SOCIAL STANDARDS IN SUSTAINABILITY CHAPTERS OF BILATERAL FREE TRADE AGREEMENTS

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Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements

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1. Introduction: contextualization and assessment of bilateral Free Trade Agreements

The European Commission has created a new generation of bilateral trade and investment agreements within the scope of the "Global Europe" strategy[1] in order to facilitate market access at a bilateral level after the liberalisation efforts declined within the World Trade Organisation. In the opinion of the Commission, this new generation of agreements shall fulfil several objectives:

"The key economic criteria for new FTA partners should be market potential (economic size and growth) and the level of protection against EU export interests (tariffs and non tariff barriers). (…) In considering new FTAs, we will need to work to strengthen sustainable development through our bilateral trade relations. This could include incorporating new co-operative provisions in areas relating to labour standards and environmental protection. We will also take into account the development needs of our partners and the potential impact of any agreement on other developing countries, in particular the potential effects on poor countries' preferential access to EU markets. The possible impact on development should be included as part of the overall impact assessment that will be conducted before deciding to launch FTA negotiations. (…) The decision to launch negotiations should be taken case-by-case, based on these economic criteria but also our partners' readiness and broader political considerations. FTA provisions should be an integral part of the overall relations with the country or region concerned."[2]

The communication seems to show a clear prioritization: sustainability aspects are subordinate to economic issues. This is also a reason why bilateral Free Trade Agreements (FTAs) are being strongly criticised in international discussions within civil society, and partly rejected per se. Even international alliances have been formed that mobilize transnationally against FTAs with the aim of abolishing them altogether.[3]

Critizism specifically relates to the fact that the EU gives priority to economic issues and that it is, because of unequal negotiating powers, also in a much better position to implement these in the negotiations; it has also been noted that negotiations are taking place behind closed doors, and that even though enterprises and economic interest groups are consulted prior to these negotiations, trade unions and NGOs are not or not sufficiently involved.[4] A number of NGOs demand a moratorium of the "Global Europe" agenda and a comprehensive revision of the trade and investment policy, also with regard to a more democratic structure of the negotiation process.[5]

As long as this paradigm shift has not been accomplished – if it can ever be accomplished – negotiations and the conclusion of new Free Trade Agreements will continue. This leads to the question how future Free Trade Agreements can be designed in a way that minimizes detrimental

[1] See Commission Communication, Global Europe: Competing in the World, COM(2006) 576 final.
[2] Ibidem, page 11-12.
[3] See for example the activities of FTA Watch, bilaterals.org, GRAIN and Médecins Sans Frontières, Fighting FTAs: An international strategy workshop, Bangkok, Thailand, July 2006, Summary Report, http://www.bilaterals.org/IMG/pdf/Fighting-FTAs-summary-report.pdf (18.2. 2010).
[4] See Peter Fuchs, Global Europe - Die neue EU-Handelspolitik im Wahn der Wettbewerbsfähigkeit (2007), 3f, [The new EU trade policy under the illusion of competitiveness] and WEED, Freie Fahrt for freien Handel? (2005), 49f. [Clearing the Way for Free Trade?]
[5] Seattle to Brussels Network et al., Towards an Alternative Trade Mandate for the EU (2010), http://www.attac.at/fileadmin/user_upload/dokumente/ATM_A4_DE.pdf (20.5. 2010).

effects to workers' rights, or even improves the latter in the context of the logics of these agreements. At this point, it is important to note that due to the institutional changes in the wake of the Lisbon Treaty, the adoption of EU trade agreements requires the consent of the European Parliament.[6]
The following chapters briefly outline the experiences made with Free Trade Agreements in terms of labour rights so far and the elements of "Good Practice" of existing as well as currently negotiated agreements, followed by final remarks summarizing these findings. The centrepiece of this report consists of two sample texts for social standards of a Sustainability Chapter in bilateral negotiations of the EU with developing and industrial countries, respectively. The Annex contains the international standards relevant to this subject.

2. Experiences with the implementation of existing agreements

Mercosur Agreement (1991)

Mercosur is South America's leading trading bloc known as the Common Market of the South. Its members include Argentina, Brazil, Paraguay, Uruguay and Venezuela; associated states are Bolivia, Chile, Ecuador, Columbia and Peru. This agreement provides for commissions on labour costs, implications of the economic integration on employment, mobility, vocational training and social security. It contains a list of ILO Agreements which can be ratified. It has a separate forum (Economic and Social Consultative Forum) on labour matters that also aims at the integration of "social players" (Grandi 2009: 22). At the same time, the "MERCOSUR Social Labour Declaration", providing minimum labour standards, was adopted, which the states should comply with.

North American Agreement on Labor Cooperation (1993)

The North American Agreement on Labor Cooperation, short NAALC, is the oldest and probably the most intensively scrutinized Labour Rights Side Agreement. It was signed in September 1993 by the Presidents of Mexico, the United States and Canada. It has its own dispute resolution mechanism. Concerning the tangible improvements of labour conditions, the majority of analyses, however, seem to arrive at tendentially negative results (Polaski 2004, Dumbois 2006, Müller/Scherrer 2007). 25 complaints were handed in between 1994 and 2002, 15 against Mexico, 8 against the USA and 2 against Canada. Most were submitted before 2000; since then a certain submission fatigue has been observed (Greven 2005).

FTA USA - Jordan (2000)

This FTA is the first US Agreement which integrates labour rights issues into the dispute resolution system of the agreement itself (Art. 17). It is regarded as one of the most rigorous agreements and does not distinguish between trade and labour rights issues: the dispute resolution body ("Dispute Settlement Panel") may decide that the complaining party withdraws its trade preferences or takes other suitable measures until compliant behaviour has been achieved.

EU - CARIFORUM Agreement (2008)

The agreement between the EU and 15 Caribbean States (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St. Christoph and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago) contains the

[6] Except where agreements relate exclusively to the common foreign and security policy (Art. 218, para. 6 of the Lisbon Treaty).

commitment to core labour standards and to the Declaration of the ECOSOC of the UN from 2006 under the heading “Full Employment and Decent Work for All” (Art. 191).
In case these Core Labour Standards are not complied with, the dispute resolution system permits the complaining party, under consideration of capacity factors, to take “suitable measures” which have the least impact on the fulfilment of the agreement. This means, however, that it is not possible to suspend any trade benefits. The Joint CARIFORUM-EU Council has the mandate to take binding decisions on all issues of the agreement (Art. 229). Further relevant institutions are the CARIFORUM-EU Parliamentary Committee for promoting the exchange of views (Art. 231) and the Consultative Committee to promote dialogue and cooperation between representatives of organisations of civil society, including the academic community, and social and economic partners (Art. 232).

Generalized System of Preferences, GSP and GSP+ (2009-2011, renewable)

The GSP system of generalized tariff preferences by the EU is open for states which fulfil specific criteria, among others the compliance with Core Labour Standards. Their goods benefit from a tariff-reduced entry into the European Union, i.e. they are either completely exempt from duty or they are subject to tariff reductions for products, which are liable to duty. A new regime, granting duty free access, the GSP+ came into force in January 2006. It provides developing countries with additional trade advantages. The countries concerned have to sign and effectively implement the 16 framework agreements on human rights and employment rights as well as 11 agreements on good governance and environmental protection. The system foresees the suspension of preferences in case of the serious violation of labour rights. So far, this has been applied to Belarus, Burma and Sri Lanka.

EU - Korea Agreement (entry into force expected 2010/2011)

This is the first EU Agreement with a Sustainability Chapter, which will probably come into force only at the end of 2010 resp. at the beginning of 2011 (Interview DG Trade 2010). The Sustainability Chapter (Chapter 13) refers to the ILO Core Labour Standards with the commitment of the contracting parties to make “continued and sustained efforts towards ratifying the remaining ILO core conventions”. This very timid formulation refers to the fact that Korea has only ratified 4 of the 8 core conventions.[7] Hence, it is not clear, which concrete steps Korea will take to ratify the remaining core conventions.

