	No
Jordan	1 May 2002	Yes
Chile	1 February 2003 (trade portion)	Yes
Lebanon	1 April 2006[22]	Yes
Former Yugoslav Republic of Macedonia	1 April 2004	No
Egypt	1 June 2004	No
Algeria	1 September 2005	No

19 'ASEAN' refers to the 'Association of Southeast Asian Nations'. The parties to this agreement are: Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, Vietnam, Australia and New Zealand.

20 This column is based on data available from the European Commission website unless otherwise stated: see European Commission, *Agreements* (3 November 2016) European Commission: Trade <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/#_europe>.

21 *Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States and the United Mexican States*, signed 8 December 1997, 2165 UNTS 111 (entered into force 1 October 2000).

22 *Note concerning the Entry into Force of the Euro-Mediterranean Agreement Establishing an Association between the European Community and Its Member States and the Republic of Lebanon* [2006] OJ L 180/19.

Table 2 (continued)

Agreement	Entry into Force	Labour Clauses?
Bosnia and Herzegovina – Interim Agreement on Trade Related Matters	1 July 2008	No
Albania	1 April 2009	No
Cameroon	Signed in 2009[23]	Yes
Eastern and South African States[24]	Signed on 29 August 2009[25]	No
Serbia	1 February 2010	No
Montenegro	1 May 2010	No
Korea	13 December 2015[26]	Yes
Iraq	Signed on 11 May 2012[27]	Yes
Central America[28]	Signed on 29 June 2012	Yes
Colombia and Peru	Signed on 26 July 2012[29]	Yes

[23] Whilst the European Commission website indicates that the Cameroon agreement has only been signed, this Press Release from the EU suggests that the agreement has come into force: European Commission, 'The EU and Cameroon Implement an Economic Partnership Agreement' (Press Release, IP/14/884, 28 July 2014) <https://perma.cc/4YET-DX87>. See also the section titled 'EU and Central Africa' in European Commission, *Countries and Regions — Central Africa* (29 April 2016) European Commission: Trade <https://perma.cc/GZV5-3NNW>.

[24] The parties that form the 'Eastern and South African States' are Madagascar, Mauritius, the Seychelles and Zimbabwe: European Commission, *Countries and Regions — Eastern and Southern Africa (ESA)* (29 April 2016) <https://perma.cc/WB7H-LDQX>.

[25] The EU Treaty Database states that the Eastern and South African agreement has only been signed: European Union External Action Service, *Summary of Treaty* (13 January 2014) Treaties Office Database <https://perma.cc/SA4D-3934>. See also: European Council, *Interim Agreement Establishing a Framework for an Economic Partnership Agreement between the Eastern and Southern African States and Its Members States* <https://perma.cc/KJ75-4VP8>.

[26] *Notice concerning the Entry into Force of the Free Trade Agreement between the European Union and Its Member States and the Republic of Korea* [2015] OJ L 307/1.

[27] The European Commission website states that the trade portions of the Iraq treaty provisionally entered into force on 1 August 2012: European Commission, *Countries and Regions — Iraq* (8 September 2016) European Commission: Trade <https://perma.cc/68XT-5JK4>.

[28] The parties that form 'Central America' are: Panama, Guatemala, Costa Rica, El Salvador, Honduras, Nicaragua. The EU Trade Database states that the entry into force of the Central America agreement is still pending: European Union External Action Service, *Summary of Treaty* (15 April 2015) Treaties Office Database <https://perma.cc/SG3D-G5EK>. The European Commission webpage on Central America, however, states that the trade pillars of the agreement have been provisionally applied with respect to the following countries: 1 August 2013 — Honduras, Nicaragua, Panama; 1 October 2013 — Costa Rica, El Salvador; 1 December 2013 — Guatemala. See European Commission, *Countries and Regions — Central America* (1 June 2016) European Commission: Trade <https://perma.cc/32VR-FE4V>.

Table 2 (continued)

Agreement	Entry into force	Labour Clauses?
CARIFORUM–EU Economic Partnership Agreement[30]	Provisionally applied[31]	Yes
Papua New Guinea and Fiji	Only ratified by Papua New Guinea in May 2011[32]	No
Serbia[33]	1 September 2013	No
Bosnia and Herzegovina – Stabilisation and Association Agreement	1 June 2015	Yes
Ecuador	17 February 2015 (agreement published but not ratified	
Ukraine	1 January 2016 (trade component of association agreement)	Yes
Kosovo	1 April 2016	Yes
Georgia	1 July 2016	Yes
Moldova	1 July 2016	Yes

Table 3 charts the position in relation to US trade agreements. Here we observe the greatest degree of uniformity in terms of inserting labour clauses into trade agreements, with all trade agreements since (and including) the *North American Free Trade Agreement* (‘*NAFTA*’) containing such clauses.

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29 The EU Trade Database states that the Columbia and Peru agreement entered into force on 1 March 2013: European Union External Action Service, *Summary of Treaty* (9 January 2014) Treaties Office Database <https://perma.cc/LQG7-JFPV>. The European Commission webpage on the Andean Community states that the Columbia and Peru agreement has provisionally applied with Peru since 1 March 2013 and provisionally applied with Columbia since 1 August 2013: European Commission, *Countries and Regions — Andean Community* (13 June 2016) European Commission: Trade <https://perma.cc/7NAZ-G29R>.

30 The parties to this agreement are: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Suriname, Trinidad and Tobago, Dominican Republic, Haiti and the member states of the EU: European Commission, *Countries and Regions — Caribbean* (29 April 2016) European Commission: Trade <https://perma.cc/24HM-AR9T>.

31 The European Commission webpage for the Caribbean states that the agreement was signed in October 2008 and provisionally applied in December 2008: ibid.

32 The European Commission webpage for the Pacific states that Fiji ‘decided to apply the Agreement in July 2014’: European Commission, *Countries and Regions — Pacific* (29 April 2016) European Commission: Trade <https://perma.cc/SLM9-54JX>.

33 A superficial comparison of the 2013 Serbia agreement and the 2010 Serbia agreement was conducted. They appear to be substantively identical. The only noticeable difference discovered was that the 2013 agreement contained the signatures of the relevant parties. For further information on the entry into force of the Serbia agreement, see European Council, *Stabilisation and Association Agreement between the European Communities and Their Member States and the Republic of Serbia* <https://perma.cc/E9M3-WGQ7>.

Table 3: Trade Agreements and Labour Clauses (United States)[34]

Agreement	Entry into Force	Labour Clauses?
Israel	1 September 1985	No
NAALC under NAFTA[35]	1 January 1994[36]	Yes
Chile	1 January 2004	Yes
Singapore	1 January 2004	Yes
Australia	1 January 2005	Yes
Morocco	1 January 2006	Yes
Bahrain	11 January 2006	Yes
CAFTA–DR[37]	2006 (US, El Salvador, Guatemala, Honduras, Nicaragua); 2007 (Dominican Republic); 2009 (Costa Rica)[38]	Yes
Oman	1 January 2009	Yes
Peru	1 February 2009	Yes
Jordan	1 January 2010	Yes
Korea	15 March 2012	Yes
Colombia	15 May 2012	Yes
Panama	31 October 2012	Yes

[34] This table is based on information from the Office of the United States Trade Representative: Office of the United States Trade Representative, *Free Trade Agreements* <https://ustr.gov/trade-agreements/free-trade-agreements>.

[35] *North American Free Trade Agreement*, Canada–USA–Mexico, signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) ('*NAFTA*'). Official webpage for *NAFTA* text: NAFTA Secretariat, *North American Free Trade Agreement* (2014) <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>.

[36] NAFTA Now, *North American Free Trade Agreement* (9 August 2013) <https://perma.cc/3G6U-82GF>. The labour clauses of *NAFTA* are found in a supplementary or side agreement: *North American Agreement on Labour Cooperation*, Canada–USA–Mexico, signed 14 September 1993, [1994] CTS 4 (entered into force 1 January 1994) ('*NAALC*').

[37] *Central American Free Trade Agreement*, signed 5 August 2004, 43 ILM 514 (entered into force 1 January 2009).

[38] United States Department of Commerce, International Trade Administration, *Dominican Republic–Central America–United States Free Trade Agreement (CAFTA–DR)* (7 January 2015) export.gov <https://perma.cc/2LYQ-YMEL>.

III Key Dimensions

We can turn now from volume to content, and here we find a growing body of scholarship seeking to analyse the substance of these clauses. One point is abundantly clear — these clauses are characterised by significant diversity.[39] Four dimensions are of particular importance in understanding such diversity. These dimensions will be illustrated by reference to the labour clauses in *AUSFTA* and *KAFTA*.

The first dimension relates to the *purposes* of the labour clauses.[40] The (contested) purposes commonly attributed to these clauses are that they aim to reduce unfair competition in international trade by promoting a 'level playing field' in working conditions; and in doing so, prevent a 'race to the bottom' in terms of labour standards and 'social dumping' (the practice of using inferior working conditions to enhance product competitiveness). Associated with these aims is that of protecting the rights of workers, whether as labour rights and/or human rights.[41] More recently, the goal of promoting sustainable development has been added, with labour clauses allied to environmental standards.[42] An example here is found in the Preamble of *AUSFTA* which states the parties have resolved to '[i]mplement this *Agreement* in a manner consistent with their commitment to high labour standards, sustainable development, and environmental protection'.[43]

Of course, a distinction should be made between the stated and the actual purposes of the labour clauses. There can (and will often) be a gap between both. Concerns have been raised that such clauses are merely 'window dressing'.[44] Some commentators have also concluded, for one, that labour clauses are principally a strategy to make trade liberalisation more politically acceptable in

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[39] See, eg, Sandra Polaski, 'Protecting Labor Rights through Trade Agreements: An Analytical Guide' (2004) 10 *UC Davis Journal of International Law and Policy* 13; Sandra Polaski and Katherine Vyborny, 'Labor Clauses in Trade Agreements: Policy and Practice' (2006) 10(25) *Integration and Trade* 95; Jacques Bourgeois, Kamala Dawar and Simon J Evenett, *A Comparative Analysis of Selected Provisions in Free Trade Agreements* (Technical Report, Directorate-General of Trade, European Commission, October 2007); Bertram Boie, *Labour Related Provisions in International Investment Agreements* (Working Paper No 126, International Labour Office, 1 October 2012) 22–6; Agustí-Panareda, Ebert and LeClercq, above n 13, 7–8; International Labour Organization, International Institute for Labour Studies, *Social Dimensions of Free Trade Agreements*, above n 13, 21.

