3. INSTRUMENTS ON THE EUROPEAN LEVEL

This chapter focuses on the European level and assesses the legal and political regimes and settings within the EU relevant for the protection of labour rights in GPN. Relevant directives as well as legal instruments that are applicable in other areas but could be used to secure labour rights in GPN will be analysed. In principle, the EU would be the appropriate institution to regulate labour rights in GPN at the European level, and it has already established regulation on other matters of cross-border nature, such as competition law. However, little has been done in the area of cross-border labour rights protection and company accountability. In the following chapter, we will look at past and current initiatives to assess the potential and direction of the EU in this regard.

3.1 The EU and Labour Rights in global production networks - past and current situation

Within the institutions of the EU, discussions on the lack of effective control over TNCs are not a new topic. As early as 1973, the European Commission (EC) proposed regulatory efforts on „multi-national undertakings“: “[T]he measures to be undertaken should not impede the development of a phenomenon with recognized economic and social advantages, but they should merely aim at guarding the Community against its harmful effects with the help of a suitable legal framework…it should apply to individuals and to undertakings, whether of national, international, Community or extra-Community foundation. ... [T]he problems raised could not be solved by adopting a few spectacular measures or a code of good conduct which by definition would be binding only on undertakings of good will. Indeed, the size of certain problems...justifies the adoption of measures of greater constraint.”45 This relatively far-reaching proposal was made in the context of the economic crisis of the 1970s; in the wave of recovery in the 1980s, unfortunately, the momentum was lost and the proposal forgotten.

In 1977, as one of the first measures of the common EC foreign policy, the Community adopted a CoC for European firms operating in South Africa.46 This Code contained guidelines on non-discrimination in the workplace, equal pay, access to education, and the recognition of trade unions. This was another step into the right direction but it proved unsustainable as well, due to ineffective monitoring and the lack of binding obligations on the firms.47

In the wake of the disaster of Bhopal48 in 1984, the European Parliament demanded in several resolutions that the Commission propose legislative measures to bind foreign branches of EU firms to uphold certain EU standards. One of those resolutions of 1999 proposed inter alia a European Monitoring Platform. However, none of these resolutions could be put into action. In reaction to the Com-

45 European Commission, Multinational Undertakings and Community Regulations, COM (73), 7 November 1973, p. 15.
46 For more details on EC foreign policy concerning the Republic of South Africa see http://europa.eu/scadplus/leg/en/lvb/r12200.htm
47 Here, see also Martin Holland, Europe Past and Future. The European Community and South Africa: In Search of a Policy for the 1990s, International Affairs, Vol. 64, No. 3. 1988, pp. 415-430.
48 In December 1984, a pesticide plant owned by Union Carbide Corporation (followed by Dow Chemicals in 2001) released 40 tons of toxic gas, immediately killing 3,000 people, more than 15,000 died in the following years. The settlement reached obliged Dow Chemicals to pay 470 Million US$, however, even this comparatively small amount has not been fully disbursed to the victims yet. See Amnesty International, Clouds of injustice. Bhopal disaster 20 years on, http://web.amnesty.org/library/print/ENGASA200152004
mission’s inactivity, the Parliament then decided to install its own ad hoc control mechanism – in 2001, public hearings were held on the activities of European oil companies in Myanmar.

In the same year, the EC issued a green paper on CSR,49 including a definition of CSR: “Most definitions of corporate social responsibility describe it as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis. Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing “more” into human capital, the environment and the relations with stakeholders (…) Corporate social responsibility should nevertheless not be seen as a substitute to regulation or legislation concerning social rights or environmental standards, including the development of new appropriate legislation. In countries where such regulations do not exist, efforts should focus on putting the proper regulatory or legislative framework in place in order to define a level playing field on the basis of which socially responsible practices can be developed.”50 This EC definition addresses two critical issues: (1) CSR includes legal compliance – also for labour rights – but must go beyond it, and (2) CSR cannot be a substitute for legal regulation.