The agreement contains the “Non-Lowering Standards Clause" (definition see page 10) but also the provision that the protection of employees’ rights will not be used for protectionist purposes. One positive aspect of the agreement is the option of setting up a so-called “Civil Society Forum” (Art. 13.13). This Forum meets once a year to discuss “aspects of the sustainable development of trade relations”. So far, there is no more information available as to how the Forum works. The agreement only specifies that further details will be determined by the contracting parties within a year after entry into force. It remains unclear how the dialogue within the Forum will influence the implementation of the agreement. The only reference remains rather vague: “[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).”[8]

[7] These are the following Conventions: No. 87 and 98 on Freedom of Association and Protection of the Right to Organize and Right to Organize and Collective Bargaining and the Conventions No. 29 and 105 on the effective abolition of forced labour. With regard to the list of the current ratification status of Core Labour Standards see http://www.ilo.org/ilolex/english/docs/declworld.htm (12th February 2010).
[8] See Art. 13.13 (3).

The weakness of the Sustainability Chapter lies in its implementation mechanisms. It only provides for government consultations and, if these fail, the opinion of an expert committee. There is no structure to bindingly implement the proposals of the committee; the report only states "[t]he parties shall make their best efforts to accommodate [it]"[9]. This means that the provisions of the Sustainability Chapter have been exempt from the dispute resolution procedure, which is in contrast to the actual trade provisions that provide for sanctions (for example the increase of tariff rates) in case of non-compliance with the decision of the dispute resolution organ. A balanced structure of capacity support, incentives and the power to impose sanctions would have increased the credibility and effectiveness of the Sustainability Chapter. This procedure, however, also conforms to the strategy of the European Commission, which rejects to link the violation of employees' rights with sanctions (interview DG Trade 2010).

3. Good Practice elements of existing agreements

USA - Cambodia Textile Agreement (1999)

A programme for implementing and promoting improved working conditions has been created within the scope of this agreement. This so-called "Better Factories" Programme (started 2001) has two main characteristics: it includes positive incentives for the compliance with employees' rights as well as a monitoring function of the ILO. All factories of the Cambodian textile and clothing sectr – with the exception of some suppliers – are registered and monitored by a local monitoring team in a 10-month cycle. The results of this supervision are monitoring reports of the factory visits and a publicly available summary report. This reporting process is made possible by a separate computer management system and made available to major companies resp. suppliers. Within the scope of the trade agreement, Cambodia has been guaranteed a fixed import quota (9 % p.a. in the first 3 years and 18 % in the following year 2004), which, based on progress made in improving working conditions, could be increased accordingly for each following year – until then a unique system of directly linking positive quota incentives with the implementation of labour rights.[10]

Two problem areas have been identified and solved during the course of the project. The Programme was based on the voluntary participation of the companies; the quota increase, however, was granted on the basis of the overall situation of the Cambodian textile sector. This resulted in the so-called "free rider syndrome", which gave advantages to those who did not participate in the Programme. As a result, the Cambodian government introduced legislation that reduced the number of available export licenses to the number of participants in the Programme. This led to a complete coverage of the sector. The second problem was the reporting on the progress concerning working conditions. The report format had not been determined, for example with respect to the important question of including factory-specific results. Subsequently reporting was agreed upon as follows: a first report published the result for all inspected factories. The second report provided a synthesis and an overview about the problems examined, without naming specific factories. Those factories that did not remove labour rights violations after a certain period were named in the following report. In doing so, decisive progress was made with regard to increased transparency.

Many participants valued the "Better Factories Cambodia" Programme as successful; some even called it the most successful initiative in this sector. However, inadequacies have also been noted.

[9] See Art. 13.15 (2).
[10] Polaski, S., Protecting Labor Rights Through Trade Agreements; An Analytical Guide (2004), 21f, and Wells, D., "Best Practice" in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement (2006), 363.

Not enough progress has been made for example with regard to some labour rights, such as trade union rights, adequate wages and working hours. Local trade unions are suggesting to fully integrate bulk buyers into the Programme, and to publish the reports concerning them in order to demonstrate which consequences their procurement practices have on labour rights in Cambodian factories.[11] In 2008, the ILO and the International Finance Corporation (member of the World Banking Group) started the "Better Work" Programme with the aim to repeat the experiences in Cambodia in other states such as Jordan, Vietnam, Haiti, Indonesia, China, Bangladesh, Pakistan, India, Nicaragua and Morocco. It is planned to extend the Programme to other branches like tourism and the electronics sector.[12] In case of this extension, it will be important to solve the remaining criticisms satisfactorily. For example, all relevant local players, including trade unions, labour inspectorates, NGOs and government authorities should be involved in the process, and the links between the procurement practices of bulk buyers and labour rights violations should be clearly shown. Developing local capacities should be a core target to replace ILO Monitoring with State Labour Inspectorates in the longer term.[13]

ASEAN Agreement (1995)

The Association of Southeast Asian Nations, short ASEAN, is an alliance of ten Southeast states, namely Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. The agreement contains an Implementation Plan for Health and Safety in the Workplace, which obliges the ASEAN States to prepare a checklist based on existing ILO Standards and Good Practice. Also planned is the cooperation with the ILO concerning these issues; a separate Memorandum of Understanding between ASEAN and the ILO[14] has been concluded (ILO 2009: 72). This Memorandum specifies cooperation in the following sectors: exchange of relevant information, including Good Practice; cooperation in relevant projects and programmes, for example with regard to the impact of trade agreements on employment, health and safety in the workplace, HIV/AIDS, etc.; cooperation in studies, including statistics; participation in specific meetings; and cooperation in all other matters of common interest.[15]

Trade Agreement USA - Chile (2004)

This agreement contains one of the more progressive social chapters, similar to the USA - Jordan Agreement. The implementation of minimum wage requirements, however, has only been provided for at the national level; the more advanced standard setting (Art. 18.8) has not been applied. The instrument of dispute resolution is the same for labour and trade matters. The reasons for this can be attributed to the pressure applied by trade unions and NGOs and the preference of a bilateral system with independent panels to unilateral sanctions by US courts (Grandi 2009: 28). The core provision of this chapter is the compliance with national labour law, based on the standards of the Core Labour Standards, health and safety in the workplace, minimum wage and adequate working hours. The principle of sovereignty has been emphasized, also judicially: no court decisions may be reopened or revised because of provisions of the agreement. The agreement contains a relatively comprehensive "Labor Cooperation Mechanism" (Annex 18.5). In case of conflicts, it is possible to involve

[11] Miller, D./Aprill, C./Certeza, R./Nuon, V. (2007) 'Business as Usual' - Governing the Supply Chain in Clothing Post MFA Phase-Out. The Case of Cambodia.
[12] Better Work (2009): The Better Work Programme, Stage II, July 2009 - June 2012, Geneva, March 2009, http://www.betterwork.org/public/global/copy_of_index/files/fileinnercontentproxy.2009-04-27.8653403652 (9. April 2010).
[13] Lukas, K./Plank, L./Staritz, C., Securing Labour Rights in Global Production Networks, Vienna 2010 (forthcoming).
[14] Text available at http://www.aseansec.org/20686.htm (18.5. 2010).
[15] See Art. 1 of the MoU.

“specialists”, “good offices”, mediation and consultation. The consultation mechanism can be quickly established (15 days) and there are specific decision deadlines (75 days for consultations, 30 days for consultation and/or mediation).

If conflicts arise, consultations have to be entered into first, before dispute resolution is allowed. Dispute resolution mainly follows the structure undertaken in trade matters. If no agreement can be been reached following the reports of the panels, or if one of the parties does not comply with the decision, the panel will be able to impose compensation measures (fines) with an annual upper limit of US$ 15 million. The following criteria will have to be taken into account: the impact on trade between the signatory states; the length and persistence of non-compliance; the reasons for non-compliance (including technical capacities); the degree of expected compliance (including limited resources); the efforts to achieve compliance; and other relevant factors. The other party is able to suspend trade preferences in cases of non-payment.

A National Consultative Committee has been set up for integrating civil society and there is the option of “amicus curiae” petitions both in cases of conflict (Art. 22.10(d)) and with regard to the payment of fines regarding suggestions for the use of these funds (Grandi 2009: 30). If these fines are not paid it is possible to withdraw trade preferences.

Since the start of negotiations in the area of market liberalisation, Chile has set up a number of activities, among others so-called “briefing rooms”, to integrate the views of civil society. As a result, Chile has achieved that not only economic interests but also public concerns are being attended to, and that a far greater acceptance of bilateral trade agreements exists than in other countries (Grandi 2009: 24).