[40] See generally Jean-Marc Siroën, 'Labour Provisions in Preferential Trade Agreements: Current Practice and Outlook' (2013) 152 *International Labour Review* 85.

[41] For a critical analysis of these purposes, see Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (Routledge, 4th ed, 2013) 716–20.

[42] For a study of the use of unilateral trade measures for this purpose, see Olivier de Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Hart, 2015).

[43] *AUSFTA* Preamble.

[44] International Labour Organization, International Institute for Labour Studies, *Social Dimensions of Free Trade Agreements*, above n 13, v.

developed countries.[45] In this context, Lance Compa has said the following in relation to labour clauses under trade agreements:

> The argument can certainly be made that the US is bullying its trading partners into acceptance of a trade–labour linkage that is largely driven by domestic US politics and marked by eccentric American notions of international labour standards. And the argument would be largely correct.[46]

The second dimension turns on the *binding nature of these clauses*: do they merely provide exhortations and encouragement or are they drafted in mandatory terms, and do they impose obligations on the parties?[47] An example closer to the former end of the scale would be *KAFTA*, which like *AUSFTA* admittedly provides that:

> Each Party affirms its obligations as a member of the International Labour Organization … and its commitments under the *Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)* (hereinafter referred to as the '*ILO Declaration*').[48]

But also like *AUSFTA*, *KAFTA* then goes on to provide that:

> Each Party shall endeavour to adopt or maintain in its laws, regulations, policies and practices the fundamental principles and rights as stated in the *ILO Declaration*.[49]

This contrasts with the TPP where the obligation on parties to the agreement is pitched at a much higher level, whereby the parties 'shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the *ILO Declaration*'.[50] It also contrasts with the European Commission's proposed text for TTIP, which is rooted not only in the *ILO Declaration* of 1998, but also the *ILO Declaration on Social Justice for a Fair Globalization*.[51] In terms of obligations, the Commission proposed that 'each Party shall ensure that its laws and practices respect, promote, and realise within an integrated strategy in its whole territory' the various standards which it addressed.[52] Unusually, the latter are set out in some detail with reference to relevant ILO conventions and other instruments, including the *Universal Declaration of Human Rights*,[53] *International Covenant on Civil and Political*

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45 Christopher L Erickson and Daniel J B Mitchell, 'The American Experience with Labor Standards and Trade Agreements' (1999) 3 *Journal of Small and Emerging Business Law* 41.

46 Lance Compa, 'From Chile to Vietnam: International Labour Law and Workers' Rights in International Trade' in Gráinne De Búrca, Claire Kilpatrick and Joanne Scott (eds), *Critical Legal Perspectives on Global Governance: Liber Amircorum David M Trubek* (Hart, 2014) 158, 174.

47 Bourgeois, Dawar and Evenett, above n 39, 23–4; Boie, above n 39, 12–18.

48 *KAFTA* art 17.1. For the *ILO Declaration*, see *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, 86th ILC sess (adopted 18 June 1998).

49 Ibid art 17.1(1) (emphasis added).

50 TPP art 19.3(1).

51 *ILO Declaration on Social Justice for a Fair Globalization*, 97th ILC sess (adopted 10 June 2008).

52 European Union, 'Textual Proposal — Trade and Sustainable Development' (6 November 2015) art 4.2(a) <https://perma.cc/HM25-G2NE>.

53 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

Rights[54] and *International Covenant on Economic, Social and Cultural Rights*,[55] as well as a host of others, in a manner that seems unattractive for the United States, and consequently unlikely to survive.

The third dimension concerns the *scope and content of the labour rights* included. In 2015, two-thirds of the labour clauses referred to ILO instruments, with most referring to the *ILO Declaration* of 1998 and only 15 per cent of these clauses referring to the eight ILO fundamental conventions,[56] though it should be emphasised that the *ILO Declaration* is based on the latter conventions (which deal with freedom of association, forced labour, child labour and discrimination). As we have seen, these include *AUSFTA* and *KAFTA*, as well as the TPP, though the precise nature of the wording is different between the bilateral agreements on the one hand and the TPP on the other. Often overlooked, however, is that the agreements (including the three referred to in this paragraph) precede the commitment to respect the labour rights in the *ILO Declaration* of 1998, with a commitment to also affirm their obligation as members of the ILO. This means complying with the ILO constitutional principles (notably freedom of association) and complying with ratified conventions.

More recently, there has been an attempt to build on the four core ILO standards, with the TPP (but not *KAFTA*) including a commitment to 'adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health'.[57] The European Commission's proposals for TTIP go much further, explicitly building on the ILO's 'Decent Work Agenda', requiring the parties to protect health and safety at work and decent working conditions for all.[58] At the same time, the recent *European Union–South Korea Free Trade Agreement* imposes a duty to make 'sustained efforts' to ratify the

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[54] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[55] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

[56] International Labour Organization, International Institute for Labour Studies, *Social Dimensions of Free Trade Agreements*, above n 13, 107–8. The eight fundamental conventions are: *Convention concerning Freedom of Association and Protection of the Right to Organise (No 87)*, opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950); *Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No 98)*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951); *Convention concerning Forced or Compulsory Labour (No 29)*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932); *Convention concerning the Abolition of Forced Labour (No 105)*, opened for signature 25 June 1957, 320 UNTS 291 (entered into force 17 January 1959) ('*Convention 105*'); *Convention concerning Minimum Age for Admission to Employment (No 138)*, opened for signature 26 June 1973, 1015 UNTS 297 (entered into force 19 June 1976); *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182)*, opened for signature 17 June 1999, 38 ILM 1207 (entered into force 19 November 2000); *Equal Remuneration Convention (No 100)*, opened for signature 29 July 1951, 165 UNTS 303 (entered into force 23 May 1953); and *Convention concerning Discrimination in respect of Employment and Occupation Convention (No 111)*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960). Similarly, in 2013, more than four out of five trade agreements with references to ILO instruments referred primarily or exclusively to the 1998 *ILO Declaration*, while a fifth referred to specific conventions: Agustí-Panareda, Ebert and LeClercq, above n 13, 9–10.

[57] TPP art 19.3(2).

[58] See International Labour Organization, *Decent Work* <https://perma.cc/Q3F2-QFGV>.

eight fundamental ILO conventions[59] (Korea has ratified only four), an obligation repeated in the European Commission's proposals for TTIP, along with a surveillance mechanism to encourage progress with this proposed undertaking.[60] This would be challenging for the US, which has ratified only two of the eight fundamental conventions.

The fourth (and crucial) dimension concerns the *institutional processes* adopted in relation to the labour clauses. A threshold question here is whether these processes apply before the trade agreement is ratified (pre-ratification) or only after ratification (post-ratification).[61] There is also the issue of the institutions and agencies empowered with monitoring implementation and compliance with the labour clauses, in particular, whether there is an agency independent of the state parties such as the ILO provided for under the labour clauses.[62] The fourth dimension implicates a distinction between conditional and promotional elements of labour clauses in trade agreements. As explained by the ILO:

> In the case of conditional elements, labour standards requirements are linked to economic consequences, in the form of sanctions or, less frequently, incentives, which concern trade or other benefits, including technical cooperation. Promotional elements combine (binding or non-binding) commitments relating to labour standards with cooperative activities, dialogue, and monitoring.[63]

Conditional provisions subject the obligations under the labour clauses to a dispute-settlement mechanism, while labour clauses that rely exclusively upon promotional measures exempt these obligations from such a mechanism (which would tend to apply to other provisions of the trade agreement).[64] Here, *AUSFTA* and *KAFTA* provide a contrast which illustrates this distinction. The dispute-settlement processes under *AUSFTA* apply to its Labour Chapter.[65] Hence, this chapter provides for conditional provisions whereas *KAFTA* emphatically states that '[n]either Party shall have recourse to dispute settlement under this Agreement for any matter arising under this [Labour] Chapter'[66] which is an instance of promotional measures.

A *The EU and US approaches*

The foregoing suggests that not only is there a diversity of labour clauses in trade agreements, but that there are important differences in the approaches of the US and the EU, the two main authors of these arrangements. The increase

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59 *European Union–South Korea Free Trade Agreement*, signed 6 October 2010, [2011] OJ L 127/1 (entered into force 13 December 2015) art 13.4(3).

60 Ibid arts 13.12–13.16.

61 International Labour Organization, International Institute for Labour Studies, *Social Dimensions of Free Trade Agreements*, above n 13, ch 2. See discussion in relation to the TPP: United States Labor Advisory Committee on Trade Negotiations and Trade Policy, *Report on the Impacts of the Trans-Pacific Partnership* (2 December 2015) 66–7 <https://perma.cc/7QKC-WG6K>.

62 Bourgeois, Dawar and Evenett, above n 39, 29–33.

63 International Labour Organization, International Institute for Labour Studies, *Social Dimensions of Free Trade Agreements*, above n 13, 21.