This promising definition has however not led to the expected developments with regard to CSR and regulation by the EU and recent documents of the Commission do not encourage high hopes. The latest communication „Making Europe a Pole of Excellence on CSR“51 presents the voluntary approach as the one and only trump card in the game. Not even the extensive consultation process following the green paper on CSR52 which revealed a considerable number of stakeholders pushing for legally binding measures changed the Commission’s position in this regard. The latest activity of the Commission was the launch of a “European Alliance for CSR” including large companies, SME’s and their stakeholders. The Communication emphasizes that this alliance “is not a legal instrument and is not to be signed by enterprises, the Commission or any other public authority.”53

A quick glance at the Commission’s position on EU Foreign policy also shows that the Commission still uses the ‘carrot without the stick’ approach: the dissemination of the CSR concept should be promoted in developing countries and TNCs should be encouraged to support human rights and workers’ rights, especially in developing countries.54 Strategically and psychologically speaking, such an incentive-driven approach may create an encouraging and positive signal for companies that are willing to get active in CSR. However, there are no binding and standardized rules and companies are free to define their own CSR standards. Further, companies that do not engage in CSR activities will not be responsive to such an approach.

Given this dilemma, a recent report of the European Parliament on CSR proposes to follow a „twin-track approach“ in pursuing both incentives and regulation. The Parliament “[a]grees with the Commission that CSR policies should be promoted on their own merits, neither as a substitute for appropriate regulation in other fields, nor as a covert approach to introducing such legislation; [and] believes the debate on voluntary versus mandatory approaches to CSR at the EU level should be ‘depolarised’ by reiterating the essentially voluntaristic approach but enabling - without obligation - re-

50 Supra, 6-7.
52 More than 250 comments from employer, employee, consumer organisations and NGOs participating in an EU Stakeholder Forum were collected. The lines were divided along the known paths: employer organisations proposed a voluntary strategy, employee and consumer organisations voted for a more binding approach. A final agreement could not be reached. See further details in http://ec.europa.eu/employment_social/soc-dial/csr/CSR_responses.htm
54 Supra, p. 4.
search and dialogue into potential regulatory measures (...). When the UN Special Representative on Business and Human Rights\textsuperscript{55} is openly considering regulatory responses to the CSR debate, the renowned Global Reporting Initiative arising from the UN Environmental Programmes is openly seeking convergence of CSR tools with business, when the UN Global Compact has removed 200 companies from its initiative for failing to abide by its requirements - the Commission will also be confronted by the reality that the "anything goes" approach of its Communication is both out-of-date and outmoded.\textsuperscript{56}

Very recently, the Commission indicated that a new communication in 2011 might take into account the work of the UN Special Representative (see 3.1.2.). Studies mandated by the Commission which seek to explore the human rights responsibilities of EU companies operating abroad are further indicators of this potential new direction.\textsuperscript{57} However, clear actions have yet to confirm this possible new trend.

The EU is in the unique position and better suited than any other organization to enact legislation with binding effect on EU based companies operating transnationally.\textsuperscript{58} According to Article 95 of the EC Treaty, the Commission would have the possibility to propose Community legislation in order to eliminate distortions to fair competition. In this area of distortions to fair competition, the Commission has in the past been very creative in using its competency for "cross-cutting issues" to be legislatively active. This has led to a dynamic extension of Community competencies on various issues, e.g concerning measures on critical infrastructure, an area of the third pillar before the Treaty of Lisbon but interpreted by the Commission as a topic that might interfere with fair competition.\textsuperscript{59}

Moreover, the subsidiarity principle becomes relevant here. This principle spells out that only if objectives of the EU cannot be met on the national level may the Commission step in and propose regulation on the EC level. The activities of TNCs operating across national borders present exactly the challenge that the exception to the subsidiarity principle seeks to solve. The regulation of TNCs poses significant problems as each subsidiary may be situated in a different country and different national laws may apply. It is usually unclear which national law applies to the TNC as a whole. Thus, a Community regulation covering TNCs and their subsidiaries in the member states would be necessary. A common regulation which is applicable to all EU countries would indeed prevent national regulatory differences and thus provide the famous „level playing field“, creating transparent and equal conditions for all players in the EU common market.