Trade Agreement Canada - Chile (2004)

The agreement contains a working plan on exchanging information and knowledge with regard to working relations, labour standards, health and safety in the workplace, training measures and social security with participation of the social partners. So far, no formal complaint has been lodged (as of November 2009); informal contacts, however, were used to solve concrete cases (Grandi 2009: 28). The agreement consists of different kinds of mediation resp. dispute resolution mechanisms, dependent on the type of law: the fine of the aggrieved contracting party will be paid in case of trade disputes; in case of labour law disputes, the amount will be paid into a fund for improving labour law administration. This also corresponds with the proposals of Human Rights Watch, as a means to deal with non-compliance due to a lack of technical capacities (Human Rights Watch 2002).

Trade Agreement Canada - Peru (2009)

The agreement permits complaints by the public in both states on issues of conformity resp. implementation of national legislation with regard to ILO Standards. An independent expert panel reviews these complaints and may commit the violating state to pay up to $15 million per year into a cooperation fund for the implementation of relevant programmes to ensure that any identified problems will be solved. The agreement provides for relatively short decision deadlines, for example 30 days to decide whether a violation is associated with trade (Art. 15.1 (b)).

Canada - EU Draft Agreement (under negotiation)

The EU has currently launched negotiations for a Free Trade Agreement with Canada. Canada's proposals[16] on employees' rights go further than those of the EU. On the one hand, Canada provides for a broader range of rights (in addition to the core Labour Standards, provisions for minimum wage, working hours, health and safety in the workplace and non-discrimination of migrants). On the other hand, Canada proposes that in dispute resolution matters employees' rights are treated equally with trade issues. Sanctions can amount to an annual sum of 15 million dollars. The Canada Draft is an important reference to show what the options are with regard to standards and structures of implementation. This is probably a maximal variant, which is expected to be at least partly watered down during the course of the negotiation process.

4. Final remarks

Although there are still a number of states which do not want labour and social standards linked to trading agendas, the international trend at the level of bilateral agreements is moving towards a greater acceptance of such standards in trade agreements (Grandi 2009: 33, ILO 2009: 63). The publication of the ILO Declaration on Fundamental Principles and Rights at Work from 1998, which contains the Core Labour Standards, has also resulted in an increased reference to ILO Standards in trade agreements. Some agreements, for example the FTA Canada - Chile resp. USA - Jordan also refer to additional rights, namely minimum wage, working hours as well as health and safety in the workplace. A few contain references to the protection of migrant workers (see draft text Canada - EU). Some agreements also emphasize the compliance with fair, balanced and transparent procedural rules, for example the publication and distribution of labour legislation (see Agreement EU - Korea and USA - Chile).

Overall, however, there are still great differences in the contentual and structural composition of bilateral trade agreements. This also leads to the rather undesirable situation of unequal standards and levels of implementation. If a state is the contractual partner of several agreements with different standards and implementation levels, it has to deal with the implementation of different types of employees' rights (ILO 2009: 63). Thus, it is imperative to define and implement a minimum standard, which generally applies. The EU would be a central player to realize this minimum standard.

There are still great controversies concerning the means for effective implementation of ILO and national standards. In the opinion of the European Commission, sanctions for the non-compliance with labour standards, including the Core Labour Standards, should not be imposed. The reason is said to be the suggestion of protectionism provided by the opportunity to withdraw relevant trade benefits. Other states like the USA and Canada do not follow this argument and have had bilateral agreements for several years, which provide for sanctions for the non-compliance with labour standards (see for example the comments on the USA - Jordan Agreement). These agreements as well as the present proposal for two sample chapters, however, regard sanctions only as the last resort in case all other mechanisms of cooperation and mediation have been exhausted. Furthermore, sanctions are not the most important instrument for implementing labour standards; the increase in capacity of local players such as trade unions and labour inspectorates and the implementation of targeted programmes is central to promoting labour rights (Greven 2005). The sanction mechanism has to be seen as a disincentive not to comply with labour standards. The extent of the sanctions must therefore also orient itself on the (also human rights) principle of proportionality and react with a sense of proportion to the violation of standards (Polaski 2004). It is equally important to use

[16] Consolidated Draft from 13th January 2010.

sanctions in a target-oriented manner and not to disadvantage employees who have already suffered damages because of the non-compliance. The sample chapters therefore specify that payments have to be made in cases of non-compliance, which benefit a fund for promoting standards and capacity-building. Only if these payments are not made, sanctions will be used by withdrawing trade benefits. It should also be pointed out that positive incentives such as increasing trade benefits have shown positive results in making progress with regard to implementing labour standards following the example of the USA - Cambodia Textile Agreement. As a result, this mechanism has been included in Sample Chapter 1 (EU - Developing Country).

5. Basic elements of social standards of a Sustainability Chapter

The following provisions represent the essential elements of social standards in bilateral Free Trade Agreements. The trading partners have a certain scope for formulating, that is to say it is possible in individual cases to adapt the concrete contents of the clauses to the current stage of development of the contracting states. The subsequent chapter outlines an optimal variant for the content of social standards in a Sustainability Chapter, which should be elaborated in accordance with the classification of the respective contractual partner in industrial resp. developing countries. An absolute minimum standard, however, must remain unaffected. The different text components in the sample texts have been coloured to show these variants.

Normative framework

The social orientation of a bilateral Free Trade Agreement should not only and not exclusively be expressed in the social part of the Sustainability Chapter, but already in its preamble. This forms the normative reference in general and is an essential component for the interpretation of the following chapters of the agreement. The preamble text must express the commitment of the contractual parties to take account of the requirements of economic and social coherence.

Due to the fact that the preamble has an interpretative function only, the general commitment to democracy and the rule of law, including the respect for human rights and the essential elements of decent work, has to be embedded as a central component at the beginning of the text of the agreement. To achieve this, a number of international standards, above all of the ILO and the UNO, exist, which determine general principles, rights and practical procedures and thereby define the normative framework. These include the international human rights documents, which also contain the fundamental social rights essential for the social dimension of sustainable development (e.g. the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc.), and the substantial declarations of the International Labour Organisation (ILO), i.e. the ILO Declaration on the Fundamental Principles and Rights at Work (Core Labour Standards)[17], the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy ("ILO Tripartite Declaration")[18] as well as the ILO Declaration on Social Justice for a Fair Globalization ("Social Justice Declaration")[19] from 2008. The eight Core Labour Standards refer to the freedom of association and the right to collective bargaining, the abolition of forced and child labour and the prohibition of discrimination in the field of employment and occupation. In an Annex, the Tripartite Declaration especially mentions conventions and recommendations that are tailored to the problems of multinational enterprises, and

[17] See Annex to relevant international standards, I.
[18] Supra, II.
[19] Supra, III.

the ILO Declaration on Social Justice makes clear that the violation of Core Labour Standards must not legitimize comparative advantages.[20]

The legal framework is complemented in the social standards of the Sustainability Chapter by additional work-related fundamental rights, which, depending on the state of development of the contracting states, have to be reflected in their national laws and policies. All 183 ILO member states are obliged to comply with the Core Labour Standards in any case. It would be, however, desirable to integrate further significant standards in the text of the agreement. These include standards on employment policy, labour inspection and on tripartite consultation ("ILO Priority Conventions")[21], which have been designated as priority instruments by the ILO Governing Body in 1994, as well as other important conventions and recommendations, the ratification, effective implementation and practical application of which must be expressly declared by the contractual parties. Among others these are the ILO Conventions No. 155 on Occupational Safety and Health, No. 102 on Social Security, No. 103 on Maternity Protection and No. 135 on Workers' Representatives as well as the Recommendations No. 193 on the Promotion of Cooperatives (2002), No. 195 on Human Resources Development (2004) and No. 198 on the Employment Relationship (2006). Their contents is partly also covered by the concept of decent work ("Decent Work Agenda")[22], which has been propagated by the ILO since 1999, comprising the four main elements - rights in the workplace (including the Core Labour Standards), full productive and freely chosen employment, social protection and safety as well as social dialogue. Additionally, the equality aspect pertains to all four areas. In spite of its long existence and its respectable contentual significance, the Decent Work Agenda has only attracted due attention since the European Union in 2006[23] set the same course and it should therefore be a core element of future EU Trade Agreements.[24]

