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# THE ROLE OF LABOUR STANDARDS AS TRADE DEFENCE INSTRUMENTS FOR THE EUROPEAN UNION<sup>1</sup>

## ABSTRACT

European trade in the 21st century has undergone significant changes due to EU enlargement and global production shifts, especially towards Southeast Asia. In response, global actors like China, India, and the US have adjusted their trade strategies, engaging with the EU not only through WTO mechanisms but also addressing non-trade issues (NTIs) beyond WTO regulations. These changes have politicized EU free trade agreements (FTAs) and preferential trade agreements (PTAs), as the EU seeks to export its regulatory framework on NTIs such as environmental protection, human rights, and labor standards. While some argue that the EU's regulatory influence is limited, others suggest its long-term objectives in promoting domestic policy changes internationally remain significant. The European Commission plays a key role in advancing these agreements, balancing trade defense tools like anti-dumping procedures with the promotion of EU standards abroad. This article explores the role of NTIs, especially labor standards, in shaping EU trade policy and its future implications.

**Keywords:** Trade, European Union, labour standards, defence instruments

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European trade in the 21st century has undergone major structural changes, resulting from enlargement from 2004 onwards and the globalisation of production, with its shift towards Southeast Asia. As the EU market has expanded and grown more complex, various actors – from China and India to the US, for instance – have decided to adjust their trade strategies to compete with European companies on *World Trade Organization* (WTO) terms but also on the basis of non-trade issues (NTIs) not covered by the WTO. As a result, the new generation of EU free trade agreements and preferential trade agreements has become more politicised. The EU seeks to export its regulatory framework on non-trade, yet trade-related, issues such as environmental protection, human rights and labour standards to countries far beyond its borders. In exchange, it offers access to the European market and a sense of community within a broader trade network. While this new wave of FTAs and PTAs has received considerable scrutiny, little academic attention has been given to the EU's long-term objectives.

While normative-oriented authors have predicted success for the EU's policies related to NTIs, others suggest that the EU's regulatory influence is rather limited and that, contrary to such optimistic assumptions, there is no evidence of the EU exporting rules.<sup>2</sup> Nevertheless, the EU, during negotiations and in the language of agreements, expresses the will to promote domestic policy changes at the international level, even though these changes are not necessarily related to trade issues. This is evident in the case of environmental and phytosanitary standards, as well as the more recent idea of the Green Deal, along with the aforementioned labour standards. Such activity can also be viewed through the lens of incomplete contracts, where unfinished policy changes at the intra-European level have been enhanced by support from abroad.<sup>3</sup> The European Commission, as the most active player in the field of international trade and as the promoter of trade agreements or regional partnerships, encourages trading partners to adopt EU standards.<sup>4</sup> A substantial strand of the European Commission's activity is concerned with widening political power in the system,<sup>5</sup> but the Commission is primarily responsible for tackling and advancing the trade agenda to promote jobs and growth. As a consequence, the Commission seeks to protect European producers against unfair competition from their foreign counterparts, using WTO rules and protection mechanisms. In particular, such defensive trade instruments encompass anti-dumping

<sup>2</sup> A.R. Young, "Liberalizing Trade, Not Exporting Rules: The Limits to Regulatory Co-Ordination in the EU's 'New Generation' Preferential Trade Agreements," *Journal of European Public Policy*, vol. 22, no. 9 (2015), pp. 1253-1275.

<sup>3</sup> A. Héritier, "Covert Integration of Core State Powers: Renegotiating Incomplete Contracts," in Ph. Genschel, M. Jachtenfuchs (eds), *Beyond the Regulatory Polity?: The European Integration of Core State Powers*, Oxford 2014, pp. 230-248.

<sup>4</sup> J. Orbie, "Promoting Labour Standards Through Trade: Normative Power or Regulatory State Europe?," in R.G. Whitman (ed.), *Normative Power Europe: Empirical and Theoretical Perspectives*, London 2011, pp. 161-184.