64 Bourgeois, Dawar and Evenett, above n 39, 29–33.

65 *AUSFTA* art 18.4 (linking to ch 21, 'Institutional Arrangements and Dispute Settlement').

66 *KAFTA* art 17.6.

in labour clauses in trade agreements since the 1990s has largely been attributed to the foreign policies of the US and EU.[67] In the case of the EU, commentators have noted how the EU is increasingly willing to exercise *power through trade* — to use its market power to 'export' its laws, standards, values and norms (as distinct from exercising *power in trade*, that is, to use market power to secure access to export markets).[68]

The question of power highlights how the geopolitics of the international trade regime deeply affect whether labour clauses are adopted in trade agreements as well as their content. In this respect, the ability of the EU and US to effect their policies in relation to labour clauses in trade agreements is not unrelated to the level at which negotiations are being conducted. The proliferation of bilateral, regional and plurilateral trade agreements is commonly traced to the stalled discussions at the multilateral level.[69] The shift away from multilateral negotiations, however, alters the power dynamics between negotiating states, potentially increasing the vulnerability of weaker trading nations to demands of the stronger nations; the WTO has observed in relation to this shift that '[i]t may be that new international trade rules are being negotiated and decided outside the WTO in a setting where differences in power are greater'.[70]

The EU and US approaches continue to evolve,[71] post-Brexit and under Trump. At the same time, it is nevertheless possible to identify their current approaches: the EU approach from the labour clauses it has proposed for TTIP (and associated material) in a draft chapter on 'Trade and Sustainable Development';[72] and the pre-Trump US approach from the 2007 Bipartisan Trade Deal[73] and its negotiating objectives in relation to the TPP.[74] Table 4 below summarises these approaches in relation to the purposes and obligations of the labour clauses, while Table 5 does the same in relation to the institutional processes of the labour clauses.

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[67] Vogt, above n 12, 827. Canada has also been active in negotiating labour clauses into its trade agreements.

[68] Axel Marx et al, 'Global Governance through Trade: An Introduction' in Jan Wouters et al (eds), *Global Governance through Trade: EU Policies and Approaches* (Edward Elgar, 2015) 1, 4. The distinction between exercising power in trade and through trade originates from an article by Meunier and Nicolaïdis: Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a Conflicted Trade Power' (2006) 13 *Journal of European Public Policy* 906.

[69] Marx et al, above n 68, 2.

[70] World Trade Organization, *World Trade Report 2011: The WTO and Preferential Trade Agreements — From Co-Existence to Coherence* (Report, 2011) 187–8. See also Australian Productivity Commission, *Trade & Assistance Review 2013–2014* (Report, 24 June 2015) 15.

[71] See Bob Hepple, *Labour Laws and Global Trade* (Hart, 2005) ch 5; Compa, above n 46; Paula Church Albertson and Lance Compa, 'Labour Rights and Trade Agreements in the Americas' in Adelle Blackett and Anne Trebilcock, *Research Handbook on Transnational Labour Law* (Elgar, 2015) 474; Vogt, above n 12.

[72] European Union, 'EU Textual Proposal — Trade and Sustainable Development', above n 52.

[73] Office of the United States Trade Representative, 'Trade Facts' (Factsheet, May 2007) <https://perma.cc/N2R7-FAWB>.

[74] Office of the United States Trade Representative, *Trans-Pacific Partnership: Summary of US Objectives* <https://perma.cc/N7AL-AMM5>.

Table 4: The Present US and EU Approaches to Purposes and Obligations of Labour Clauses and Trade Agreements

	US Approach	**EU Approach**
Purposes of labour clauses	• Ensuring 'level playing field' • Ensuring respect for worker rights	• Promoting sustainable development • Upholding existing labour standards • Promoting labour standards globally
Obligations		

International labour standards	• Adopt and maintain in laws and policies principles stated in 1998 *ILO Declaration*
	• Violation only when occurs in a manner affecting trade or investment between the parties
		• Support realisation of ILO 'Decent Work Agenda'
		• In accordance with 1998 *ILO Declaration*, laws and practices to respect, etc 'the internationally recognised core labour standards, which are the subject of the fundamental ILO *Conventions*'
		• Obligation above elaborated through:
		  ○ identification of key principles; and
		  ○ stipulation of specific obligations (including promoting world-wide implementation of the principles)
		• Sustained efforts to ratify fundamental ILO conventions and 'priority and other ILO Conventions that are classified as up to date by the ILO and their Protocols'
		• Effective implementation of ratified ILO conventions (bearing in mind Recommendations)
		• '[C]onsult and cooperate as appropriate' in relation to 'cooperation with and in third countries' in relation to ILO core labour standards and fundamental ILO conventions

Minimum level of protection (apart from obligations relating to international standards)	• Laws establishing 'acceptable conditions of work'	• Domestic policies and laws to 'provide for and encourage high levels of protection' • Parties to 'strive to continue to improve those policies and laws and their underlying levels of protection' • Laws to protect health and safety • Laws to protect decent working conditions

Obligations	**US Approach**	**EU Approach**
Waiver and derogation	• Not to waive or derogate from labour laws in a manner that affects trade or commerce	• Not to waive or derogate from labour laws as an encouragement for, or in a manner affecting, trade or commerce • '[V]iolation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage'
Protectionism	• No	• '[L]abour standards should not be used for … protectionist trade purposes'
Enforcement	• Obligation to effectively enforce labour laws • Violation only when non-enforcement occurred: ○ through a sustained or recurring course of in/action; and ○ in a manner affecting trade or investment between parties	• '[R]ecognise the need for an adequate system of labour inspections'
Procedural guarantees	• No	• No
Transparency and public participation in development and implementation of labour laws	• No	• Requirement of transparency and public participation
Corporate social responsibility	• No	• Promote corporate social responsibility including through adherence to internationally agreed guidelines and principles
Voluntary sustainability assurance schemes	• Discourage trade in goods by forced labour	• Encourage voluntary sustainability assurance schemes

Table 5: The Present US and EU Approaches to Institutional Processes of Labour Clauses in Trade Agreements

	US Approach	**EU Approach**
Pre-ratification mechanisms	• Has been required of some countries	• No
Post-ratification monitoring and enforcement mechanisms		
Independent agency	• No	• EU principal emphasis on promotional measures • TTIP proposal yet to be released
Domestic mechanisms	• Mechanisms for public to raise concerns with obligation on governments to consider and respond	
Dialogue between parties	• Consultative mechanism	
Dispute-settlement processes and remedies	• State–state processes • Same as applies to other obligations in the trade agreements	

Table 4 highlights how the scope of the labour clauses differ significantly under the EU and US approaches with the former adopting a far broader agenda, at least in its proposals for TTIP (and to a lesser extent the *Comprehensive Economic Trade Agreement*) ('*CETA*'), if not in the agreement with Korea. This is evident in two ways. First, unlike the US approach, the EU approach to TTIP proposes obligations that go beyond the *ILO Declaration* of 1998 to extend to other ILO instruments, including the fundamental ILO conventions and also to key UN conventions; second, public participation in the development and implementation of labour laws is more visible in the EU approach, but not so with the US approach (at least ostensibly — though the significance of this in practice would be contested by activists). Both these aspects perhaps reflect widespread political anxiety about the trade agreements (with TTIP being particularly controversial) and the need to convince a sceptical public about the virtues of the arrangements.

The broader EU agenda also provides for more detail than the US approach. The US approach is restricted to the *ILO Declaration* of 1998 (due in no small part to its non-ratification of six out of the eight fundamental ILO conventions).[75] The EU approach also hinges upon the 1998 *ILO Declaration* and the four areas it covers (freedom of association and right to collective bargaining; elimination of forced or compulsory labour; effective abolition of child labour; and equality and non-discrimination in respect of employment). The EU's proposed labour clauses for TTIP, however, go beyond the 1998 *ILO*

[75] Of the eight, the US has only ratified *Convention 105* and *Convention 182*: see International Labour Organization, *Ratifications of Fundamental Conventions by Country* <https://perma.cc/2MTC-KFZ4>.

Declaration to refer to the various conventions and stipulate key principles and specific obligations in these areas.[76]

Table 5 summarises how the two approaches deal with institutional processes relating to the labour clauses. And again there is a notable difference. Table 5 indicates that, while there are promotional elements in the US approach (for example, dialogue between the parties), it is strongly based on conditional measures both at the pre-ratification and post-ratification stages.[77] While the EU's proposal in relation to institutional processes for TTIP's labour clauses has yet to be released, its traditional emphasis has been on promotional measures.[78]

In sum, the EU approach is one of a *broad agenda based on promotional measures*, while the US approach can be characterized as one of a *narrow agenda based on conditional measures.*

IV THE LABOUR CLAUSES IN THE TPP AND TTIP

A *The Labour Chapter of the TPP*

1 *Purposes and Obligations*

According the Preamble of the TPP, one of the key goals of the agreement is to:

> *PROTECT* and enforce labour rights, improve working conditions and living standards, strengthen cooperation and the Parties' capacity on labour issues.[79]

The key article concerning obligations of parties in relation to international labour standards is art 19.3.1 which provides that (footnote omitted):

> Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the *ILO Declaration*:
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour and, for the purposes of this Agreement, a prohibition on the worst forms of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation.

The Labour Chapter also imposes obligations on TPP parties to provide a minimum level of labour protection (beyond the obligations relating to the foregoing international labour standards) by requiring them to 'adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and

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[76] European Union, 'EU Textual Proposal — Trade and Sustainable Development', above n 52, arts 5–8.

[77] For US emphasis on conditional measures, see International Labour Organization, International Institute for Labour Studies, *Social Dimensions of Free Trade Agreements*, above n 13, ch 2.