"Non-Lowering of Standards" Clause

This principle, which is also articulated in the ILO Declaration 2008 on Social Justice for a Fair Globalization, expressly obliges the parties to maintain all existing labour and social legal standards comprehensively and under all circumstances. This will prevent the dilution or even suspension of labour and social standards for the purpose of attracting foreign direct investment. The indication that it applies to the entire national territory avoids that the FTA results in an increase in production in so-called free export zones. As companies in these zones regularly abolish even the most fundamental labour rights, they have to be rejected in general, or the remark has to be added that they also apply in FTA. The prohibition of "retrogression" from the legal level of protection is also known as "Upholding Levels of Protection" clause resp. as principle of "Non-Retrogression" and does also apply to the environmental aspects of the Sustainability Chapter.[25]

[20] See AK Position Paper, Yes to a binding Sustainability Chapter! New codecision competence of the European Parliament for Trade Policy should be actively used for social and environmental standards!, March 2010, S. 4f, http://www.akeuropa.eu/_includes/mods/akeu/docs/main_report_de_116.pdf (24.03.2010); ETUC/ITUC Declaration of the demands of trade unions with regard to core elements of the chapter "Sustainable Development" in EU Negotiations on Free Trade Agreements (FTA), http://www.ituc-csi.org/IMG/pdf/TLC_DE.pdf (25.02.2010).
[21] See Annex on relevant international standards, IV.
[22] Supra, V.
[23] In its Communication from 24.Myi 2006 [COM(2006) 249, the EU Commission has finally developed an integrated strategy, with which it wants to achieve that the promotion of decent work in all domestic and foreign policy areas, including trade, will be considered. See European Commission, Employment, Social Affairs and Equal Opportunities, http://ec.europa.eu/social/main.jsp?catId=323&langId=de (29.03.2010).
[24] See AK Position Paper, page 4f; ETUC/ITUC Declaration.
[25] See AK Position Paper, page. 5; ETUC/ITUC Declaration.

Shield Function

The “Shield Function” is a human rights principle, which gives priority to human rights as universally recognized (minimum) standards. According to this, a state, when implementing trade law provisions which infringe upon its human rights obligations stemming from the conventions ratified by it, may postpone the implementation of the commercial law provision by referring to this obligation.[26] Similar to this, even though stipulated as a last resort provision, are exemption clauses in trade agreements, which have been used for example in the case of South Africa with regard to TRIPS concerning the issue of generic drugs to combat HIV/AIDS.

Sustainability Impact Assessment

Social standards in FTAs should contain provisions on carrying out a sustainability impact assessment and already specify those measures, which can be taken based on the result of these assessments (follow-up process). These assessments must consider all aspects of the social and economic impact of the agreement, such as access opportunities to high-quality public services or the various strategies for achieving industrial development. Employee and employer representatives as well as NGOs have to be involved in assessing the impact of the agreement. The results and the recommendations of the sustainability impact assessment must be available prior to the start of negotiations and must flow into the negotiation process. A continuous, repeated review of the impact of the agreement is also required.

Monitoring: Implementation and Control[27]

The following implementation mechanisms and organs should be provided for the effective implementation of the agreement and for monitoring compliance with the obligations following from it - in particular duties within the scope of the ILO Declaration on Fundamental Principles and Rights at Work, of the Tripartite Declaration of Principles and the Declaration on Social Justice as well as in the additional agreements explicitly stated:

a. Reporting on the stage of implementation of labour and social standards by an independent committee of experts;
b. Evaluation of complaints and development of recommendations by experts;
c. Consultative forum for the exchange of information between governments, social partners and other important stakeholders.

a. The governments of both contractual parties shall carefully document and regularly report on the progress of implemention of all obligations specified in the agreement. To undertake this task, an independent committee of qualified experts has to be set up, which consists of at least one ILO member in a consultative capacity. The reports will be prepared on the basis of information made available by the government, and on statements provided by trade unions and employers of both contractual parties on the issues of trade and social affairs. Apart from that, special reports should be prepared on special subjects or problems (see also b.).

b. The committee of experts shall also be responsible for complaints concerning social problems. Its recommendations must be part of a determined process for the reasonably speedy handling of the issues addressed, in order to be able to take effective action against the tolerance of

[26] See the reports of the UNO High Commissioner for Human Rights, “Liberalization of trade in services and human rights" (E/CN.4/Sub.2/2002/9) and “Human rights, trade and investment” (E/CN.4/Sub.2/2003/9).
[27] See AK Position Paper, Page 5f; ETUC/ITUC Declaration.

labour law violations by the contracting governments. If complaints of one government cannot be satisfactorily addressed or clarified within a reasonable period of time (e.g. within 2 months) by the other contractual party, the matter will be submitted to the independent experts for evaluation. Apart from reports and recommendations, the results of the committee should also contain concrete requirements for follow-up and control. Only in doing so it can be ensured that governments effectively deal with any objections raised. The same applies with regard to officially submitted complaints of the social partners. These should be embedded in an equally binding mechanism, which provides the recognised employee and employer as well as some civil society organisations (NGOs) on both sides of a FTA with the opportunity to submit such requests for action. Any review, appeal or complaint procedures with the ILO as well as other control or complaint procedures in accordance with international law remain unaffected by these mechanisms.

c. With regard to the implementation of the agreement, the bi-regional exchange and dialogue should also be institutionalised. The coordination and exchange of information between the governments of the partner countries on the one hand and employee and employer organisations as well as NGOs on the other hand, may take place within the scope of a Forum for Trade and Sustainable Development. The so-called Consultative Forum should meet at least twice a year and provide its members with the opportunity to publicly discuss social issues and concerns. There must be a clearly defined, adequate balance between the three member groups. In order to achieve the further integration of civil society, the contractual parties should also be obliged to engage in technical cooperation in social matters, including consultation, exchange of information and setting up of a joint data basis as well as monitoring centres.

“Non-Execution” Clause

It has to be made explicitly clear that in connection with the implemention of the social standards of the Sustainability Chapter the same provisions apply as for all other elements of the agreement. This applies in particular with regard to dispute resolution, which means that the same standard mechanisms are to be used for solving conflicts on labour and social matters as for all other points of the agreement.

Sanctions

Ideally, it should be possible to eliminate non-compliance with labour and social obligations of the agreement by one of the contractual parties, or at least to achieve a positive change within a reasonable period of time, by means of the above-mentioned implementation mechanisms (consultations between the governments, social partners and non-governmental organisations, recommendations of the independent committee of experts). If this is not the case, sanctions in form of substantial fines should be imposed after the general dispute resolution mechanisms has been exhausted, like the agreements between Canada and Chile, Canada and Peru, or the NAALC provide for. At the same time, these fines should be allocated to those sectors and areas where the relevant problems have emerged in order to sustainably improve the local social standards and working conditions by technical and administrative support. Cooperation with international organisations, in particular the ILO, should be aimed at.

Incentives

Apart from that, the agreement should provide for technical and developmental support, which – if appropriate – is linked to cooperation with multilateral agencies and in particular the ILO.[28] Additional incentives including trade incentives could also be included.[29]

6. Sample texts for social standards of a Sustainability Chapter

This chapter presents two sample texts: one for EU negotiations with developing countries, another for EU negotiations with industrial countries. Both sample texts have been compiled from relevant elements of existing agreements. The changes made by the authors are marked by square brackets and footnote references. The differentiation in two sample chapters has been made to meet the different requirements and capacities with regard to standardization and implementation of these country groups.[30] The possible negotiating scope of the EU has also been taken into account. A traffic light system has been used with regard to standards and implementation mechanisms to show minimum requirements (red), average requirements (yellow) and maximum requirements (green). The following diagram depicts the range, which is presented by the coloured text elements:

	EL		IL
Standards			
	Core Labour Standards		Core Labour Standards + Priority Conventions
	Priority Conventions		Minimum wage, working hours, health & safety in the workplace, non-discrimination of migrants
	Decent Work Agenda		Decent Work Agenda
Implementation mechanisms			
	Social standards part of dispute resolution		Social standards part of dispute resolution
	Programme for improving working conditions		

The non-coloured text represents standard formulations in Sustainability Chapters, which in the present form - neutral resp. undisputed - are included in a large number of existing agreements. It should also be pointed out here that not the complete, largest possible extent of a subchapter in FTAs has been depicted, but exclusively those social standards, which have been included by the authors of the study as central, integrated components of such a chapter.