The following section looks at specific initiatives at the EU level in other areas which could be applied to secure labour rights protection in GPN.

\textsuperscript{55} On the work of the Special Representative see section 3.2.
\textsuperscript{57} See for example the call for tenders of the European Commission on a study of the legal framework on human rights and the environment applicable to European enterprises operating outside the EU, http://ec.europa.eu/enterprise/newsroom/cf/itemlongdetail.cfm?item_id=3334&lang=de
3.2 An Alien Tort Claims Act on the EU level? The Brussels I Regulation

This section addresses the possibilities of EU member states to exercise extraterritorial jurisdiction concerning labor rights violations committed abroad along the lines of the US ATCA (see 1.3.1). The Brussels I Regulation\(^{60}\) entitles the national jurisdictions of Member States to accept civil proceedings against corporations based in the EU for certain acts even if they have been committed outside of the EU. This regulation, along with the Council Framework Decisions on trafficking in human beings and on sexual exploitation against children (see further below), is explicitly mentioned by the European Parliament\(^{61}\) as a legal instrument which could be used to enforce corporate accountability for “matters relating to tort, delict or quasi-delict”\(^{62}\) committed abroad.

Art. 2(1) of the Brussels I Regulation provides that a “person domiciled in a Member State\(^{63}\) shall, whatever their nationality, be sued in the courts of that Member State.” According to the European Court of Justice, if the occurrence of the event and the results in damage are not identical, “the defendant may be sued, at the option of the plaintiff, in courts for either of these places.”\(^{64}\) De Schutter concludes from this judgement that if for example a decision of the Board of Directors of a company is taken in Member State A and this decision causes damage in Member State B, the plaintiff may choose where to sue the company and may seek the more favourable jurisdiction.\(^{65}\) In addition, a company may also be sued in a Member State where it has a branch or subsidiary (Art. 5(5)). The European Court of Justice has also clarified in the Josi case\(^{66}\) that the regulation applies in a dispute between a claimant from a state outside the EU (e.g. a worker of a branch of a TNC) and a defendant (the TNC) domiciled in the EU. Thus, the Regulation allows for EU Member States’ courts to hear tort actions by victims whatever their nationality or residence against TNCs or any of its subsidiaries or branches domiciled in the EU. Regarding the issues of this study, the Convention has been applied in the Lubbe Case where the House of Lords confirmed that the UK had jurisdiction over a case on labor rights violations which took place in South Africa (for further details see section 2.1.2.3).

Other areas of law than the Brussels Regulation show similar venues. In the field of penal law, the Council Framework Decision on the Combat of Trafficking in Human Beings (2002)\(^{67}\) includes the liability of legal persons, including companies, with headquarters in the EU for delicts committed abroad. The Council Framework Decision obliges the EU member states to prosecute criminal activity even if it takes place outside the member state’s jurisdiction, if the legal person benefits from it. Similar provisions exist concerning the sexual exploitation of children.\(^{68}\) These regimes would pro-

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\(^{62}\) Art. 5(3) of the Convention.

\(^{63}\) This includes a company or other legal person or association of natural or legal persons domiciled at the place where it has its statutory seat or central administration or principal place of business (Art. 60(1)).

\(^{64}\) European Court of Justice, Case C-51/97, Réunion européenne SA and others, para. 28.


\(^{66}\) Case 412/98.


vide a proper basis for a further development of EU law towards greater accountability of EU based companies for human rights, including labour rights violations committed in non-EU countries, thus capturing violations in GPN.

The Brussels I Regulation is currently under review after an extensive consultation process of the EC. According to the proposal of the Commission, it is envisaged to explicitly extend the jurisdiction to persons (defendants) outside of the EU because of “equal access to justice on the basis of clear and precise rules on international jurisdiction.” This proposal has been welcomed by a number of actors, such as Amnesty International, the European Coalition for Corporate Justice and the Austrian Chamber of Labour. However, the majority of submissions, for various reasons such as “sensitiveness” and “complexity” of the issue oppose such an extension. It remains to be seen whether the outcome of the consultations will change the Commission’s proposal. If the proposal were to be put into action, this would mean an important step forward to ensure greater access to justice for victims of labour rights violations by non-EU domiciled companies that operate in GPN with connection to the EU market.