<sup>5</sup> G. Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?*, Cambridge 2014; V.L. Birchfield "Coercion with Kid Gloves? The European Union's Role in Shaping a Global Regulatory Framework for Aviation Emissions," *Journal of European Public Policy*, vol. 22, no. 9 (2015), pp. 1276-1294.

procedures and anti-subsidy measures. However, amidst WTO-supported instruments, NTIs can also play an important role in the protection of the European market. An important point of departure here is recognising that NTIs are politically sensitive and more complicated to tackle than trade disputes. While traditional trade defence instruments are relatively easy to calculate, although the EU methodology may raise questions about indicators and the existence of trade practices, the direct linkage between NTIs, trade and defence instruments is a political puzzle. Labour standards, typically negotiated as a third-tier issue in FTAs, can play an important role in the regulation of foreign markets in the long run, while also reinforcing the EU's position as a global normative power. Nevertheless, such a long-run perspective means that labour standards included in the FTAs have not been promoted aggressively by the EU; in fact, the EU has not sought to promote labour standards until recently. This latent trade defence instrument in the FTAs has helped the EU and European companies to benefit from the FTAs and fairly quick negotiations over FTAs, without jeopardising them.

The article is structured as follows. Firstly, it explores the concepts of NTIs with regard to labour standards, thereby introducing the analytical framework of the study. Next, the article presents the various types of labour standards included in the EU FTAs. The third section focuses on various models and grades of compliance concerning NTIs as emerging trade defence instruments. In conclusion, the article considers the future and implications of NTIs as a trade defence instrument.

## THE ROLE OF LABOUR STANDARDS IN GLOBAL TRADE

By March 2024, more than 60 international trade agreements included labour provisions, compared to 21 in 2005 and only four in 1995. Such a level of development, as some authors suggest,<sup>6</sup> is particularly visible in the United States, where, after NAFTA and due to the strong cleavage between the two parties, the ratification of any FTA depends on the political process. In fact, there are only four trade agreements in the world – between the US and Peru, Panama, Colombia and Korea – that provide fully enforceable requirements to adopt and maintain fundamental International Labour Organisation (ILO) labour rights and to effectively enforce labour laws. The recently adopted Comprehensive Trans-Pacific Partnership will extend these requirements to ten new partners, with the US as the main actor deciding on instruments, rules and commitments. The aforementioned 60 agreements only partially cover labour issues, and most of the commitments contained in them are soft by nature and voluntary. But who else can write the rules of global labour standards? Among the actors pushing to include specific clauses on labour standards for FTAs/PTAs is the European Union. The EU has played a significant role in altering and harmonising transnational practices of labour

<sup>6</sup> J. Oehri, "Comparing US and EU Labour Governance 'Near and Far' – Hierarchy vs Network?," *Journal of European Public Policy*, vol. 22, no. 5 (2015), pp. 731-749; E. Postnikov, I. Bastiaens, "Does Dialogue Work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements," *Journal of European Public Policy*, vol. 21, no. 6 (2014), pp. 923-940.

standards and has had a substantial impact on regulatory outcomes. This is partially a result of an agenda based on a holistic approach to international affairs in the area of creating international standards (cf. *normative power*),<sup>7</sup> global trade relations (cf. *trade power*),<sup>8</sup> as well as the development of regulations around both economic and social problems within the EU and with third countries (cf. *regulatory power*).<sup>9</sup> Authors such as those cited emphasise that the EU uses its internal power resources to change global standards but often focus on their favoured causal variable, either civil normative power or regulatory power. Therefore, the current debate on the role of the EU creates an unnecessary dichotomy between different power resources, ignoring important points of interaction between substantive norms and institutions of regulation. As a result, there is frequent overestimation of EU influence and an inability to make sense of important empirical observations of practices on labour standards across time, geographical area and the number of parties involved.

Labour standards are a facet of human rights<sup>10</sup> and are reflected in the Universal Declaration of Human Rights (Arts. 4, 5, 7, 22 and 23); however, this is only part of the overall picture. Labour rights or principles also represent an important factor in determining global economic relations. Labour is, in most cases, the main component of the prices of products or services, and their availability depends directly on the amount of labour. Labour rights and standards, as well as environmental standards, play an important role in the competitiveness of both developing countries and those that can be assessed as highly developed. Competitiveness, in the absence of effects on the exchange rate and innovative economies in the least-developed countries, is based on two factors already mentioned: underregulated labour rights and low environmental standards. Therefore, the competitive advantage of poorer countries lies partly in the realm of the low protection of fundamental workers' rights.

The WTO's regulatory framework significantly impacts global labour practices by imposing rules in the market, though labour standards themselves are not explicitly covered. At the first WTO Ministerial Conference in Singapore in 1996, the proposal to link labour standards to international trade was rejected. The WTO Ministerial

<sup>7</sup> I. Manners, "The Normative Ethics of the European Union," *International Affairs*, vol. 84, no. 1 (2008), pp. 45-60; H. Larsen, "The EU as a Normative Power and the Research on External Perceptions: The Missing Link," *Journal of Common Market Studies*, vol. 52, no. 4 (2014), pp. 896-910; V. Birchfield, "A Normative Power Europe Framework of Transnational Policy Formation," *Journal of European Public Policy*, vol. 20, no. 6 (2013), pp. 907-922; E.O. Eriksen, *The Normativity of the European Union*, Basingstoke 2014.