[28] See also the USA - Cambodia Textile Agreement.
[29] See also ITUC/ETUC Statement of trade union demands relating to key social elements of "sustainable development" chapters in EU negotiations on free trade agreements" (FTA), http://www.ituc-csi.org/IMG/pdf/TLC_DE.pdf (25.02.2010).
[30] Certain regions or individual countries were not categorized to make the sample chapters manageable and practicable on the one hand, and to avoid a fragmentation of standards and implementation mechanisms on the other, which would be problematic from both a theoretical and a practical point of view.

EU – Developing Country

Sustainability Chapter

Preamble: Context and objectives[31]

1. Recalling the Rio Declaration on Environment and Development of 1992, the Agenda 21 on Environment and Development, the Johannesburg Declaration and Plan of Implementation of 2002 on Sustainable Development, the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, [the UN Convention on Economic, Social and Cultural Rights,][32] and the 2008 ILO Declaration on Social Justice for a Fair Globalisation, the Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and they reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations. In particular, the Parties underline the benefit of considering trade related labour and environmental issues as part of a global approach to trade and sustainable development, and [will][33] ensure that sustainable development objectives are integrated and reflected at every level of their trade relationship.

2. In this regard, through the implementation of this Chapter, the Parties aim to:

    a. promote sustainable development through an enhanced coordination and integration of labour, environmental and trade policies and measures;

    b. promote dialogue and cooperation between the Parties with a view to developing and improving their trade and economic relations in a manner supportive of labour and environmental protection measures and standards;

    c. enhance compliance with, and enforcement of, labour and environmental multilateral agreements and domestic laws;

    d. make full use of instruments for better regulation of trade, labour and environmental issues, such as impact assessment and stakeholder consultations, and encourage businesses, civil society organisations and citizens to develop and implement practices that contribute to the achievement of sustainable development goals;

    e. promote public consultation and participation in the discussion of sustainable development issues arising under this Agreement and in the development of relevant domestic laws and policies.

Article 1: Definitions[34]

For the purposes of this Chapter, "labour" includes the issues relevant to the strategic objectives of the International Labour Organisation.

Article 2: Multilateral labour standards and agreements

1. The Parties recognise the value of international co-operation and agreements on employment and labour affairs as a response of the international community to economic, employment and social challenges and opportunities resulting from globalisation. They commit to consulting

[31] Canada-EU (Draft Canada).
[32] Insertion Boltzmann Institute of Human Rights.
[33] Change made by Boltzmann Institute of Human Rights.
[34] Canada-EU (Draft Canada).

and co-operating as appropriate on trade-related labour and employment issues of mutual interest.[35]

2. The Parties reaffirm the commitment, under the *2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work*, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international co-operation and to promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all, including men, women and young people.[36]

3. The Parties, in accordance with their obligations as members of the ILO and the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising the fundamental rights at work, and accordingly, each Party shall ratify, to the extent that it has not yet done so, and shall effectively implement in its laws and practices, in its whole territory, the respective Fundamental ILO Conventions on:

    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

    d. the elimination of discrimination in respect of employment and occupation.[37]

4. The Parties, in accordance with the ILO Governing Body's decision of 1994 also commit to respecting, promoting and realising the following rights at work, and accordingly, each Party shall ratify, to the extent that it has not yet done so, and shall effectively implement in its laws and practices, in its whole territory, the respective Priority ILO Conventions on labour inspection, tripartite consultation and employment policy.[38]

5. The Parties, in accordance with the four strategic objectives of the ILO Decent Work Agenda shall commit to respecting, promoting and realising the fundamental principles and rights at work and international labour standards; employment and income opportunities; social protection and social security; and social dialogue and tripartism.[39]

Article 3: Upholding levels of protection[40]

1. The Parties recognise that it is inappropriate to encourage trade or foreign direct investment by lowering the levels of protection embodied in domestic labour laws and standards.

2. A Party shall not weaken or reduce the labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws and regulations or standards in a manner affecting trade or investment between the Parties.

3. A Party shall not fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties or foreign direct investment.

[35] EU-Korea.
[36] EU-Korea.
[37] EU-Korea.
[38] Insertion Boltzmann Institute of Human Rights.
[39] Insertion Boltzmann Institute of Human Rights.
[40] EU-Korea.

4. A Party shall not fail to effectively enforce its labour laws as expressed by its international human rights commitments in cases where other provisions of this agreement interfere with these commitments.[41]

Article 4: Government Enforcement Action[42]

1. Each Party shall, subject to Article 7, promote compliance with and effectively enforce its labour law through appropriate government action, such as:

    a. establishing and maintaining effective labour inspection services, including by appointing and training inspectors;

    b. monitoring compliance and investigating suspected violations, including through on-site inspections;

    c. requiring record keeping and reporting;

    d. encouraging the establishment of worker-management committees to address labour regulation of the workplace;

    e. providing or encouraging mediation, conciliation and arbitration services; and,

    f. initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labour law.

2. Each Party shall ensure that its competent authorities give due consideration, in accordance with its law, to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labour law.

3. A decision a Party makes on the distribution of enforcement resources shall not be a reason for not complying with the provisions of this Chapter. Each Party retains the right to the reasonable exercise of discretion and to bona fide decisions with regard to the allocation of resources among labour enforcement activities for the fundamental labour rights enumerated in Article 1, provided the exercise of such discretion and such decisions are not inconsistent with the obligations of this Chapter.

Article 5: Private Action[43]

Each Party shall ensure that a person with a recognized interest under its labour law in a particular matter has appropriate access to administrative or tribunal proceedings which can give effect to the rights protected by such law, including by granting effective remedies for any breaches of such law.

Article 6: Procedural Guarantees[44]

1. Each Party shall ensure that its administrative, quasi-judicial, judicial and labour tribunal proceedings for the enforcement of its labour law are fair, equitable and transparent and, to this end, each Party shall provide that:

    a. such proceedings comply with due process of law;

    b. any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires;

[41] Insertion Boltzmann Institute of Human Rights; concerning the shield function see p. 10.
[42] Canada-EU (Draft Canada), Canada-Chile.
[43] Canada-EU (Draft Canada).
[44] Canada-Chile.

c. the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and

d. such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.

2. Each Party shall provide that final decisions on the merits of the case in such proceedings are:

   a. in writing and [state][45] the reasons on which the decisions are based;

   b. made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and

   c. based on information or evidence in respect of which the parties were offered the opportunity to be heard.

3. Each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.

4. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.

5. Each Party shall provide that the parties to administrative, quasi-judicial, judicial or labour tribunal proceedings may seek remedies to ensure the enforcement of their labour rights. Such remedies may include, as appropriate, orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures.

6. Each Party may, as appropriate, adopt or maintain labour defence offices to represent or advise workers or their organizations.

7. Nothing in this Article shall be construed to require a Party to establish, or to prevent a Party from establishing, a judicial system for the enforcement of its labour law distinct from its system for the enforcement of laws in general.

Article 7: Enforcement Principle[46]

Nothing in this Agreement shall be construed to empower a Party's authorities to undertake labour law enforcement activities in the territory of the other Party.

Article 8: Transparency[47]

1. The Parties, in accordance with their respective domestic laws, agree to develop, introduce and implement any measures aimed at protecting labour conditions that affect trade between the Parties in a transparent manner, and with appropriate and timely communication to and consultation of non-state actors including [social partners, NGOs][48] and the private sector [with sufficient time for comments to be made and to be taken into account].[49]

2. The Parties shall promote public awareness of their labour laws.[50]

[45] Change made by Boltzmann Institute of Human Rights.
[46] Canada-Chile.
[47] EU-Korea.
[48] Insertion Boltzmann Institute of Human Rights.
[49] Canada-EU (Draft Canada).
[50] USA-Chile.

Article 9: Social Standards favouring Trade[51]

1. The Parties reconfirm that trade should promote sustainable development in all its dimensions. The Parties recognise the beneficial role that core labour standards and decent work can have on economic efficiency, innovation and productivity, and they highlight the value of greater policy coherence between trade policies, on the one hand, and employment and labour policies on the other.