[78] This does not mean that there are not detailed supervision and enforcement mechanisms for obligations that are expected to be binding, as in the case of *Comprehensive Economic Trade Agreement* between Canada and European Union: see text accompanying ns 155–8.

[79] TPP Preamble (emphasis in original).

occupational safety and health'.[80] This obligation is, however, a 'soft' obligation with 'acceptable conditions of work as determined by that Party'.[81] This obligation and that imposed by art 19.3.1 in relation to the 1998 *ILO Declaration* do not apply generally. Violation of these obligations only occurs when a party 'has failed to adopt or maintain a statute, regulation or practice in a manner affecting trade or investment between the Parties'.[82]

The Labour Chapter of the TPP also commits parties not to waive or derogate from their labour laws in a manner that affects trade or commerce when such waiver or derogation is inconsistent with a right as stated in the 1998 *ILO Declaration* or weakens or reduces adherence to a right as stated in the *ILO Declaration* and 'acceptable conditions of work' in a special trade or customs area.[83] On the flip side, the parties are not to use labour standards 'for protectionist trade purposes'.[84] In terms of enforcement, parties are prohibited from failing 'to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties'.[85] The Labour Chapter also imposes obligations in terms of procedural guarantees with parties obliged to promote public awareness of their labour laws[86] and to adhere to a series of requirements relating to access to and conduct of proceedings for the enforcement of labour laws.[87]

Finally, the Labour Chapter of the TPP provides for two other 'soft' obligations: parties are obliged to 'endeavour to encourage' the adoption of corporate social responsibility initiatives[88] and to discourage, through initiatives it considers appropriate' the importation of goods produced in whole or in part by forced or compulsory labour.[89]

2 *Institutional Processes*

The TPP does not set up pre-ratification mechanisms in relation to its Labour Chapter. The US has, however, reached bilateral agreements with Brunei, Malaysia and Vietnam which commit the latter three countries to detailed and significant changes of their labour laws prior to the TPP entering into force[90] and subject these commitments to the dispute-settlement mechanisms under the

[80] Ibid art 19.3(2).
[81] Ibid ch 19 n 5.
[82] Ibid ch 19 n 4.
[83] Ibid art 19.4.
[84] Ibid art 19.2(2).
[85] Ibid art 19.5(1).
[86] Ibid art 19.8(1).
[87] Ibid art 19.8.
[88] Ibid art 19.7.
[89] Ibid art 19.6.
[90] *Brunei Darussalam–United States Labour Consistency Plan*, signed 4 February 2016 (not yet in force) cl VII(1); *Malaysia–United States Labour Consistency Plan*, signed 4 February 2016 (not yet in force) cl VII(1); *United States–Viet Nam Plan for the Enhancement of Trade and Labour Relations*, signed 4 February 2016 (not yet in force) cl VII(1). See also US Trade Representative, 'Chapter 19: Labour', above n 10.

TPP.[91] These agreements are relatively detailed — as a simple comparison, the Labour Chapter comprises 13 pages while the 'Labour Consistency Plans' for Brunei, Malaysia and Vietnam are respectively 5, 11 and 10 pages long. And in contrast to the latter, the bulk of the former is concerned with monitoring and surveillance rather than the substantive obligations.

In terms of post-ratification monitoring and enforcement mechanisms, the Labour Chapter provides for three distinct processes: domestic mechanisms; dialogue between the parties; and dispute settlement. With domestic mechanisms, parties are to designate contact points in relation to the Labour Chapter,[92] with these contact points being required to receive and consider written submissions from members of the public of the parties on matters related to the chapter.[93] In addition, the parties are required to establish, maintain or consult a national labour consultative body (or similar mechanism) for members of its public to provide their views on matters related to this chapter.[94] These political processes are to be the principal domestic avenue for the public of TPP parties to raise issues related to the Labour Chapter, as the TPP (generally) prohibits parties from providing a domestic right of action against TPP parties for breaching the agreement.[95]

The Labour Chapter establishes two mechanisms in relation to dialogue between the parties. First, it envisages that the TPP Parties will cooperate on matters relating to the chapter and provides a long list of activities and topics on which they can cooperate.[96] Second, it sets up a mechanism for 'cooperative labour dialogue', a process for parties to discuss specific matters arising between them. Notably, this process provides for public engagement and its outcome is to be made public unless the parties engaged in dialogue decide otherwise.[97] Thereafter, the dispute-settlement processes of the Labour Chapter comprises two stages. The first stage is 'labour consultations' between the disputing parties,[98] while the second stage involves the general dispute-settlement procedures under ch 28 of the TPP. These stages are sequential, in that there is no recourse to the general dispute-settlement procedures until 60 days have elapsed after the receipt of a request for labour consultations;[99] and the parties have sought first to resolve matter through these consultations.[100]

In terms of ch 28 of the TPP, its procedures are detailed and lengthy. Notably, however, only states party to the agreement may invoke these procedures — there is no opportunity for them to be engaged by a union or a

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[91] *Brunei Darussalam–United States Labour Consistency Plan*, signed 4 February 2016 (not yet in force) cl VII(3); *Malaysia–United States Labour Consistency Plan*, signed 4 February 2016 (not yet in force) cl VII(3); *United States–Viet Nam Plan for the Enhancement of Trade and Labour Relations*, signed 4 February 2016 (not yet in force) cl VII(4). See also Office of the United States Trade Representative, 'Chapter 19: Labour', above n 10.

[92] TPP art 19.13(1).

[93] Ibid art 19.9(1).

[94] Ibid art 19.14(2).

[95] Ibid art 28.22.

[96] Ibid art 19.10.

[97] Ibid art 19.11.

[98] Ibid art 19.15(13).

[99] Ibid art 19.15(12). This requirement is similar to the one that applies generally to the establishment of a panel under ch 28: see at art 28.7(1).

[100] Ibid art 19.15(13).

non-governmental organisation. For the purpose of this article, it suffices to note several aspects of these procedures. Disputes under this chapter are determined by a panel of three members with the complaining party (or parties) and responding party (or parties) appointing one panellist each and the chair of the panel being appointed with agreement of the disputing parties in the first instance.[101] In relation to disputes concerning the Labour Chapter, panellists other than the chair are to have expertise or experience in labour law or practice unless selected from the roster (which is agreed to by all parties).[102]

The functions of a panel include: making such findings, determinations and recommendations as necessary for the resolution of the dispute.[103] Its rules of procedures include a requirement for public hearings and an obligation upon the panel to consider requests from non-governmental entities to provide written views; disputing parties are also to publicly release their submission as soon as possible after they are filed and no later than before the final report of the panel is issued.[104] A panel drafts an initial report which is submitted to the disputing parties; the parties also have the opportunity to submit comments on this report.[105] It subsequently presents a final report which is publicly released.[106] Disputing parties are obliged to implement the final report[107] with compensation and trade sanctions in the form of suspension of benefits under the TPP available in the event of non-implementation.[108]

The TPP Labour Chapter does not provide for an agency independent of the parties. In particular, the ILO does not have a mandatory role under the chapter: cooperative activity amongst the parties *may* involve the ILO;[109] cooperative labour dialogue *may* involve the parties deciding upon independent verification of compliance or implementation by the ILO;[110] and the parties 'shall, *as appropriate*' liaise with the ILO.[111] Rather, the oversight body is a Labour Council comprising senior governmental representatives which is entrusted with various functions including: considering matters relevant to the chapter, reviewing reports from (domestic) contact points and reviewing the implementation of the Labour Chapter five years after the agreement enters into force.[112] In discharging its functions, the Labour Council is to provide a means for receiving and considering the views of interested persons.[113]

3 *An American Approach to Labour Clauses*

Table 6 makes clear how the TPP Labour Chapter largely corresponds to the current US approach to labour clauses in trade agreements.

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[101] Ibid art 28.9.
[102] Ibid art 28.9(5)(a).
[103] Ibid art 28.12(1).
[104] Ibid art 28.13.
[105] Ibid art 28.17.
[106] Ibid art 28.18.
[107] Ibid art 28.19.
[108] Ibid art 28.20.
[109] Ibid art 19.10(3).
[110] Ibid art 19.11(6)(b).
[111] Ibid art 19.12(9) (emphasis added).
[112] Ibid art 19.12.
[113] Ibid art 19.14(1).

Table 6: The TPP Labour Chapter and the US Approach to Labour Clauses in Trade Agreements

	TPP Labour Chapter
Purposes of labour clauses	Similar to US approach
Obligations	
International standards	Identical to US approach
Minimum level of protection (apart from obligations relating to international standards)	Similar to US approach
Waiver and derogation	Narrower than US approach as limited to rights as stated in 1998 *ILO Declaration* and 'acceptable conditions of work'
Protectionism	Obligation in addition to US approach
Enforcement	Identical to US approach
Procedural guarantees	Obligation in addition to US approach
Transparency and public participation in development and implementation of labour laws	Similar to US approach
Corporate social responsibility	Obligation in addition to US approach
Voluntary sustainability assurance schemes	Identical to US approach
Institutional processes: Pre-ratification mechanism	Consistent with US approach
Institutional processes: Post-ratification monitoring and enforcement mechanisms	
Independent agency	Similar to US approach
Domestic mechanisms	Similar to US approach
Dialogue between parties	Similar to US approach
Dispute-settlement processes and remedies	Similar to US approach

As indicated by Table 6, most aspects of the TPP labour chapter are identical or similar to the US approach.[114] The obligations in relation to protectionism and corporate social responsibility are in addition to those proposed by this approach, but these are not obligations of significance: the obligation on 'protectionism' may be unenforceable given the lack of definition as to what is 'protectionism', and the obligation in relation to corporate social responsibility is merely a very 'soft' obligation to 'endeavour to encourage'.