<sup>8</sup> Ch. Damro, "Market Power Europe: Exploring a Dynamic Conceptual Framework," *Journal of European Public Policy*, vol. 22, no. 9 (2015), pp. 1336-1354; S. Meunier, K. Nicolaidis, "The European Union as a Conflicted Trade Power," *Journal of European Public Policy*, vol. 13, no. 6 (2006), pp. 906-925.

<sup>9</sup> Ph. Genschel, M. Jachtenfuchs, "Beyond Market Regulation: Analysing the European Integration of Core State Powers," in Ph. Genschel, M. Jachtenfuchs (eds), *Beyond the Regulatory Polity?: The European Integration of Core State Powers*, Oxford 2014, pp. 1-23; A.R. Young, "Liberalizing Trade...".

<sup>10</sup> Cf. E.M. Hafner-Burton, "Trading Human Rights: How Preferential Trade Agreements Influence Government Repression," *International Organization*, vol. 59, no. 3 (2005), pp. 593-629; Ph. Alston (ed.), *Labour Rights as Human Rights*, New York 2005; C. Fenwick, T. Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation*, Oxford 2010.

Declaration from that meeting reaffirmed member states' commitment to upholding core labour standards recognised internationally, but designated the International Labour Organisation (ILO) as the competent body to set labour standards. They also posited that trade and liberalisation would enhance labour standards. Nonetheless, they reserved that labour standards should not be used for protectionist purposes and that the competitive edge of developing countries, particularly low wages, should remain unquestioned. Many developing nations viewed labour standards as veiled protectionism favouring industrialised countries. Decisions made in Singapore continue to impact countries vying for investment and shape corporate strategies by allowing companies to 'optimise' costs without aligning with international standards. Nevertheless, significant players in the global economy, such as the United States and Canada, are successful in including labour standards in bilateral FTAs – in some cases, explicitly providing an option for dispute resolution at the WTO. While the US government virtually opposes ILO standards by ratifying only 7% of total ILO conventions, the most recent bilateral US FTAs have such provisions. On the other hand, the EU, with its strong labour regulations and influential trade union movement, pursues material interests rather than norms in its foreign policies, and labour standards, while important for EU member states, hold lesser appeal in trade arrangements.

Despite focusing attention on the power of the European market and the EU's agenda-setting authority on labour standards, the current debate about the functions of labour standards and the practical implementation of PTAs/FTAs suffers from three main weaknesses.

Firstly, the EU's policies seem to contradict its normative assumptions and what one would expect of foreign policy behaviour.<sup>11</sup> Values and norms oriented towards the EU/domestic level, through the extended internal regulation of labour standards, represent a moderate view at the international level, employing softer means for the implementation of EU standards. As some authors suggest, from a conventional and rationalist perspective, the answer to this puzzle lies in the fact that the EU has presented itself as a normative power while pursuing economic goals.<sup>12</sup> More recent studies of EU labour standards suggest that the long-term and ex-post effects of the EU's stance and particular EU policies towards FTA partners result in the smooth implementation of EU labour standards through learning.<sup>13</sup> Learning, however, does not just happen; it

<sup>11</sup> Cf. M. Oehri, "Comparing US...".

<sup>12</sup> M. Riddervold, "A Matter of Principle? EU Foreign Policy in the International Labour Organization," *Journal of European Public Policy*, vol. 17, no. 4 (2010), pp. 581-598; S. Meunier, K. Nicolaidis, "The Geopoliticization...".

<sup>13</sup> E. Postnikov, I. Bastiaens, "Does Dialogue Work?...", B.M. Araujo, "Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality," *International & Comparative Law Quarterly*, vol. 67, no. 1 (2018), pp. 233-253; L. Bartels, "Human Rights, Labour Standards, and Environmental Standards in CETA," in S. Griller, W. Obwexer, E. Vranes (eds), *Mega-Regional Trade Agreements CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations*, Oxford 2017, pp. 202-215; J. Harrison, M. Barbu, L. Campling, B. Richardson, A. Smith, "Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters," *Journal of Common Market Studies*, vol. 57, no. 2 (2019), pp. 260-277.

requires agency, funding, support from the local audience and genuine interest on the EU side in promoting labour standards.