2. The Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability.

Article 10: Review of Sustainability Impacts[52] **and Monitoring of the Agreement**[53]

1. The Parties commit to reviewing, monitoring and assessing the impact of the implementation of this Agreement on sustainable development, including the promotion of decent work, through their respective participative processes and institutions, as well as those set up under this Agreement, for instance through trade-related sustainability impact assessments. [The first such assessment must take place before the beginning of the negotiations between the Parties].[54]

2. In order to assure effective implementation of this Agreement and to review compliance with the rights and standards contained therein, the implementation process will be duly documented and reported on by the Parties. The Panel of Experts will be in charge of monitoring activities, in addition to its tasks laid down in Article 14 (Government Consultations) and Article 16 (Dispute Settlement). The Panel of Experts reports on the basis of information provided by the Parties as well as other interested parties such as trade unions, employers' organizations and NGOs.

Article 11: Cooperation[55]

Recognising the importance of co-operating on trade-related aspects of social policies in order to achieve the objectives of this Agreement, the Parties commit to initiating co-operative activities as set out in Annex 1.

Article 12: Programme on the improvement of working conditions[56]

1. Party X (Government of developing country) shall support the implementation of a program to improve working conditions in sector(s) X, including internationally recognized core labor standards, through the application of national labor law.

2. The Parties shall conduct at least two consultations during each Agreement Year to discuss labor standards, specific benchmarks, and the implementation of this program.

3. Based on these consultations and other information regarding the implementation of this program and its results, the European Union will make a determination by December 1 of each Agreement Period, beginning on December 1 of the year following the entry into force of this agreement, whether working conditions in sector(s) X substantially comply with such labor law and standards. If the European Union makes a positive determination, then the specific limits as agreed upon by the Parties shall be increased by X percent for the Agreement Year following such certification. Any increase granted under this paragraph will remain in effect for a subsequent Agreement Year only if the European Union makes a

[51] EU-Korea; title changed by Boltzmann Institute of Human Rights, original title: Trade favouring Sustainable Development.
[52] EU-Korea.
[53] Insertion Boltzmann Institute of Human Rights.
[54] Insertion Boltzmann Institute of Human Rights.
[55] EU-Korea.
[56] Based on US-Cambodia Textile Agreement.

positive determination by December 1 of the previous Agreement year. If, [following an affirmative determination of the dispute settlement panel],[57] that the Government of X has failed to take major action resulting in a significant change in working conditions, the European Union may withdraw such an increase.

4. The Government of X shall seek financing for this program, including financing from the sector(s) in question and from international organizations. The European Union shall seek to assist the Government of X in obtaining financing.

Article 13: Institutional Mechanism[58]

1. Each Party shall designate an office within its administration which shall serve as a contact point with the other Party for the purpose of implementing this Chapter.

2. The Parties shall establish a Committee on Trade and Sustainable Development. The Committee on Trade and Sustainable Development shall comprise senior officials from within the administrations of the Parties.

3. The Committee shall meet within the first year of the entry into force of this Agreement, and thereafter as necessary, to oversee the implementation of this Chapter, including co-operative activities undertaken under Annex 1.

4. Each Party shall establish a Domestic Advisory Group on labour with the task of advising on the implementation of this Chapter. [Besides senior officials],[59] the Domestic Advisory Group comprises independent representative organisations of civil society in a balanced representation of labour, [non-governmental][60] and business organisations as well as other relevant stakeholders.

5. Members of the Domestic Advisory Group of each Party will meet at a Civil Society Forum in order to conduct a dialogue encompassing sustainable development aspects of trade relations between the Parties. The Civil Society Forum will meet once a year unless otherwise agreed by the Parties. The Parties shall agree by decision of the Committee on Trade and Sustainable Development on the operation of the Civil Society Forum no later than one year after the entry into force of this Agreement.

6. The Domestic Advisory Group will select the representatives from its members in a balanced representation of relevant stakeholders as set out in Article 13(4). The Parties [will][61] present an update on the implementation of this Chapter to the Civil Society Forum. The views, opinions or findings of the Civil Society Forum [will][62] be submitted to the Parties directly or through the Domestic Advisory Group.

Article 14: Government Consultations[63]

1. The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt to arrive at a mutually satisfactory resolution of any matter that might affect its operation. [The Parties shall ensure that the resolution reflects the activities of the ILO or relevant multilateral environmental organisations or bodies so as to promote greater cooperation and coherence between the work of the Parties and these organisations. Where relevant, subject to the agreement of the Parties, they can seek advice of these organisations or bodies.][64]

[57] Insertion Boltzmann Institute of Human Rights.
[58] EU-Korea.
[59] Insertion Boltzmann Institute of Human Rights.
[60] Insertion Boltzmann Institute of Human Rights.
[61] Change by Boltzmann Institute of Human Rights.
[62] Change by Boltzmann Institute of Human Rights.
[63] US-Jordan.
[64] EU-Korea.

2. Either Party may request consultations with the other Party with respect to any matter affecting the operation or interpretation of this Agreement. If a Party requests consultations with regard to a matter, the other Party shall afford adequate opportunity for consultations and shall reply promptly to the request for consultations and enter into consultations in good faith.

Article 15: Panel of Experts[65]

1. Unless the Parties otherwise agree, a Party may, 90 days after the delivery of a request for consultations under Article 14, request that a Panel of Experts be convened to examine the matter that has not been satisfactorily addressed through government consultations. The Parties can make submissions to the Panel of Experts. The Panel of Experts should seek information and advice from either Party, the Domestic Advisory Group or international organisations as set out in Article 14, as it deems appropriate. The Panel of Experts shall be convened within two months of a Party's request.

2. The Panel of Experts that is selected in accordance with the procedures set out in paragraph 3, shall provide its expertise in implementing this Chapter. Unless the Parties otherwise agree, the Panel of Experts shall, within 90 days of the last expert being selected, present to the Parties a report. The Parties shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter. The implementation of the recommendations of the Panel of Experts shall be monitored by the Committee on Trade and Sustainable Development. The report of the Panel of Experts shall be made available to the Domestic Advisory Group of the Parties.

3. Upon the entry into force of this Agreement, the Parties shall agree on a list of at least 15 persons with expertise on the issues covered by this Chapter, of whom at least five shall be non-nationals of either Party who will serve as chair of the Panel of Experts. [At least one of the experts shall be a representative of the ILO.][66] The experts shall be independent of, and not be affiliated with or take instructions from, either Party or organisations represented in the Domestic Advisory Group. Each Party shall select one expert from the list of experts within 30 days of the receipt of the request for the establishment of a Panel of Experts. If a Party fails to select its expert within such period, the other Party shall select from the list of experts a national of the Party that has failed to select an expert. The two selected experts shall decide on the chair who shall not be a national of either Party.

Article 16: Dispute Settlement[67]

1. The Parties shall make every attempt to arrive at a mutually agreeable resolution through consultations under Article 14 whenever

    a. a dispute arises concerning the interpretation of this Agreement;

    b. a Party considers that the other Party has failed to carry out its obligations under this Agreement;

    c. Party considers that measures taken by the other Party severely distorts the balance of trade benefits accorded by this Agreement, or substantially undermine fundamental objectives of this Agreement.

2. A Party seeking consultations pursuant to subparagraph 1 shall submit a request for consultations to the contact point provided for under Article 13(1). If the Parties fail to resolve a matter described in subparagraph 1 through consultations within 60 days of the submission of such request, either Party may refer the matter to the Committee on Trade and Sustainable Development, which shall be convened and shall endeavor to resolve the dispute.

[65] EU-Korea.
[66] Insertion Boltzmann Institute of Human Rights.
[67] US-Jordan.

3. If a matter referred to the Committee on Trade and Sustainable Development has not been resolved within a period of 90 days after the dispute was referred to it, or within such other period as the Committee on Trade and Sustainable Development has agreed, either Party may refer the matter to a dispute settlement panel. Unless otherwise agreed by the Parties, the panel shall be composed of three members [from the list of experts][68]: each Party shall appoint one member, and the two appointees shall choose a third who will serve as the chairperson.

4. The panel shall, within 90 days after the third member is appointed, present to the Parties a report containing findings of fact and its determination as to whether either Party has failed to carry out its obligations under the Agreement or whether a measure taken by either Party severely distorts the balance of trade benefits accorded by this Agreement or substantially undermines the fundamental objectives of this Agreement. [Besides the submissions of the Parties, the panel may take into consideration other relevant information and receive amicus curiae briefs by other interested parties.][69] Where the panel finds that a Party has failed to carry out its obligations under this Agreement, it may, at the request of the Parties, make recommendations for resolution of the dispute. The report of the panel shall be non-binding.