There are two areas of departure from the US approach which are of greater significance. The first concerns waiver and non-derogation and results in weaker labour protection under the TPP: while the US approach proposes obligations in relation to waiver and non-derogation that apply to all labour laws, the TPP's Labour Chapter confines it much more narrowly to inconsistency with rights

[114] The US Labor Advisory Committee on Trade Negotiations and Trade Policy has said that '[t]he TPP's Labor Chapter broadly meets the standards of the "May 10" Agreement': United States Labor Advisory Committee on Trade Negotiations and Trade Policy, above n 61, 50. See also discussion in Vogt, above n 12, 835–6.

under the 1998 *ILO Declaration* and in special trade zones, the weakening of these rights or 'acceptable conditions of work'.[115] The second area of departure, obligations concerning procedural guarantees, on the other hand, results in more stringent obligations, as the US approach does not propose any such obligations.

The strong correspondence between the TPP's Labour Chapter and the US approach is hardly a matter of coincidence. The US was clearly the dominant party — by far — in the TPP negotiations. As Jane Kelsey noted before the TPP was concluded, '[t]here is really only one certainty' with the [TPP] — that US trade strategy and negotiating demands will determine the shape of negotiations and the prospects for a final agreement'.[116] The US government itself has characterised the TPP as the opportunity for America to write 'the rules of the road' in Asia.[117]

With the labour clauses in particular, the US government has said that the 'TPP helps ensure that the global economy reflects our interests and values by requiring other countries to play by fair wage, safe workplace, and strong environmental rules that we help set'.[118] The US Labor Advisory Committee on Trade Negotiations and Trade Policy, a statutory body comprising of union officials, has argued in relation to the TPP's Labour Chapter that '[t]he core part of the Chapter is a mere copy' of the labour clauses in the US–Peru trade agreement.[119]

The TPP does not merely correspond to the US approach — *it adopts the US approach*.

B *The Labour Chapter of TTIP: State of Negotiations*

At the time of writing, discussion of labour clauses in TTIP is highly speculative, with the very existence of TTIP imperilled at least for the time being. According to recent EU reports on TTIP negotiations, however, the process of textual consolidation of the EU and US proposals has been completed, with the most recent report on negotiations on TTIP's labour clauses stating that:

> On labour, the EU and the US concurred on the importance of including in the text commitments related to the International Labour Organisation (ILO) core labour standards, as well as to effectively enforce, and not derogate from, their respective labour laws. Provisions ensuring protection for health and safety at work and decent working conditions were also identified as an area of interest to both sides. Furthermore, the EU and the US agreed on TTIP being a useful platform for supporting cooperation on trade and labour matters in third countries, and discussed options in this regard.[120]

The latter report underlines how embryonic the negotiations are in relation to TTIP's labour clauses. While it indicates three areas where the parties have

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[115] See text above accompanying n 83.

[116] Kelsey, above n 7, 12.

[117] Office of the United States Trade Representative, *The Trans-Pacific Partnership Agreement* <https://ustr.gov/tpp/>.

[118] Ibid.

[119] United States Labor Advisory Committee on Trade Negotiations and Trade Policy, above n 61, 65.

[120] European Commission, *Report of the 13th Round of Negotiations for the Transatlantic Trade and Investment Partnership* (2016) 15 [3.1] <https://perma.cc/R6KD-AZT9>.

agreed to include commitments — the ILO core labour standards, effective enforcement and non-derogation — it says nothing as to the nature of these commitments. Further, it is difficult to speculate what the likely areas of agreement might be between the EU and the US because the US proposal has not been made public. Its negotiating objective in relation to these clauses is highly vague and is worded as follows:

> We seek to obtain *appropriate* commitments by the EU with respect to internationally recognized labor rights and effective enforcement of labor laws concerning those rights, consistent with US priorities and objectives, and establish procedures for consultations and cooperation to promote respect for internationally recognized labor rights.[121]

What is perhaps safe to say is that if TTIP had been concluded, it would not only have adopted the US approach to labour clauses, but it would also have drawn on elements of the EU approach. Given that the Labour Chapter in the TPP adopted the US approach, the probable incorporation of (parts of) the EU approach into the labour clauses of TTIP suggests that the labour clauses in these two agreements would have been different had TTIP been concluded and accepted.

V A Formula for Ineffective Labour Standards? (Or Why We Might End Up with American Rules)

A *Factors Determining the Impact of Labour Clauses*

The labour chapters of the TPP and the proposed TTIP raise questions about the likely implications of the labour clauses in trade agreements as regulatory instruments at the national level. In particular, is it likely that they would raise standards? The answer is likely in turn to depend on a complex range of factors, including the steps taken by the parties to implement the clauses domestically, as well as monitoring their compliance by other signatories. This would no doubt be influenced in turn by the level of domestic support for the labour clauses, together with the extent and intensity of the regulatory effort required for the signatories to implement the clauses.

Effectiveness is also likely to be influenced by the disparity in the level of labour standards amongst the signatories: those with lower standards are less likely to monitor — let alone complain about — the lack of compliance with the labour clauses by those with higher standards; conversely, signatories with higher standards may be more likely to be concerned about non-compliance by signatories with lower labour standards. Cutting across all these factors is the crucial question of the power relations amongst the signatories — the more powerful countries are in a position to not only shape (or dictate) the content of these labour clauses, but also determine the nature and extent of their compliance.

These power relations may vary according to the parties to the agreement. In the case of the TPP and the bilateral US agreements, the dominant partner will generally be the United States, which will have a key role to play in ensuring

[121] Office of the United States Trade Representative, *Labor*, above n 5 (emphasis added).

enforcement. But in the case of the proposed TTIP, it is unclear to what degree the US would be the dominant party in an agreement that is more likely to be closer to an agreement of equals (at least in so far as the EU is concerned, though not in so far as individual EU states are concerned). Here the power dynamics may be different, in the sense that the US would be poorly placed to demand compliance of EU member states that fall short of their obligations because the US itself is in breach of those standards. There may also be less reluctance to make retaliatory complaints leading to outcomes with which the United States, for domestic political reasons, could not comply, as we shall see below.

B *Labour Standards and Inactive State Power*

1 *A General Orientation to Non-Application*

Given all these factors, we suggest that there will be a *general orientation to non-application* of the labour clauses — whatever their specific textual content. This argument is based upon the decisive character of power relations between states when it comes to the application of these clauses. With the TPP, it would be the US as the dominant party which would profoundly shape the orientation of all TPP parties to the application of the Labour Chapter, with four factors relating specifically to the United States being likely to give rise to a general orientation to non-application towards the TPP's labour clauses.

First, although the US has not ratified either of the core freedom of association conventions, it has been found by the ILO's Committee on Freedom of Association to be in breach of the fundamental constitutional principle of freedom of association on which those conventions are based.[122] In the meantime, the US has ratified only two of the eight conventions by which the 1998 *ILO Declaration* is informed.[123] Moreover, the US is quite clearly in breach of the *Declaration*, and this is important in view of the fact that the latter has been incorporated into the TPP's Labour Chapter, as pointed out above. In the first report under the follow-up procedure established under the *Declaration*,[124] the ILO identified three areas of concern in relation to US compliance with its obligations,[125] and the US Labor Advisory Committee on

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[122] For the purposes of clarification, the US has not ratified *Convention 87* or *Convention 98* and so is not subject to regular scrutiny by the ILO Committee of Experts on the Application of Conventions and Recommendations. But as an ILO member it is subject to the jurisdiction of the more recently established ILO Committee on Freedom of Association, which hears complaints that members have violated the freedom of association principles by which they are bound by the *ILO Constitution*.

[123] These are *Convention 105* and *Convention 182*. The USA has ratified only 14 conventions.

[124] On the follow-up procedure, see International Labour Organization, *ILO Declaration of Fundamental Principles and Rights at Work and Its Follow-Up*, 86th ILC sess (adopted 18 June 1998, annex revised 15 June 2010) annex.

[125] In addition to the *Employee Free Choice Act* jurisprudence referred to below, see also International Labour Organization, 'Your Voice at Work: Global Report under the Follow-Up to the Declaration on Fundamental Principles and Rights at Work' (Report, 2000) <https://perma.cc/AT8W-ATAF>. See especially at [74], [103]–[104], highlighting restrictions in agriculture, strike restrictions on state employees and the use of replacement labour in all strikes respectively.

Trade Negotiations and Trade Policy has since acknowledged that 'the US is out of compliance in a number of ways with fundamental labor rights'.[126]

The second factor is the toxic counterpart of the first — the official US position is that it is compliant with the 1998 *ILO Declaration*, and is in denial that it is in breach. This is clear from the 2007 bipartisan trade deal and its emphasis on 'United States Compliance with the *ILO Declaration*'.[127] There has also been no intimation by the US government that committing to the TPP's Labour Chapter requires any action on the part of the United States — the clear implication being that the US is compliant.

This brings us to the third factor. Full compliance with the 1998 *ILO Declaration* by the US is unlikely, if not impossible, because of domestic political constraints, as most clearly revealed by Obama's failure (albeit for the want of a single vote) to make progress with his *Employee Free Choice Act* ('*EFCA*').[128] This was a modest measure which would have addressed some of the rigidities of the *National Labor Relations Act of 1935*,[129] for example by allowing 'card check' rather than elections to secure certification as a bargaining agent. Even so, the *EFCA* would not have taken the US all the way to compliance with ILO freedom of association standards.[130]

The fourth factor militating against compliance is that it is very unlikely that other state parties would require the US to comply with provisions of the TPP's Labour Chapter. This could be for fear of US power or because the state party itself is not compliant. It is telling here that despite the many labour clauses in the trade agreements to which the US is a party, no state party has initiated processes requiring the US to comply with the 1998 *ILO Declaration*.[131]

In the case of TTIP, had it got up there may have been less reluctance to bring a complaint for this latter reason, but there would be other factors inducing restraint. So while it would be no doubt galling to many EU member states that the US is so transparently in breach of ILO standards, the same is true of EU member states, as well as EU law itself. Neither the EU members nor the EU are thus in any position to complain.