The second weakness concerns a tendency to focus on a limited set of possible EU goals and strategies while excluding the nature of the linkages of interests declared and pursued by public and private actors operating in the strategic constellations<sup>14</sup> from the discourse. The preferences of these actors differ, as do the rationale and logic of the actions taken, which – in turn – manifest as interference regulation. In the case of private actors, the dominant logic is one of economic gain, and companies urge the EU to pursue Free Trade or Preferential Trade Agreements, whereas public actors advocate for the further development of the common market.<sup>15</sup>

The third weakness relates to the absence of political competition between major EU institutional bodies and member states. Neither devotes much attention to the achievement of institutional advantage on the part of the Commission over member states regarding labour standards in PTAs/FTAs. Appealing to basic and undeniable political values such as progress, participation, justice and economic growth, in the case of international labour standards, helps to achieve and sustain the Commission's political monopoly. This monopoly, in turn, gives it complete political power and the possibility of creating other policies thanks to the functional legitimacy it has achieved. This monopoly is important because international labour standards is also an area of law in which the competencies of EU member states are still executed. EU member states may be parties to the Conventions of the International Labour Organisation, while the EU has no such powers. Employment policy and social policy are essentially within the competence of the member states, in accordance with Art. 153 TFEU, which is the legal basis for EU legislation on the protection and improvement of working conditions; in this, the EU supports and complements the activities of the member states. The delegation of powers by the EU member states to conclude agreements relating to trade at the European Union level, which contain provisions for the protection of labour rights, creates a complex legal situation. The negotiating mandate, subsequent oversight of an agreement, and control of its results lie with the Commission, while international labour standards are still developed and negotiated by the member states. Thus, the interests and preferences of the states in shaping the ILO Conventions and the decision to join Conventions clash with the interests of the Commission, guided by the logic of deepening integration and widening institutional influence. Therefore, internal decision-making processes and internal EU political dynamics are affected by international agreements.<sup>16</sup> In turn, labour standards in PTAs/FTAs build the impetus

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<sup>14</sup> Ch. Knill, D. Lehmkuhl, "Governance and Globalization: Conceptualizing the Role of Public and Private Actors," in A. Héritier (ed.), *Common Goods: Reinventing European and International Governance*, Lanham 2002, pp. 85-104.

<sup>15</sup> N. Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985-2005*, Ithaca 2006; Ch. Damro, "Market Power Europe..."

<sup>16</sup> H. Farrell, A.L. Newman, "Domestic Institutions beyond the Nation-State: Charting the New Interdependence Approach," *World Politics*, vol. 66, no. 2 (2014), pp. 331-363.

for deepening integration through completed contracts with actors outside the EU. International agreements and arrangements result in covert integration,<sup>17</sup> where the standards of labour law in PTAs/FTAs have effects on both the internal and external activities of the EU. Hence, assuming the logic of covert integration, provisions for the protection of labour rights should be analysed from the perspective of utilitarian benefits rather than normative aspirations. This applies to external activities (EU trade policy) but, more importantly, to relations between the Commission and the member states, where the Commission is empowered vis-à-vis other political actors. The distribution of regulatory capacity among the major regulatory players (i.e., European Commission, European Parliament, member states) is an important determinant of how the Commission seeks to manage labour standards in PTAs/FTAs, and it is a critical component of their global regulatory context.

The analytical framework for analysing the functions of labour standards isolates two primary dimensions of EU actions: (1) external and internal functions; and (2) the nature of EU activities, including regulatory, commercial and normative actions. These will be analysed in detail to distinguish instruments of integration through completed external contracts. The external functions (normative and regulatory) of labour standards are of secondary importance in the negotiations, and provisions are mostly not executed. An argument for the secondary importance of labour standards in EU external policies stems from the analysis of the Commission's activity in enforcing the provisions of agreements at the time of a breach. The litmus test for EU intentions will be a comparison of EU activities with those of other actors – the United States, Canada and the EFTA countries – which have signed PTAs/FTAs with the same actors outside the EU. However, it cannot be excluded that the pressures exerted by the member states translate into changes in the application of labour provisions in the PTAs/FTAs on the EU side. Therefore, initial normative orientations, supported by the member states through negotiation mandates, have been outweighed by commercial interests. Consequently, the Commission is an actor actively supporting this dimension at the expense of labour standards. What, then, are the functions of labour standards in PTAs/FTAs within the political system of the European Union? The answer to this question will help us understand the competing empirical claims of EU influence on the practices and standards of labour provisions in world trade and the functions of labour standards for the development of the European Union. This also allows for the integration of a considerable number of empirical claims that have been depicted as competing arguments<sup>18</sup> by providing an alternative approach and explanation of the external relations of the European Union.