5. If, in its report, a panel determines that there has been a persistent pattern of failure by the Party complained against to effectively enforce its labour standards, the Parties may agree on a mutually satisfactory action plan, which [shall][70] conform with the determinations and recommendations of the panel.[71]

6. If the Parties have not agreed on an action plan under subparagraph 5 within 60 days of the date of the Panel report, or the Parties cannot agree on whether the Party complained against is fully implementing an action plan agreed under subparagraph 5, either Party may request that the panel be reconvened by delivering a request in writing to the other Party. The Committee on Trade and Sustainable Development shall reconvene the panel on delivery of the request to the other Party.[72]

7. If the Parties

    a. have not agreed to an action plan, no Party may make a request under subparagraph 6 earlier than 60 days, or later than 120 days, after the date of the Panel report.

    b. have agreed on an action plan, a request under subparagraph 6 may be made no earlier than 180 days after the date of the action plan.

8. Where a panel has been reconvened under subparagraph 7, it

    a. shall determine whether any action plan proposed by the Party complained against is sufficient to remedy the pattern of non-enforcement and

        (i) if so, shall approve the plan, or
        (ii) if not, shall establish such a plan consistent with the law of the Party complained against, and

    b) may, where warranted, impose a monetary enforcement assessment in accordance with Article 17.

9. If the dispute settlement panel under this Agreement or any other applicable international dispute settlement mechanism under an agreement to which both Parties are Party has been invoked by either Party with respect to any matter, the mechanism invoked shall have exclusive jurisdiction over that matter.

[68] Insertion Boltzmann Institute of Human Rights.
[69] Insertion Boltzmann Institute of Human Rights.
[70] Change by Boltzmann Institute of Human Rights.
[71] Based on Canada-Chile.
[72] Based on Canada-Chile.

10. If such a mechanism fails for procedural or jurisdictional reasons to make findings of law or fact, as necessary, on a claim included in a matter with respect to which a Party has invoked such mechanism, subparagraph 9 shall not be construed to prevent the Party from invoking another mechanism with respect to such claim.

11. The Parties, within 180 days after the entry into force of this Agreement, shall enter into discussions with a view to developing rules for the selection and conduct of members of panels based on Art. 16(3) and Model Rules of Procedure for such panels. The Committee on Trade and Sustainable Development shall adopt rules to this effect.

Article 17: Monetary Enforcement Assessments[73]

1. Any monetary enforcement assessment shall be no greater than 15 million dollars (U.S.) or its equivalent in the currency of the Party complained against.

2. In determining the amount of the assessment, the panel shall take into account:

    a. the pervasiveness and duration of the Party's persistent pattern of failure to effectively enforce its labour standards;

    b. the level of enforcement that could reasonably be expected of a Party given its resource constraints;

    c. the reasons, if any, provided by the Party for not fully implementing an action plan;

    d. efforts made by the Party to begin remedying the pattern of non-enforcement after the final report of the panel; and

    e. any other relevant factors.

3. All monetary enforcement assessments shall be paid in the currency of the Party complained against into a fund established by the Committee on Trade and Sustainable Development and shall be expended at the direction of the Committee to improve or enhance the labour law enforcement in the Party complained against, consistent with its law.

Article 18: Suspension of Benefits[74]

1. Where a Party fails to pay a monetary enforcement assessment within 180 days after it is imposed by a panel:

    a. under Article 16(7)(a), or

    b. under Article 16(7)(b), any complaining Party may suspend, in accordance with subparagraph 4, the application of benefits of the Agreement to the Party complained against in an amount no greater than that sufficient to collect the monetary enforcement assessment.

2. Where a Party has suspended benefits under paragraph 1(a) or (b), the Committee on Trade and Sustainable Development shall, on the delivery of a written request by the Party complained against to the other Party and the Committee, reconvene the panel to determine whether the monetary enforcement assessment has been paid or collected, or whether the Party complained against is fully implementing the action plan, as the case may be. The panel shall submit its report within 45 days after it has been reconvened. If the panel determines that the assessment has been paid or collected, or that the Party complained against is fully implementing the action plan, the suspension of benefits under subparagraph 1(a) or (b), as the case may be, shall be terminated.

[73] Based on Canada-Chile and Canada-EU (Canada Draft).
[74] Based on NAALC.

3. On the written request of the Party complained against, delivered to the other Party and the Committee on Trade and Sustainable Development, the Committee shall reconvene the panel to determine whether the suspension of benefits by the complaining Party or Parties pursuant to paragraph 1 or 2 is manifestly excessive. Within 45 days of the request, the panel shall present a report to the disputing Parties containing its determination.

4. In considering what tariff or other benefits to suspend pursuant to Article 18(1)

    a. a complaining Party shall first seek to suspend benefits in the same sector or sectors as that in respect of which there has been a persistent pattern of failure by the Party complained against to effectively enforce its labor laws; and

    b. a complaining Party that considers it is not practicable or effective to suspend benefits in the same sector or sectors may suspend benefits in other sectors.

Annex 1: Implementation and Cooperation Mechanisms

Article 19: Cooperation Measures[75]

1. The Committee on Trade and Sustainable Development shall promote cooperative activities between the Parties, as appropriate, regarding:

    a. child labour;

    b. the equality of women and men in the workplace;

    c. migrant workers of the Parties;

    d. human resource development;

    e. work benefits;

    f. social programs for workers and their families;

    g. employment standards and their implementation;

    h. occupational health and; safety

    i. legislation relating to the formation and operation of unions, collective bargaining and the resolution of labour disputes, and its implementation;

    j. labour-management relations and collective bargaining procedures;

    k. forms of cooperation among workers, management and government;

    l. the provision of technical assistance for the development of their labour standards; and

    m. such other matters as the Parties may agree.

2. In carrying out the activities referred to in paragraph 1, the Parties may, commensurate with the availability of resources in each Party, cooperate through:

    a. seminars, training sessions, working groups and conferences;

    b. joint research projects, including sectoral studies;

    c. technical assistance; and

[75] Based on Canada-Chile.

d. such other means as the Parties may agree.

3. The Parties shall carry out the cooperative activities referred to in paragraph 1 with due regard for the economic, social, cultural and legislative differences between them. They shall jointly select, implement and fund all projects falling within the category of cooperative activities referred to in paragraph 1.

Article 20: Cooperation with the International Labour Organisation[76]

The purpose of the present article is to facilitate collaboration between the parties to the agreement and the ILO Secretariats in areas of common interest. Such cooperation shall include:

1. the exchange of relevant information, documentation, books, studies, research results and good practices, as a means to promote cooperation and complementarity in their work;

2. Cooperation in the implementation of programmes and projects, including but not limited to occupational health and safety, HIV/AIDS and the workplace, employment implications of trade agreements, labour market reforms and industrial relations, the [International Programme on the Elimination of Child Labour (IPEC)],[77] youth employment, vocational training, social security and labour migration;

3. Research studies, including gathering statistics, on matters of mutual interest;

4. Representation at specified meetings of each organization based on formal invitation;

5. Mutual cooperation in all other aspects that are consistent with the objectives of both organizations and the spirit of this Article.

6. Monitoring of the Program as set forth in Article 12 of this Agreement.[78]

[76] Asean.
[77] Insertion Boltzmann Institute of Human Rights.
[78] Insertion Boltzmann Institute of Human Rights.

EU – Industrialized Country

Sustainability Chapter

Preamble: Context and objectives[79]

1. Recalling the Rio Declaration on Environment and Development of 1992, the Agenda 21 on Environment and Development, the Johannesburg Declaration and Plan of Implementation of 2002 on Sustainable Development, the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, [the UN Convention on Economic, Social and Cultural Rights],[80] and the 2008 ILO Declaration on Social Justice for a Fair Globalisation, the Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and they reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations. In particular, the Parties underline the benefit of considering trade related labour and environmental issues as part of a global approach to trade and sustainable development, and [will][81] ensure that sustainable development objectives are integrated and reflected at every level of their trade relationship.