So far as the member states are concerned, the United Kingdom is a notorious example of non-compliance with ILO standards,[132] albeit that the United Kingdom is poised to leave the EU following a referendum in June 2016. Nevertheless, as recently as 2016 (at the time TTIP negotiations were taking place), the ILO Committee of Experts told the British government that proposed trade union legislation would if enacted violate the *Convention concerning Freedom of Association and Protection of the Right to Organise* ('*ILO*

[126] See United States Labor Advisory Committee on Trade Negotiations and Trade Policy, above n 61, 69.

[127] See Office of the United States Trade Representative, 'Trade Facts', above n 73, 2.

[128] *Employee Free Choice Act*, HR 1409, 111th Congress (2009) ('*EFCA*').

[129] *National Labor Relations Act*, 29 USC §§ 151–69 (1935).

[130] On the *EFCA*, see Zev J Eigen and Samuel Estreicher (eds), *Labor and Employment Law Initiatives and Proposals under the Obama Administration* (Kluwer Law International, 2011).

[131] Vogt, above n 12, 837.

[132] International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *Observation on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)*, 76th ILC sess (1989, adopted 1989) ('*United Kingdom*') <https://perma.cc/6PNN-WWUW>.

Convention 87').[133] Yet the United Kingdom is not alone, a recent study showing that no fewer than 22 of 28 EU member states are in breach of the freedom of association conventions alone.[134] Work now needs to be done on the other six fundamental conventions, though it seems unlikely that problems quite as significant as those relating to freedom of association will be revealed. But this is not the end of the matter, with EU law itself in breach of ILO standards in a manner that seems impossible to remedy.

The problem here arises as a result of the decisions of the European Court of Justice ('ECJ') in the now infamous decisions in the *Viking*[135] and *Laval*[136] cases. In the first of these cases a union threatened industrial action to prevent the reflagging of a Finnish vessel in Estonia;[137] and in the second case a Swedish union took industrial action at a school employing workers supplied by a Latvian company, the workers being paid less than the collectively agreed rates in Stockholm.[138] In both cases the ECJ held that the union action violated the employers' right to freedom of establishment and freedom to provide services, as provided for by the *Treaty on European Union* at the time. It has since transpired that the restrictions on the right to strike introduced by these cases violates *ILO Convention 87*, following examination of the impact of these decisions by the ILO Committee of Experts.[139] But there is nothing that can be done about it apart from changing the EU treaty or persuading the Court of Justice of the European Union to change its mind and reverse the prior ECJ decisions. Neither is likely.

What we have here in the case of TTIP is a proposed trade deal with clauses that neither party intends to comply with, simply because neither party is able to do so, for a combination of political and legal reasons.

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133 International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *Observation on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)*, 105th ILC sess (2016, adopted 2015) ('*United Kingdom*') <https://perma.cc/7837-DCQ9>. See *Convention concerning Freedom of Association and Protection of the Right to Organise (No 87)*, opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950).

134 Keith D Ewing and John Hendy, 'The Eclipse of the Rule of Law: Trade Union Rights and the EU' (2015) 4 *Revista Derecho Social y Empresa* 80, 96.

135 *International Transport Workers' Federation v Viking Line ABP* (C-438/05) [2007] ECR I-10779.

136 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (C-341/05) [2007] ECR I-11767.

137 *International Transport Workers' Federation v Viking Line ABP* (C-438/05) [2007] ECR I-10779.

138 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (C-341/05) [2007] ECR I-11767.

139 International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *Observation on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)*, 99th ILC sess (2010, adopted 2009) ('*United Kingdom*') <https://perma.cc/8DR3-7HU6>.

2 *Non-Application with Neutral Impact*

Whilst we can rule out the orientation to non-application having a positive impact, it can result in a neutral impact[140] as well as a negative impact. An indication of the former can be found close to home in terms of the impact of *AUSFTA*, which as we have seen included a labour chapter with a commitment by the parties to

> strive to ensure that its laws provide for labour standards consistent with the internationally recognised labour principles and rights set forth.[141]

The latter are defined to mean: (a) the right to association; (b) the right to organise and collectively bargain; (c) the prohibition of forced or compulsory labour; (d) labour protection for children and young people; and (e) 'acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health'. But it does not include the elimination of discrimination, though this is one of the four ILO fundamental principles.

Nevertheless, in a flush of naïve enthusiasm (albeit informed by concerns expressed publicly by the Howard government),[142] it was thought that the latter agreement would require Australia to take steps to amend domestic law and bring it into line with ILO standards.[143] That did not happen, and indeed Australia's renewal of its commitment to ILO standards did not prevent the enactment of Work Choices just after the agreement was signed. It is true that steps were taken subsequently by the Rudd government to repeal much of the Howard legacy. But in doing so, there is no evidence that the *AUSFTA* played any part in this process, which in any event appeared to not fully satisfy the demands of *ILO Convention 87*, the Committee on Freedom of Association commenting adversely on a number of provisions in the *Fair Work Act 2009* (Cth) in a trade union complaint soon after its enactment.[144]

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140 Our argument here is consistent with the following observation by Lance Compa: 'the *North American Free Trade Agreement* (*NAFTA*) and its parallel labour accord, the *North American Agreement on Labour Cooperation* (*NAALC*), have had no measurable influence on labour law and practice in Canada, the United States, or Mexico'. See Lance A Compa, 'Trade Liberalization and Labour Law' (Paper presented at XVIII World Congress, International Society for Labour and Social Security Law, Paris, September 2006) 19. Compa and Brooks, however, point to the impact of the *NAALC* on international labour solidarity: see Lance Compa and Tequila Brooks, 'The *North American Free Trade Agreement* (*NAFTA*) and the *North American Agreement on Labor Cooperation* (*NAALC*) and Labor Provisions in Other North American Free Trade Agreements' in Kluwer Law International, *International Encyclopedia for Labour Law and Industrial Relations*, supp 419 (at 2014).

141 *AUSFTA* art 18.1.

142 Christine Wallace, 'Labour Laws Threaten US Trade Pledge', *The Australian*, 6 May 2003, 4. Note that the *Singapore–Australia Free Trade Agreement* also negotiated by the Howard government did not contain a labour clause, unlike the *US–Singapore Free Trade Agreement*. See *Singapore–Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003); *United States–Singapore Free Trade Agreement*, signed 6 May 2003, 42 ILM 1026 (entered into force 1 January 2004).

143 K D Ewing, 'The Price of Free Trade' (2003) 9(7) *Employment Law Bulletin* 1.

144 See International Labour Office, Committee on Freedom of Association, *Complaint against the Government of Australia Presented by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)*, 357th report, 308th sess, Agenda Item 3 (June 2010).

Nor is there any evidence that *AUSFTA* has had any effect on raising standards in the US, any more than any of the many other bilateral agreements concluded by the US with a host of countries, all typically containing the same or similar labour clauses. This is despite the fact that the ILO Committee on Freedom of Association has also concluded that national law (in the shape of the *National Labor Relations Act 1935*[145] — the so-called '*Wagner Act*') does not satisfy ILO constitutional principles on freedom of association, which the FTAs expressly require (insofar as the parties 'reaffirm their obligations as members of the ILO'). The ILO's Committee on Freedom of Association has found the US in breach because of restrictions on union officials' right of access to employers' premises during organising campaigns;[146] and the rule introduced by the Supreme Court in *National Labor Relations Board v McKay Radio & Telegraph Co*,[147] whereby striking workers can be permanently replaced (but not dismissed — work that one out).

All this should not come as too much of a surprise: the effectiveness of labour provisions of trade agreements to which the United States is presently a party is highly doubtful. Only one complaint has proceeded to arbitration, the case brought by the US against Guatemala under its trade agreement with five Central American countries and the Dominican Republic (*CAFTA–DR*);[148] even then, this case seems to underscore the problem of ineffectiveness with recent commentary saying that '[t]he US–Guatemala labour case shows how lengthy, expensive, and most ineffective the dispute resolution process can be'.[149] The experience with the labour side agreement under *NAFTA*, the *North American Agreement on Labor Cooperation* is similar with Compa observing that it has had 'no measurable influence on labour law and practice in Canada, the United States, or Mexico'.[150]

There are of course other examples elsewhere of FTAs having no impact on the labour law of the parties, as illustrated by two recent agreements concluded or close to being concluded by the EU. The first is the *EU–Korea Free Trade Agreement*, characterized by the EU as 'the first of a new generation of FTAs'.[151] As such it has a labour chapter, which after referring to the obligations of ILO membership and the 1998 *Declaration*, provides that the parties 'commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights', which are listed in the text. These are the

[145] 29 USC §§ 151–69 (1935).

[146] International Labour Organization, Committee on Freedom of Association, *Case No 1523 (United States)* (Definitive Report No 284, November 1992).

[147] 304 US 333 (1938). See International Labour Organization, Committee on Freedom of Association, *Case No 1543 (United States)* (Definitive Report No 278, June 1991).

[148] See Albertson and Compa, above n 71, 479–84; Vogt, above n 12, 843–7.

[149] Laura Macdonald and Angella MacEwen, 'Does the TPP Work for Workers? Analyzing the Labour Chapter of the TPP' (Report, Canadian Centre for Policy Alternatives, July 2016) 15 <https://perma.cc/S3BL-NLUH>.