<sup>17</sup> A. Héritier, "Covert Integration...".

<sup>18</sup> M. Kim, "Ex Ante Due Diligence: Formation of PTAs and Protection of Labour Rights," *International Studies Quarterly*, vol. 56, no. 4 (2012), pp. 704-719.

## LABOUR STANDARDS AS A TRADE DEFENCE INSTRUMENT

As of 2024, research on labour standards, as a case study and element of the EU's normative stance in international politics, is rather broad but not necessarily focused on its defensive characteristics. The ongoing discussion on the transfer of core state powers<sup>19</sup> or regulatory integration<sup>20</sup> omits the fact that there is an aspect of EU policy in which the transfer of core powers is not obvious, though occurring in practice. There is a noticeable gap between the research undertaken in these areas and that on labour standards as part of EU normative power. This is partly the result of the adoption of a positive overview of EU actions in this field, due to a belief in the normative approach of the EU regarding international labour standards. The majority of authors<sup>21</sup> focus mainly on the comparison of provisions adopted by the EU and the United States, indicating the soft approach adopted by the EU and the anticipated positive effects of an ex-post evaluation. However, labour standards in EU foreign policy could be a representative case study of EU policies because detailed analysis in this area addresses most of the key issues and questions concerning the meaning of political action in the EU, both in the normative and regulatory dimensions, as well as regarding trade and the global economy.

The empirical and theoretical dynamics surrounding the formulation and implementation of agencies for labour standards at the EU level remain vague and poorly understood. Moreover, relations between the member states and the Commission regarding the nature and scope of the promoted standards, as well as the actual effects of provisions adopted in PTAs/FTAs, have also been overlooked by scholars working on EU politics. No real action has yet been taken by the European Commission to achieve the objectives outlined in the individual agreements on labour standards. The declared democratic control over the agreements, in the form of meetings of joint committees, does not exist; these committees are merely a smokescreen that obscures real problems.

<sup>19</sup> J. Richardson, "The Onward March of Europeaization: Tectonic Movement and Seismic Events," in J. Richardson (ed.), *Constructing a Policy-Making State? Policy Dynamics in the EU*, Oxford 2012, pp. 334-359.

<sup>20</sup> Ph. Genschel, M. Jachtenfuchs, "Beyond Market Regulation..."

<sup>21</sup> H. Horn, P.C. Mavroidis, A. Sapir, "Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements," *The World Economy*, vol. 33, no. 11 (2010), pp. 1565-1588; E. Postnikov, I. Bastiaens, "Does Dialogue Work?..."; R. Grynberg, V. Qalo, "Labour Standards in US and EU Preferential Trading Arrangements," *Journal of World Trade*, vol. 40, no. 4 (2006), pp. 619-653; A.S. Bronstein, *International and Comparative Labour Law: Current Challenges*, Basingstoke-New York 2009; S. Veluti, *The Role of the EU in the Promotion of Human Rights and International Labour Standards in Its External Trade Relations*, Cham 2020; P.G. Gahan, R. Mitchell, S. Cooney, A. Stewart, "Economic Globalisation and Convergence in Labour Market Regulation: An Empirical Assessment," *American Journal of Comparative Law*, vol. 60, no. 3 (2012), pp. 703-742; M. Oehri, "Comparing US..."; J. Harrison, M. Barbu, L. Campling, F.Ch. Eber, D. Martens, A. Marx, J. Orbie, B. Richardson, A. Smith, "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda," *World Trade Review*, vol. 18, no. 4 (2019), pp. 635-657; B.M. Araujo, "Labour Provisions..."; L. Bartels, "Human Rights..."