Another proposal of the Austrian Chamber of Labour sent as a submission in the consolidation process merits attention for the purposes of this study. The Austrian Chamber of Labour suggests that special jurisdiction should be extended to include collective action in labour disputes such as strikes. This means that cases must be decided by the courts where the collective action takes place. As of now, if several countries are involved which is usually the case in cross-border settings, such a dispute could be drawn to the national court which is deemed more favourable to the position of the employer. In the Viking case, the dispute arose over the decision of Viking Line ABP and OÜ Viking Line Eestia to reflag one of its ships, to an Estonian flag, to enable it to acquire cheaper Estonian labour to work on the ship. The Finnish Seamen’s Union, while accepting that the company had the right to employ the workers, insisted that these workers must be employed under the terms of the existing Finnish collective agreement. When the company refused to accept, the union answered with measures of collective action and called on trade unions internationally to support it, one of them being the International Transport Federation (ITF) with seat in London. Viking then sued ITF in a British court, with the result that a British court had to render a judgement on a labour dispute taking place in Finland. Thus, it can be the case that a court without any relation to the collective action in question is decisive on its outcome. The review process of the Brussels I Regulation would provide the opportunity to explicitly refer cases of collective action to the country where the dispute occurs.

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72 Bundesarbeiterkammer, Grünbuchüberprüfung der Verordnung (EG) Nr. 44/2001 des Rates über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen (2009), 8f.
75 Judgement of 11th December 2007 – C-438/05.
3.3 Chain liability on the EU level?

Up to now, chain liability regimes only exist on the national level in some EU member states for the construction sector (see section 2.2.2.). In its draft report on the social responsibility of subcontractors in production chains,\textsuperscript{76} the European Parliament points out that the phenomenon of subcontracting allows “social dumping” and the possibility to circumvent obligations in the area of social security. This is an issue of European dimension (which) “requires European solutions” (European Parliament 2008: 9). In particular, the report notes that all countries concerned face profound problems in view of the enforcement of liability towards foreign subcontractors and temporary agencies. As national provisions differ in protection, and some countries provide no protection at all, the draft report calls for a European liability system for subcontractors to meet the demands of the EU labour market.

The European Court of Justice seems in principle to endorse the instrument of extended liability as a means of workers rights protection. In the landmark case Wolff & Müller,\textsuperscript{77} the European Court of Justice ruled that a national system that makes a firm liable for a subcontractor who fails to pay the minimum wage or contributions to a social security scheme established by collective agreement is a justified limitation of the freedom to provide services.\textsuperscript{78}

As the existing liability regimes in member countries have rendered positive results in securing workers rights, at least for some categories of workers, while also – according to some social partners – providing a level playing field for companies, it would be useful to consider such a liability regime for all member states and other sectors besides the construction sector. An EU wide application would also remove one central limitation of the national regimes because the protection of labour rights would extend to employment relationships across national borders throughout the EU. But two limitations are likely to remain which became apparent in the national regimes: First, not all types of workers are covered with the same level of effectiveness (part-time, temporary and in particular posted workers) and some types of workers are even excluded (informal workers). And, while an EU wide regime would cover employment relationships in the whole EU territory it would not extent to employment relationships outside the EU which are very important in most GPN. Besides these limitations, this regime bears great potential if enacted and implemented at the European or even international level and if extended to more sectors.

The next instrument that will be discussed on the EU level is a fairly new regime of European social dialogue which also has important implications for the protection of labour rights in GPN.


\textsuperscript{77} Judgment of 12 October 2004 - C-60/03.