[150] Compa, 'Trade Liberalization and Labour Law', above n 140, 19. See also Chris Tilly, 'Labor in the Global South: Transnational Turmoil, Latin American Lessons' (2013) 11(1) *Perspectives on Politics* 205–11; Jean-Marc Siroën et al, 'The Use, Scope and Effectiveness of Labour and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements' (Final Report No VC/2007/0638, European Commission, 15 September 2008) 62–4; Bourgeois, Dawar and Evenett, above n 39, 42–50.

[151] European Commission, *Countries and Regions — South Korea* (1 July 2016) European Commission: Trade <https://perma.cc/9CLX-QNVM>.

four rights listed in the ILO's 1998 *Declaration*, the parties also reaffirming their commitment to 'effectively implementing' ILO conventions already ratified as well as 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'.[152]

Korea has been the subject of excoriating criticism by the ILO supervisory bodies on freedom of association, and has not ratified several of the core conventions.[153] Indeed Korea has ratified only 27 conventions and only four of the eight core conventions on which the 1998 *Declaration* is based. The four in question relate to discrimination and child labour, but do not include either of the instruments dealing with freedom of association or forced labour respectively. Moreover, there has been no indication in the six years since the free trade agreement was concluded that matters are set to change, for although Korea has ratified six conventions since 2010, these are all 'technical conventions', albeit dealing with important questions such as workers with family responsibilities, and occupational health and safety, as well as the massive consolidating *Maritime Labour Convention* of 2006.[154]

The other example is the EU–Canada *CETA*, which the EU is in the process of signing off.[155] *CETA* contains the same commitments to ILO standards, despite the fact that Canada has not ratified *ILO Convention 98*,[156] and despite the fact that Canada has been the subject of more complaints to the ILO's Committee on Freedom of Association than perhaps any other developed country.[157] Canada's violation of ILO standards with illiberal labour laws is remarkable and counter-intuitive, all the more so for the willingness of the Supreme Court of Canada warmly to embrace ILO standards in its now very progressive interpretation of the *Charter of Rights and Freedoms*.[158] Given the fact that labour law in Canada (unlike the USA or now Australia) is predominantly a matter of provincial jurisdiction (subject to *Charter* override), it remains to be seen just how practical it will be to ensure that Canada complies with commitments made.

Once again we confront the reality that FTAs are concluded by parties who are in breach of the commitments made, with no intention of meeting these commitments, which domestic political constraints make it virtually impossible to guarantee, even in the event of the necessary goodwill in the first place.

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[152] *Free Trade Agreement between the European Union and Its Member States and the Republic of Korea*, signed 6 October 2010, [2011] OJ L 127/1 (not yet in force) art 13.4(3).

[153] International Labour Organization, Committee on Freedom of Association, *Case No 2602 (Republic of Korea)* (Interim Report No 359, March 2011).

[154] *Maritime Labour Convention*, opened for signature 23 February 2006, [2013] ATS 29 (entered into force 20 August 2013).

[155] See European Commission, *In Focus* (5 July 2016) <https://perma.cc/8MQB-BHYD>.

[156] See Brian Langille, 'The Freedom of Association Mess: How We Got into It and How We Can Get Out of It' (2009) 54 *McGill Law Journal* 177, 194–7; *Convention concerning the Application of the Principles of the* Right to Organise and to Bargain Collectively (No 98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951).

[157] See K D Ewing, '"The Lady Doth Protest Too Much, Methinks" — The Right to Strike, International Standards and the Supreme Court of Canada' (2015) 18 *Canadian Labour and Employment Law Journal* 517.

[158] *Saskatchewan Federation of Labour v Saskatchewan* [2015] SCR 245. See Judy Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes' (2015) 68 *Current Legal Problems* 267.

3 *Non-Application with Negative Impact*

So despite its warm words, it is unlikely that the TPP would have or would have had any impact on labour law in Australia or the United States, just as the earlier bilateral FTA between the two countries has had no tangible effect. This would seem to be the typical impact of such agreements generally, though the position may now be changing. From the perspective of anxious European trade unionists 'no impact' nevertheless would be the most desirable outcome of TTIP, in the event that the latter is ever successfully concluded. Like their US counterparts, European trade unionists are generally hostile to TTIP, as is a coalition of non-governmental organisations. The fear (and the likelihood) is that TTIP would have a negative impact on labour standards in the EU, even if it is the EU FTA model that is adopted in preference to the American. These fears are most keenly felt in relation to collective bargaining, partly because of the different collective bargaining systems operating in the US and the great bulk of EU member states.[159]

Such differences reflect the different role of collective bargaining and the different levels of coverage in the two 'systems'. In the bulk of EU states (the UK being a notable exception — though it will soon not be a member state), collective bargaining has traditionally had a 'regulatory' function in the sense that it operates on a multi-employer basis, at sectoral level or above, setting terms and conditions for the sector as a whole, and in some cases capable of extension to employers who were not parties to the agreement. In the US, in contrast, collective bargaining has a 'representative' function, the union acting as a 'bargaining agent' for a 'bargaining unit' within an enterprise. In the US system (as in most of the English speaking world), the union will generally have to campaign for recognition by the employer and certification as a bargaining agent, and any collective agreement concluded will generally apply only to employees of the employer who is a party to it.

Function (regulatory or representative) and level (sectoral or enterprise, though mainly the latter) are crucial in determining collective bargaining density, with the EU average of 61 per cent comparing favourably with US figures which may be as low as 6 per cent in the private sector. The question now is whether bargaining levels and structures will be affected by TTIP, a question that has never been a significant feature of earlier agreements, where such a stark regulatory conflict has never been present on quite this scale. The fear, however, is that free trade will lead inevitably to a convergence of regulatory method, and that the parties will gravitate to what will be the point at which both sides can settle. It is at this point that the difference between the EU and US approaches to labour rights in FTAs collapses and becomes irrelevant. Even assuming the US agrees to the apparently more progressive EU model of labour rights, the pressure towards regulatory convergence in a competitive market is likely to lead only one way, which will be the American rather than the European way.

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[159] This issue is more fully explored in Keith Ewing, 'The EU, the USA, and TTIP — Collective Bargaining and the Emerging "Transnational Labor Relations Act"' (2016) 117 *Theory & Struggle: Journal of the Marx Memorial Library* 16. See also Annamaria Simonazzi and Michele Faioli, 'Introduction' (2015) 49(2) *Economia & Lavoro* 7, 9–10.

There are two reasons for this. The first is that the EU bargaining model is one that the US cannot reach, even if it were to ratify *ILO Convention 87*. Apart from the fact that it would require a profound political change in the US to create the legislation necessary to reflect the EU collective bargaining model, it is in any event the case that regulatory bargaining of the kind found throughout the EU would almost certainly be unconstitutional in the US, following the *Schechter Poultry* case in 1935,[160] where it was held that industry-wide codes of fair competition to regulate labour conditions were unconstitutional. This is because the procedure endowed 'voluntary trade or industrial associations or groups with privileges or immunities'; the codes of fair competition were 'codes of laws', placing 'all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent'.[161]

So even if the political will was there, the US cannot meet the EU bargaining model. On the contrary, the *Wagner Act* is likely to operate as a magnet pulling EU collective bargaining systems in the direction of the American, partly because US investors will eschew European bargaining methods, just as large-scale post-war US investors in the United Kingdom eschewed the bargaining structures operating at the time in favour of practices more recognisably American, the Ford Motor Company for example demanding to do in Dagenham what they were doing in Detroit. Ford's contemporary counterparts will be encouraged by the European Commission to do the same, the latter already pushing in the direction that the magnet is pulling. By a combination of new economic governance initiatives adopted in 2010 and financial assistance conditionality, steps are already well underway to decentralise in the American direction.[162] TTIP would help with that process.

The fear is that free trade will pull and push the European collective bargaining model in the direction of the *Wagner Act*. This would not in itself be in breach of the FTA's commitment to promote ILO standards on freedom of association, as the ILO supervisory bodies do not prescribe any particular form or level of collective bargaining, which should be a matter of choice for the bargaining parties.[163] But such a development would almost certainly be a negative consequence of free trade if — as is likely — decentralisation were to lead to the spectacular decline in coverage witnessed in the UK since 1980. Here a highly centralised system of collective bargaining organised on a multi-employer basis in both public and private sectors consistently yielded density levels of above 80 per cent, which has fallen to 23 per cent today following the systematic dismantling of these structures in favour of a mainly enterprise-based system.

Here we confront a new reality, not only of parties entering agreements that are in breach of and with which they have no intention of complying, but of parties entering agreements in the knowledge that they will be used as

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160 *Schechter Poultry Corp v United States*, 295 US 495 (1935).

161 Ibid 529.

162 See Aristea Koukiadaki, Isabel Távora and Miguel Martínez Lucio, 'The EU is Exporting UK Neoliberalism to the Rest of Europe' on *The Institute of Employment Rights Blog* (29 March 2016) <https://perma.cc/UJ3Z-W6AU>.

163 International Labour Office, 'General Survey on the Fundamental Conventions concerning Rights at Work in Light of the *ILO Declaration on Social Justice for a Fair Globalisation*, 2008' (Report No III (Part 1B), 2012) [222].

instruments of deregulation rather than support for the standards they purport to uphold.