Analysis of the functions of labour standards in EU policies contributes to the answer to the question concerning the importance of the actions taken by the Commission when the regulated areas are of a normative, regulatory and economic nature, as is the case with international labour law standards. It also allows us to reconstruct the hierarchy of preferences of the participants in political processes involved in the implementation of PTAs/FTAs in terms of the choices made, agenda-setting and ways of achieving policy goals. Therefore, three intertwining elements should be analysed in detail to understand the approach to labour law standards (i.e., ideas, interests and institutions). The triad of these terms refers to the process of formulating and implementing the EU policy agenda in labour standards, but also reflects the political interests of each actor involved. The understanding of the ideas underlying the inclusion of labour standards in FTAs/PTAs is based on the analysis of negotiating mandates, the negotiating positions of third countries, the content of the PTAs/FTAs, the communications and positions of the Commission and the European Parliament, as well as the sustainability impact assessment prepared before formal agreement. Ideas, as some authors suggest,<sup>22</sup> may be cognitive or normative; above all, they are often taken for granted and situated in the background of debates on political decisions. This assumption is also relevant in the case of labour standards. In order to determine which entities play the most important roles in shaping the idea of labour standards in PTAs/FTAs, the author decided to refer to the concepts of framing and agenda-setting. The process of setting the agenda and framing<sup>23</sup> is the result of the manipulation of information and ideas, but it also requires reliance on existing frames. In this case, it will be essential to consider the idea of Europe as a normative power, an actor that promotes human rights. It should be emphasised, however, that it is a long-standing notion in the European Union to incorporate new elements into existing policies or to legitimise a new policy by referencing other policies.<sup>24</sup> This approach is the dominant strategy arising from the concept of spillover. Thus, the idea of labour standards in trade agreements should also be analysed from the perspective of expanding EU competences. Moreover, the dominant strategy of the Commission is the *topos of the market as a strategic idea* for building a repertoire of innovative political strategies used by an actor who employs market ideas to compensate for a lack of power and political resources.<sup>25</sup> The concept of the market or market ideas is designed to transform existing

<sup>22</sup> J.L. Campbell, *Institutional Change and Globalisation*, Princeton 2004.

<sup>23</sup> E. Goffman, *Frame Analysis: An Essay on the Organization of Experience*, Boston 1986; F. Daviter, "Policy Framing in the European Union," *Journal of European Public Policy*, vol. 14, no. 4 (2007), pp. 654-666; M. Rhinard, *Framing Europe: The Policy Shaping Strategies of the European Commission*, Dordrecht-Boston 2010; S. Princen, *Agenda-Setting in the European Union*, Houndmills-New York 2009.

<sup>24</sup> A. Moravcsik, "Reassessing Legitimacy in the European Union," *Journal of Common Market Studies*, vol. 40, no. 4 (2002), pp. 603-624; A. Smith, "How the European Commission's Policies Are Made: Problematisation, Instrumentation and Legitimation," *Journal of European Integration*, vol. 36, no. 1 (2014), pp. 55-72.

<sup>25</sup> N. Jabko, *Playing the Market...*

institutions, but also has a normative element, assuming competition and efficiency for the benefit of European citizens.

Nevertheless, FTAs and PTAs have been crafted to promote and support European producers in third countries, so it is worth analysing the kinds of interests that have been pursued by including labour standards in PTAs/FTAs. The concept of interest will be based on the assumption that the EU is a system whose purpose is control and efficiency, and according to some authors,<sup>26</sup> this is acceptable from both normative and empirical points of view. Principles of regulation and efficiency are embedded in the TFEU in relation to the common market, which has been created and regulated by the EU institutions. As indicated above, the European Commission is a very active player in redefining the borders of the European political space, and two types of allies are particularly supportive of this: subnational actors and private actors interacting at the European and global scales. While private actors are well-recognised lobbies in Brussels,<sup>27</sup> the role of subnational actors in the making and maintenance of EU FTAs was largely neglected until 2016, when Belgium's Wallonia blocked CETA.<sup>28</sup> Nevertheless, when the EU system is considered as a strategic constellation, there are a good number of interests and ideas behind the proposed policy on labour standards. Interests should be analysed in terms of the preferences of participants, which are dealt with in *three different dimensions*. The *subjective* dimension of preferences allows us to identify the actors declaring and implementing their preferences regarding labour standards. In this group, the following actors will be examined: European institutions, member states, civil society and private actors pursuing economic interests. The second dimension will relate to the *nature of preferences*, whether they are exogenous (i.e., do not result from current and ongoing processes of European integration) or endogenous as a result of previous actions and are, therefore, path-dependent. The third dimension will assume *ideological and material* preferences associated with the perception of the aim of integration as the creation of ideas and identities or the desire to acquire or expand resources.<sup>29</sup> All of these dimensions are present in the labour chapters in EU FTAs.