\textsuperscript{78} “Article 5 of Directive 96/71/EC (…) interpreted in the light of Article 49 EC, does not preclude, in a case such as that in the main proceedings, a national system whereby, when subcontracting the conduct of building work to another undertaking, a building contractor becomes liable, in the same way as a guarantor who has waived benefit of execution, for the obligation on that undertaking or that undertaking's subcontractors to pay the minimum wage to a worker or to pay contributions to a joint scheme for parties to a collective agreement where the minimum wage means the sum payable to the worker after deduction of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay), if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective”. (Wolff & Müller, para. 45)
3.4 European Framework Agreements

European Framework Agreements (EFAs) are agreements between European TNCs and European trade unions and/or European Works Councils on a range of labour-related and social issues of transnational nature and are therefore relevant for the protection of labour rights in GPN with a European dimension. Around 60 EFAs have been concluded by 2009. Most agreements focus on the following issues (see also diagram 1.2):

- Restructuring issues
- Organisation of social dialogue
- Equality in employment
- Health and safety
- Data protection
- Subcontracting
- CSR and human resources management

This distinguishes them from their “twins” on the global level, the International Framework Agreements (IFAs, see 3.3) which in general are focused exclusively on the protection of (core) labour rights. The majority of EFAs contain provisions on restructuring issues. Subcontracting, the topic which is most relevant for this study features less prominently. This mirrors the situation that on the level of social dialogue, restructuring issues are more pressing on the European level, whereas subcontracting issues are higher on the agenda on the international level (see 3.3). This also corresponds with the actors on these levels: the European Works Councils have been created to provide information and to be consulted in such matters as restructuring, whereas global trade unions have set other priorities relevant in their negotiations with TNCs.

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79 European Works Councils must be established in companies with 1,000 or more workers, and at least 150 employees in each of two or more EU Member States to bring together workers’ representatives from all the EU Member States where the company operates in. They meet with management, receive information and give their views on current strategies and decisions affecting the company and its workforce. See ETUC, European Works Councils, http://www.etuc.org/et/docs/etuc/etuc.wc1.pdf (accessed 14th April 2010).

80 The term European Framework Agreement is also used for agreements of the European Social Partners on specific labour-related issues, such as part-time work, telework or on harassment and violence at work (see for example the agreement on harassment and violence at work, http://www.traeunio.mp.eu/Agreement%20at%20Work2.pdf (accessed 19th March 2010). Although both categories of agreements are results of social dialogue on the European level, their actors, contents, objectives and outcomes are however distinct.
EFAs are meant to accompany collective bargaining agreements at the national level. In this regard, the EC expressed its intention to propose a European framework for transnational collective bargaining in 2004 and commissioned a study to explore the possibilities in this area. The study and a survey on transnational agreements were presented but no agreement could be found because employer representatives were strongly opposed to a legal framework, whereas the European Trade Union ETUC voiced its conditional support. In its staff working document on the role of TNC agreements of July 2008, the Commission links this discussion to the EU efforts concerning the Renewed Social Agenda in managing “globalisation in a balanced way and to help European citizens benefit from the opportunities presented to them” (EC 2008: 3). In this document, the EC states that it “is convinced of the potential of transnational company agreements in a context of increasing international integration” (EC 2008: 4).

As to the legal standing of EFAs, the Commission states that because of their varying levels of commitment and as they are not concluded in accordance with collective bargaining rules, EFAs should be qualified as “negotiations” (EC 2008: 5). According to the Commission, European Works Councils have inadequate competences because their mandate is limited to information and consultation activities, not collective bargaining. On the other hand national workers’ organisations do not have a mandate going beyond the national arena and it is also not clear that European workers’ organisations may lead such negotiations. Clarity could however be established by the EC by adopting a legal framework to such effect (EC 2008: 7). The legal framework could be based on Art. 139 of the EC Treaty which states that social partners may transpose collective agreements at the EU level into national collective agreements in order to establish legal standing of the agreement at the national level (Sobczak 2007: 481).