C *Labour Standards and Active State Power*

Our argument that there will be a *general* orientation to non-application of the labour clauses of free trade agreements allows for departures from such an orientation, in the sense that it could have a negative impact. Similarly, we do not exclude the possibility that these agreements could have a beneficial impact on labour standards in limited situations especially when pre-ratification measures are put in place. In the case of the TPP, there is a potential for departures from this general orientation resulting in a positive impact, with the US specifically committed to enforcing the provisions of the TPP's Labour Chapter against a particular state party. This may very well be the case with domestic labour standards in Brunei, Malaysia and Vietnam because of the labour side agreements negotiated by the US and these countries.

The latter are much more specific, coercive and conditional than is the case in most FTAs, typically drafted in much more general terms. All of these countries have low levels of ratification of the ILO conventions and high levels of non-compliance with those which they have ratified. Brunei, for instance, has only been an ILO member since 2007, and has ratified just two conventions (both on child labour). Furthermore, there have been concerns expressed about Brunei's compliance with *Convention 138*[164] and *Convention 182*[165] (the child labour conventions). The earliest concern about child pornography has been addressed, however the outstanding issue which relates to the latter convention pertains to Brunei's slow response in dealing with children in hazardous occupations.[166]

Nevertheless, Brunei has agreed to make significant changes across five different fields, namely: freedom of association, forced labour, child labour, discrimination in employment, and working conditions, in the last case committing to legislate for a minimum wage for private sector workers. The far-reaching freedom of association guarantees address the need to protect the independence of trade unions from both employer and state interference, the need for remedies to deal with acts of anti-union discrimination, as well as establishing procedures for dealing with collective bargaining and amendments to guarantee the right to strike.[167]

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164 *Convention concerning Minimum Age for Admission to Employment (No 138)*, opened for signature 26 June 1973, 1015 UNTS 297 (entered into force 19 June 1976).

165 *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182)*, opened for signature 17 June 1999, 38 ILM 1207 (entered into force 19 November 2000).

166 See International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *Direct Request on the Worst Forms of Child Labour Convention, 1999 (No 182)*, 105th ILC sess (2016, adopted 2015) ('*Brunei Darussalam*') <https://perma.cc/QWF7-BKCM>.

167 See *Brunei Darussalam–United States Labour Consistency Plan*, signed 4 February 2016 (not yet in force).

Malaysia has ratified only 17 conventions, including six of the fundamental conventions (all except *Convention 87* and *Convention 111*,[168] though *Convention 105*[169] was denounced in 1958 and is not now in force). However, the ILO Committee of Experts on the Application of Conventions and Recommendations ('CEACR') has expressed concerns about Malaysia in relation to forced labour and freedom of association, the concerns in the latter case applying to: the excessive delays faced by unions seeking recognition by employers for collective bargaining purposes, the high threshold of support required in order to secure recognition, the failure of employers to comply with recognition orders and restrictions on the scope of collective bargaining.[170]

Although impervious to ILO criticism, it seems that Malaysia has yielded to US demands, committing in a TPP side agreement to undertake radical surgery to its labour laws,[171] with the US Trade Representative triumphantly reporting that:

> Malaysia commits to remove restrictions on union formation and strikes that have been in place for decades; to limit governmental discretion in registering and canceling a trade union; to allow foreign workers to assume leadership positions in unions (after working in the country for a period of time); and to remove restrictions on the subjects on which workers can collectively bargain with their employers. Malaysia also commits to address concerns that outsourcing or subcontracting may be used to undermine freedom of association or collective bargaining rights.[172]

As with the Brunei side agreement, the US agreement with Malaysia establishes a government-to-government review mechanism to oversee its implementation. In the case of Vietnam, it is further provided that 'the United States may withhold or suspend tariff reductions for Vietnam if Vietnam does not comply with its commitment to provide the right to form labor unions across enterprises and at higher levels within five years'.[173] Vietnam has ratified 17 ILO conventions, including five of the eight fundamental conventions, two of the exclusions being *Convention 87* and *Convention 98* (freedom of association).

In the two years prior to the conclusion of the TPP, the ILO CEACR had expressed concern about the application of the forced labour, child labour and

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168 *Convention concerning Discrimination in respect of Employment and Occupation Convention (No 111)*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

169 *Convention concerning Forced or Compulsory Labour, as Modified by the Final Articles Revision Convention, 1946,* opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932); *Convention (No 105) concerning the Abolition of Forced Labour*, opened for signature 25 June 1957, 320 UNTS 292 (entered into force 17 January 1959).

170 International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *Observation — Right to Organise and Collective Bargaining Convention, 1949 (No 98)*, 105th ILC sess (2016, adopted 2015) ('*Malaysia*') <https://perma.cc/RE7N-Q6B8>.

171 *Malaysia–United States Labour Consistency Plan*, signed 4 February 2016 (not yet in force).

172 See Office of the United States Trade Representative, 'Chapter 19: Labour', above n 10.

173 Ibid.

discrimination conventions by Vietnam.[174] All of these matters are addressed in the US–Vietnam side agreement, though it is clear from the foregoing that the United States was more concerned with the type of freedom of association that is not considered by the ILO. The great bulk of the detailed 10-page labour reform project demanded by the US is dedicated to what will be the long slow process towards a US-type system, with Vietnam to embrace concepts such as good faith bargaining and rights-based strikes.[175]

These are important initiatives, and it may not matter that the TPP was being used by the US for nakedly protectionist reasons if the purpose and effect is to raise standards on core questions. The coercive use of the TPP in this way would, however, be more compelling if the strategy were used more widely to apply to all countries in breach of core conventions, and if the author of the strategy was to set an example not only by ratifying all eight of the core conventions, but also by fully complying with them. As it is, the United States has ratified fewer conventions than either Malaysia or Vietnam, and, as we have seen, has ratified only two of the eight ILO core conventions.

VI Conclusion

We write at a time of great uncertainty about the future of free trade agreements, with the future of mega-deals such as the TPP and TTIP now under question.

This, however, seems likely to lead to a reorientation of free trade rather than its reversal, with greater focus by the US in the short-term on bilateral agreements. The implications of this for the rest of the world are unclear if other countries continue to promote multilateral agreements and discourage their participants from entering into bilateral agreements with third countries such as the US. Such uncertainty simply adds to the growing sense of uncertainty about the future of labour clauses and their impact, though it can hardly be in the interests of even the Trump administration to be indifferent to labour practices in the rest of the world. One answer to low standards abroad, of course, is to reduce standards at home.

But whatever the outcome in these uncertain times, we have argued that labour clauses in trade agreements will be profoundly shaped by a general orientation to non-application — regardless of any textual differences and notwithstanding the dissimilarities between the EU and US approaches to labour clauses in trade agreements. This orientation will have a neutral — or worse, negative — impact on domestic labour standards; and it is only in limited situations that a credible argument can be made that these provisions will improve domestic labour standards. Even in these latter cases, it cannot be guaranteed that an improvement in formal standards will lead to an improvement in practice, nor is it clear that the latter can reasonably be expected.

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[174] The ILO CEACR expressed concern about forced labour and child labour in its 2013 observations, and concern about discrimination in its 2015 observations. On the latter, see International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *Observation on the Discrimination (Employment and Occupation) Convention, 1958 (No 111)*, 105th ILC sess (2016, adopted 2015) ('*Viet Nam*') <https://perma.cc/8WZX-SDGA>.

[175] See *United States–Viet Nam Plan for the Enhancement of Trade and Labour Relations*, signed 4 February 2016 (not yet in force).

The gulf between the rhetoric surrounding the labour clauses in the TPP and TTIP and their likely impact is apparent. And again, this parallels the general position in relation to the TPP with a former United Nations Assistant Secretary-General for Economic Development characterizing the case for the TPP as 'bogus'.[176] A strong dose of caution is thus warranted towards labour clauses in trade agreements. They hold out the prospect of improving labour standards but such a prospect seems rather remote given the fraught context in which they have been made.[177] In particular, it is difficult to break free from the suspicion that they are being used mainly by the US, simultaneously, for aggressive protectionism and expansionism, a suspicion reinforced by the revealing marketing from the US Trade Representative.[178]

In the case of the TPP, in other words, free trade is about protecting US jobs from poorly regulated developing economies, and in the quite different case of TTIP, it was about protecting US investment from more heavily regulated countries in a proposed agreement between two highly developed economies.[179] For labour law, it looks very much like taking US law as the standard for America's trading partners, the standard which no one falls below and which no one rises above. Whether a better understanding of this inheritance leads to a reconsideration of the initial policy reorientation of the Trump team remains to be seen. But it is difficult to imagine that free trade in whatever form it takes will not involve steps taken in the direction of a developing US hegemony on labour law solutions.

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[176] Australian Broadcasting Corporation, '"Bogus" Case for TPP Trade Deal', *RN Breakfast*, 14 June 2016 (Jomo Sundaram) <https://perma.cc/6JKX-R5TK>.

[177] This is not to say that concrete steps cannot be taken to enhance the effectiveness of the labour clauses. See, eg, Lance Compa, 'Labor Rights and Labor Standards in Transatlantic Trade and Investment Negotiations: An American Perspective' (Transatlantic Stakeholder Forum Working Paper, John Hopkins University SAIS Centre for Transatlantic Relations, Friedrich Ebert Foundation, June 2014); Michele Faioli et al, 'A Social Dimension for Transatlantic Economic Relations' in Roger Blanpoin et al (eds), *Rethinking Corporate Governance: From Shareholder Value to Stakeholder Value* (Kluwer Law International, 2011) 255; Michele Faioli, 'The Quest for a New Generation of Labor Chapter in the TTIP' (2015) 49(2) *Economia & Lavoro* 103.

[178] See Office of the United States Trade Representative, above n 172, 1: 'The Trans-Pacific Partnership (TPP) levels the playing field for American workers and American businesses, leading to more Made-in-America exports and more higher-paying American jobs here at home'.

[179] On TTIP and collective bargaining, see Ewing, above n 159.