Research on the function of labour standards in PTAs/FTAs as trade defence instruments indicates the existence of three groups of member states which, in varying degrees, support the EU's position to promote labour standards in PTAs/FTAs. It is worth stressing that the European Union, in its bilateral and regional agreements, generally focuses on the goals of social development cooperation. It does not apply trade sanctions to social norms and labour standards. Countries that have signed and

<sup>26</sup> Ph. Genschel, M. Jachtenfuchs, "Beyond Market Regulation..."

<sup>27</sup> A. Dür, D. Marshall, P. Bernhagen, *The Political Influence of Business in the European Union*, Ann Arbor 2019.

<sup>28</sup> P. Leblond, C. Viju-Miljusevic, "EU Trade Policy in the Twenty-First Century: Change, Continuity and Challenges," *Journal of European Public Policy*, vol. 26, no. 12 (2019), pp. 1836-1846; K. Hübner, A.-S. Deman, T. Balik, "EU and Trade Policy-Making: The Contentious Case of CETA," *Journal of European Integration*, vol. 39, no. 7 (2017), pp. 843-857.

<sup>29</sup> D. Leuffen, B. Rittberger, F. Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union*, Basingstoke 2012.

effectively implement the fundamental rights of the international conventions of the UN/ILO receive additional customs preferences under GSP+. For example, in 2012, in the free trade agreement between the EU and the member states of Colombia and Peru, both parties committed to the effective implementation of fundamental ILO conventions (Article 269, Paragraph 3) and the exchange of information on progress in the ratification of priority conventions (Article 269, Paragraph 4). It is also recognised that labour standards should not be used for protectionist trade purposes; a comparative advantage in this respect should not be questioned. On the other hand, despite the conclusion of very elaborate mechanisms to support and control labour law standards in agreements with Group I, these mechanisms are not applied. Moreover, there are examples of counterproductive EU actions against countries such as Swaziland and Guatemala, where governments have breached the agreements and provisions on labour standards. In these cases, other countries, like the US, decided to lift trade preferences because governments imposed a ban on trade unions, while the EU chose to cancel trade barriers.

The case study, which has been analysed in detail in this article, is the free trade agreement between the EU and South Korea. The provisions of this agreement (hereinafter KOREU) look very similar to the FTA with Peru and Colombia, where in Art. 13.4 relating to multilateral norms and agreements, the parties to the agreement are committed to efforts to ratify the core conventions (South Korea signed only four of the eight core conventions) and other conventions that have been classified by the ILO as 'updated' (Paragraph 3). However, in the KOREU, there is no claim, as included in the agreements with Peru and Colombia, to ban the use of labour standards for commercial purposes, which may significantly reduce the settlement of disputes regarding non-tariff-related issues of labour law that restrict free trade. This is a unique situation, considering that South Korea is not a party to the Convention on Forced Labour, as well as the Convention on the Law of Association, which can affect the nature of the relationship between employers and workers and, consequently, increase the comparative advantage of that country. Hence, the agreement provides only the provisions of the commitment of the parties to respect, promote and reflect in regulations and practices the applicable fundamental rights of all members of the ILO under the Declaration of 1998. Article 13.7 provides for the maintenance of levels of environmental protection and labour (Paragraph 1) and states that neither party can weaken or limit the protection in the work provided for in its legislation so as to stimulate trade and investment (Paragraph 2). However, the question of how violations of these obligations can be resolved remains open, as there is no information about the functioning of a consultative mechanism on the resolution of disputes in this area. Provided for in Art. 14, the dispute settlement system also covers issues of labour law, but there is no clear interpretation of how the parties would have to prove the link between the breach of the fundamental principles and the stimulation of trade and investment. Although Art. 13.12 implies the existence of institutional mechanisms designed to support the implementation of the provisions of Chapter 13, it is too early to assess the effectiveness of this solution. In addition, the internal advisory groups designed to provide advice

on the implementation of the provisions of Chapter 13, which are *independent representative organisations representing civil society organisations in a balanced manner across environmental, labour and entrepreneurship sectors, as well as other interested parties*, are not allowed to make decisions but only formulate non-binding opinions. The contents of the statement of the Commission annexed to the agreement specify that the consultative body shall be composed of equally numerous representations of employers, trade unions, non-governmental organisations and the European Economic and Social Committee. Detailed conditions for the functioning of the group shall be agreed with stakeholders.