Regardless of these legal uncertainties, the Commission declares in the conclusive chapter of the working paper that it “will support initiatives to conclude transnational company agreements without...
prejudice to compliance with the applicable national or Community provisions” (EC 2008: 10). The Commission also installed an expert group that will monitor developments and exchange information on how to support this process. It seems clear that regardless of EU action in this area through a legal framework, EFAs will continue to be negotiated by European TNCs and European trade unions and/or European works councils. However, a legal framework would support this strand of transnational social dialogue and remove the legal uncertainties mentioned. If EFAs were accepted as such collective bargaining agreements they would have legally binding effect and they would be far more than mere “negotiations”. Thus, this step would be a relevant mosaic piece in the effort to protect cross-border labour and social rights.

The following last instrument on the EU level looks at how labour rights protection can be incorporated into trade agreements.

3.5 EU Trade Agreements and Labour Rights

The inclusion of a social clause (e.g. consisting of ILO core labour standards) in trade agreements has been one avenue to protect labour rights in GPN. At the multilateral level in the Uruguay round, and subsequently in the World Trade Organisation (WTO) founded in 1995, social clauses have been discussed. However, no results have been achieved at the WTO level so far. Since the stalemate situation at the WTO’s Doha Development Round, trade liberalization initiatives have shifted from the multilateral to the bilateral and regional level. The US and the EU – major players in bilateral and regional trade negotiations - have incorporated labour standards in their trade agreements since the 1990s - the US in the North American Free Trade Agreement (NAFTA), the General System of Preferences (GSP) and bilateral trade agreements such as the US-Cambodia Textile agreement see below) and the EU in its GSP system and in the future also in bilateral trade agreements. The EU currently negotiates a number of bilateral trade agreements with various countries such as Canada, India and China. Free Trade Agreements (FTAs) are an important strategy of the EU’s “Global Europe” strategy which seeks to enhance EU competitiveness in a globalized world. In these agreements, the EU has the objective to include a “sustainability chapter” which seeks to consider trade related social and environmental issues to further sustainable development (Interview DG Trade 2010). This strategy has to be seen in conjunction with the promotion of the EU Decent Work Agenda where the Commission identifies trade as “a factor in sustainable development” by “taking account of the social dimension, decent work and the recommendations of social impact assessments in bilateral and regional trade negotiations.”

This EU initiative has caused considerable controversy. On the one hand, it has been welcomed as a major step forward to reconcile trade and social issues; on the other hand, such agreements are seen as mere “trade liberalization instruments” where the social dimension is used to justify trade liberalization which is in many cases not beneficial for the EU partner countries. Since Doha, a number of international alliances have emerged that mobilize against FTAs with the objective to have them removed altogether. On the EU level, in particular, civil society organizations, criticize that

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87 European Commission, Promoting Decent Work for all, 8.
the EU clearly prioritizes trade issues over social issues; and in most instances, due to the unequal bargaining powers of the EU and their trade negotiation partners, the EU is in a much better position to further EU business interests. Moreover, the negotiations take place behind closed doors and prior to the consultations, trade unions and NGOs are not adequately consulted whereas business organizations’ input is – at least to some extent – taken into account. Also, although the EC has initiated civil society consultations, the impression prevails that they have had little impact on the negotiations themselves.

To minimize some of these concerns, the EC foresees sustainability impact assessments which should ensure that the impact of the respective trade agreement on social and environmental matters is properly assessed to reduce negative consequences and enhance possible positive impacts. The direct value of these impact assessments however remains unclear. In principle, such an assessment must take place before or at least while negotiations are ongoing to have relevance. In the negotiation process of the first FTA with a sustainability chapter, the EU-Korea Agreement, this was unfortunately not the case (interview DG Trade 2010).