In general, no real action has been taken until recently by the European Commission to achieve the objectives contained in the individual agreements on labour standards. However, on 17 December 2018, the EU decided to request consultations with South Korea under the TSD chapter due to the lack of sufficient efforts on the Korean side. That was the very first step in the implementation of labour standards through FTAs in a developed country. On 4 July 2019, the EU requested the establishment of a panel of experts.<sup>30</sup> Van Roozendaal points out that South Korea is relatively reluctant to improve labour standards but might have the political will to do so. Nevertheless, her research suggests that, in terms of institution-building, having strong labour provisions in FTAs signed by Korea does not translate into structural changes. Therefore, labour provisions in FTAs serve only a symbolic purpose.<sup>31</sup> A hearing by a panel of experts on the EU-Korea dispute regarding labour rights under the Trade and Sustainable Development Chapter of the trade agreement took place on 8 and 9 October 2020. In the aftermath of political changes and pressure from the European Union, the Korean cabinet supported a motion to ratify the ILO Fundamental Conventions, namely Convention No. 29 concerning Forced or Compulsory Labour, Convention No. 87 on Freedom of Association and Protection of the Right to Organise and Convention No. 98 on the Right to Organise and Collective Bargaining. The panel of experts ruled that even though labour standards are NTIs, by having such a chapter in the FTA, South Korea is obliged to fulfil commitments, as the FTA is an act of international law. For the reason that labour conditions are part of the competitiveness of Korean companies, the panel's award should be clearly seen as a trade defence instrument for EU market protection. Although it took 13 years to utilise such an instrument, a reading of the award suggests that later disputes would follow the same direction.

Another instrument, developed to provide more protection for European producers, was introduced in November 2020 in the aftermath of a series of policy papers published by the European Commission in 2017. In the reflection paper on harnessing globalisation, the EU emphasised its commitment to rule-based and progressive trade that enhances global governance on issues like human rights, working conditions and

<sup>30</sup> European Union, *Republic of Korea – Compliance with Obligations under Chapter 13 of the EU – Korea Free Trade Agreement*, Brussels 2019.

<sup>31</sup> G. Van Roozendaal, "Where Symbolism Prospers: An Analysis of the Impact on Enabling Rights of Labour Standards Provisions in Trade Agreements with South Korea," *Politics and Governance*, vol. 5, no. 4 (2017), pp. 19-29.

environmental protection.<sup>32</sup> The paper was followed by the non-paper of the Commission services on improving the implementation and enforcement of the Trade and Sustainable Development chapters in EU Free Trade Agreements.<sup>33</sup> On 16 November 2020, the Commission launched a new complaints system for reporting market access barriers and breaches of Trade and Sustainable Development commitments in the EU's trade agreements and under the Generalised Scheme of Preferences.<sup>34</sup> Such a system, based on the submission of complaints via an EU website, shall be perceived as a soft trade defence instrument, as representatives of civil society could be involved in monitoring and signalling infringements. By gaining knowledge, the EU may, in turn, use diplomatic instruments to convince trading partners that some changes in labour standards are just, necessary and welcome.

## CONCLUSION

The perspective presented here on NTIs as possible trade defence instruments contributes to a growing literature in European studies, international relations and comparative politics, highlighting the role of labour standards both in the foreign policy of the European Union and in its internal arrangements and mechanisms of governance. This analysis of EU trade defence instruments in *statu nascendi* reveals that the EU has not, until recently, enforced non-trade issues as tools for the protection of the European market. This claim does not imply that the EU does not establish tools for protection in the EU FTA, but, contrary to expectations and the literature on the role of labour standards, new generations of FTAs/PTAs have been crafted to serve as incomplete contracts, with the aim of using them when needed. The low degree of interest in labour standards in developing countries results from their fragile political situations and, to some extent, the history of European trade relations. While the EU may transfer regulatory standards on labour to the weaker party, it is not seeking to do so because the expected cost of such a transfer may exceed the expected benefits. Moreover, developing countries do not compete with the European market; thus, it is only those states that compete with the European economy that are targeted with trade defence instruments based on non-trade issues. This logic and dynamic of the EU's activity in global trade may evolve; however, it is unlikely that it will align with the European normative power perspective. Conversely, norms articulated by the EU in global trade have been used as flexible instruments, with detailed and insightful calculations on whether the promotion of EU norms may harm European economic interests.

<sup>32</sup> European Commission, *Reflection Paper on Harnessing Globalisation*, Brussels 2017.

<sup>33</sup> European Commission, *Feedback and Way Forward on Improving Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements (Non paper of the Commission services)*, Brussels 2018.

<sup>34</sup> "Commission Launches New Complaints System to Fight Trade Barriers and Violations of Sustainable Trade Commitments," *European Commission*, 16 November 2020, at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2134](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2134), 1 XII 2023.

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