Experiences with the impact of sustainability chapters could so far not be made because the first and so far only such chapter is not yet in force: the EU-Korea Agreement has been signed in 2009 and will possibly enter into force by the end of 2010 (interview DG Trade 2010) or in 2011. In substance, the sustainability chapter of this agreement includes reference to the ILO core labour standards and the commitment of the parties to effectively implement the conventions they have ratified and to make “continued and sustained efforts” towards ratifying the remaining ILO core conventions (Art 13.4 (3)). This rather hesitant formulation takes note of the fact that Korea has not ratified 4 of the 8 core conventions. Importantly, the “non-lowering standards” clause, equivalent to the human rights principle of non-retrogression, is explicitly stipulated: no party shall weaken or reduce its labour protections to favour trade or attract investment. On the other hand, it is made clear that labour rights protection may not be used for protectionist purposes (Art. 13.2 (2)). This provision responds to the traditional criticism that labour rights may be used by countries of the North against countries of the South to protect their own firms. Another positive aspect of the agreement is the possibility of including civil society opinions via the “Civil Society Forum” (Art. 13.13). This Forum usually meets once a year to discuss “sustainable development aspects of trade relations”. Further details on the operation of the Forum will be laid down by the EU and Korea within one year after entry into force of the agreement. However, it is unclear how this dialogue will influence the implementation of the agreement and in particular the protection of labour rights. The only paragraph addressing this issue suffers from weak wording: “[t]he Parties can present an update on the implementation of this Chapter to the Civil Society Forum. The views, opinions or findings of the Civil Society Forum can be submitted to the Parties directly or through the Domestic Advisory Group(s).”

The major weakness of the Sustainability Chapter lies in its enforcement mechanisms. It only foresees government consultations, and if these are unsatisfactory, the establishment of an expert panel

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90 On these consultations see http://trade.ec.europa.eu/civilsoc/index.cfm (accessed 18th February. 2010).
92 These are the conventions no. 87 and 98 on freedom of association and the right to collective bargaining, and the conventions no. 29 and 105 on forced and compulsory labour. For a list of ratifications of the core conventions see http://www.ilo.org/ilolex/english/docs/decworld.htm (accessed 12th February 2010).
93 See for example Marzia Fontana et al., Global Trade expansion and liberalisation: gender issues and impacts (1998), BRIDGE report No. 42, 33f.
94 See Art. 13.13. (3).
whose report “[t]he parties shall make their best efforts to accommodate” (Art. 13.15. (2)). No incentive or sanctions structure exists to make parties integrate the findings of the experts report. This means, in short, that the sustainability chapter is excluded from the dispute settlement system which applies to the other chapters of the agreement and foresees sanctions (for example the increase of tariff rates) for non-compliance. This is very unfortunate because a well-balanced structure of incentives and sanctions would have greatly enhanced the credibility and effectiveness of the protection of labour rights in trade agreements and would show that labour rights protection is taken as seriously as trade liberalization.

The example of the US - Cambodia Textile Agreement is interesting in this regard. In the section on labour, the agreement relates improvements in market access to labour rights improvements in the apparel sector which are monitored and reported by the ILO (for details see section 4.1.1.3). Despite some problems, this programme (which is called “Better Factories Cambodia”) has improved working conditions of Cambodian apparel workers and contributed to the protection of labour rights in a complex GPN. The program has been recently extended to more countries and sectors and renamed to “Better Works”. It would be useful for the EU to consider similar support activities for its own negotiations. While it seems too late for the Korea FTA, current negotiations with other countries such as India would greatly benefit from the Cambodia experience.

Currently, the EU negotiates an FTA with Canada. The proposals of Canada go further than the current EU positions. Canada presents a broader approach to labour rights by including minimum wage provisions, overtime, health and safety at work and the non-discrimination of migrants. Canada also suggests the inclusion of labour rights issues in the dispute settlement system and foresees fines for non-compliance. It remains to be seen if and how this fairly progressive approach will be watered down in the negotiation process. The draft of Canada is an important reference point to show possibilities of extending the scope of labour rights and their inclusion in the dispute settlement system and thus an equal treatment of trade and labour issues in the implementation of a bilateral trade agreement.

In conclusion, it can be said that the EU would have the potential to strongly support the protection of labour rights in GPN by incorporating labour rights into trade agreements and making market access conditional on the fulfilment of labour rights. Given the cross-border nature of GPN and the political and legal implications of the EU’s support for the decent work agenda, the exploration of this potential would be imperative.


Draft consolidated text as of 13th January 2010.