2. In this regard, through the implementation of this Chapter, the Parties aim to:

    a. promote sustainable development through an enhanced coordination and integration of labour, environmental and trade policies and measures;

    b. promote dialogue and cooperation between the Parties with a view to developing and improving their trade and economic relations in a manner supportive of labour and environmental protection measures and standards;

    c. enhance compliance with, and enforcement of, labour and environmental multilateral agreements and domestic laws;

    d. make full use of instruments for better regulation of trade, labour and environmental issues, such as impact assessment and stakeholder consultations, and encourage businesses, civil society organisations and citizens to develop and implement practices that contribute to the achievement of sustainable development goals;

    e. promote public consultation and participation in the discussion of sustainable development issues arising under this Agreement and in the development of relevant domestic laws and policies.

Article 1: Definitions[82]

For the purposes of this Chapter, "labour" includes the issues relevant to the strategic objectives of the International Labour Organisation.

Article 2: Multilateral labour standards and agreements

1. The Parties recognise the value of international co-operation and agreements on employment and labour affairs as a response of the international community to economic, employment and social challenges and opportunities resulting from globalisation. They commit to consulting

[79] Canada-EU (Draft Canada).
[80] Insertion Boltzmann Institute of Human Rights.
[81] Change made by Boltzmann Institute of Human Rights.
[82] Canada-EU (Draft Canada).

and co-operating as appropriate on trade-related labour and employment issues of mutual interest. [83]

2. The Parties reaffirm the commitment, under the *2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work*, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international co-operation and to promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all, including men, women and young people.[84]

3. The Parties, in accordance with their obligations as members of the ILO and the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising the fundamental rights at work, and accordingly, each Party shall ratify, to the extent that it has not yet done so, and shall effectively implement in its laws and practices, in its whole territory, the respective Fundamental ILO Conventions on:

    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

    d. the elimination of discrimination in respect of employment and occupation.[85]

4. The Parties, in accordance with the ILO Governing Body's decision of 1994 also commit to respecting, promoting and realising the following rights at work, and accordingly, each Party shall ratify, to the extent that it has not yet done so, and shall effectively implement in its laws and practices, in its whole territory, the respective Priority ILO Conventions on labour inspection, tripartite consultation and employment policy.[86]

5. The Parties, commit to respecting, promoting and realising the fundamental rights at work, and accordingly, each Party shall ratify, to the extent that it has not yet done so, and shall effectively implement in its laws and practices, in its whole territory, the respective Fundamental ILO Conventions on

    a. acceptable minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements;

    b. the prevention of occupational injuries and illnesses and compensation in cases of such injuries or illnesses; and,

    c. non-discrimination in respect of working conditions for migrant workers.[87]

6. The Parties, in accordance with the four strategic objectives of the ILO Decent Work Agenda shall commit to respecting, promoting and realising the fundamental principles and rights at work and international labour standards; employment and income opportunities; social protection and social security; and social dialogue and tripartism.[88]

[83] EU-Korea.
[84] EU-Korea.
[85] EU-Korea.
[86] Insertion Boltzmann Institute of Human Rights
[87] Canada-EU (Draft Canada).
[88] Insertion Boltzmann Institute of Human Rights

Article 3: Upholding levels of protection[89]

1. The Parties recognise that it is inappropriate to encourage trade or foreign direct investment by lowering the levels of protection embodied in domestic labour laws and standards.

2. A Party shall not fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties or foreign direct investment.

3. A Party shall not weaken or reduce the labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws and regulations or standards in a manner affecting trade or investment between the Parties.

4. A Party shall not fail to effectively enforce its labour laws as expressed by its international human rights commitments in cases where other provisions of this agreement interfere with these commitments.[90]

Article 4: Government Enforcement Action[91]

1. Each Party shall, subject to Article 7, promote compliance with and effectively enforce its labour law through appropriate government action, such as:

    a. establishing and maintaining effective labour inspection services, including by appointing and training inspectors;

    b. monitoring compliance and investigating suspected violations, including through on-site inspections;

    c. requiring record keeping and reporting;

    d. encouraging the establishment of worker-management committees to address labour regulation of the workplace;

    e. providing or encouraging mediation, conciliation and arbitration services; and,

    f. initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labour law.

2. Each Party shall ensure that its competent authorities give due consideration, in accordance with its law, to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labour law.

3. A decision a Party makes on the distribution of enforcement resources shall not be a reason for not complying with the provisions of this Chapter. Each Party retains the right to the reasonable exercise of discretion and to bona fide decisions with regard to the allocation of resources among labour enforcement activities for the fundamental labour rights enumerated in Article 1, provided the exercise of such discretion and such decisions are not inconsistent with the obligations of this Chapter.

Article 5: Private Action[92]

Each Party shall ensure that a person with a recognized interest under its labour law in a particular matter has appropriate access to administrative or tribunal proceedings which can

[89] EU-Korea.
[90] Insertion Boltzmann Institute of Human Rights; regarding the shield function, see p. 10.
[91] Canada-EU (Draft Canada), Canada-Chile.
[92] Canada-EU (Draft Canada).

give effect to the rights protected by such law, including by granting effective remedies for any breaches of such law.

Article 6: Procedural Guarantees[93]

1. Each Party shall ensure that proceedings referred to in subparagraphs 1 (b) and (f) of Articles 4 and Article 5 are fair, equitable and transparent and to this end shall provide that:

    a. persons who conduct such proceedings are impartial and independent and do not have an interest in the outcome of the matter;

    b. the parties to the proceedings are entitled to support or defend their respective positions and to present information or evidence, with the decision based on such information or evidence and final decisions on the merits of the case in writing;

    c. the proceedings are open to the public, except where the law and the administration of justice otherwise requires; and

    d. the proceedings are free and expeditious or at least do not entail unreasonable fees or delays, and the time limits do not impede exercise of the rights.

2. Each Party shall provide that parties to such proceedings have the right, pursuant to its legislation, to seek review and, correction of final decisions issued in such proceedings.

Article 7: Enforcement Principle[94]

Nothing in this Agreement shall be construed to empower a Party's authorities to undertake labour law enforcement activities in the territory of the other Party.

Article 8: Transparency[95]

1. The Parties, in accordance with their respective domestic laws, agree to develop, introduce and implement any measures aimed at protecting labour conditions that affect trade between the Parties in a transparent manner, and with appropriate and timely communication to and consultation of non-state actors including [social partners, NGOs][96] and the private sector [with sufficient time for comments to be made and to be taken into account].[97]

2. The Parties shall promote public awareness of their labour laws.[98]

Article 9: Social Standards favouring Trade[99]

1. The Parties reconfirm that trade should promote sustainable development in all its dimensions. The Parties recognise the beneficial role that core labour standards and decent work can have on economic efficiency, innovation and productivity, and they highlight the value of greater policy coherence between trade policies, on the one hand, and employment and labour policies on the other.[100]

[93] Canada-EU (Draft Canada).
[94] Canada-Chile.
[95] EU-Korea/Canada-EU.
[96] Insertion Boltzmann Institute of Human Rights.
[97] Canada-EU (Draft Canada).
[98] USA-Chile.
[99] Canada-EU (Draft Canada minus environmental aspects); title changed by Boltzmann Institute of Human Rights, original title: Trade favouring Sustainable Development.
[100] EU-Korea.

2. The Parties confirm that trade should promote sustainable development. Accordingly, in the respect of their legislative frameworks, each Party shall strive to promote trade and economic flows and practices that contribute to enhancing decent work, in particular by:

    a. Encouraging trade in products under criteria of environmental, social and economic sustainability, including products that are the subject of schemes such as Fair and Ethical Trade schemes;

    b. Encouraging voluntary best practices of corporate social responsibility by enterprises within their territories, to strengthen coherence between economic and social objectives.

3. The Parties recognise the importance of identifying the best options to address specific sustainable development issues, on the basis of a balanced assessment of the likely economic, social and environmental impacts of possible actions, taking account of the views of stakeholders.

Article 10: Review of Sustainability Impacts[101] and Monitoring of the Agreement[102]

1. The Parties commit to reviewing, monitoring and assessing the impact of the implementation of this Agreement on sustainable development, including the promotion of decent work, through their respective participative processes and institutions, as well as those set up under this Agreement, for instance through trade-related sustainability impact assessments. [The first such assessment must take place before the beginning of the negotiations between the Parties].[103]

2. In order to assure effective implementation of this Agreement and to review compliance with the rights and standards contained therein, the implementation process will be duly documented and reported on by the Parties. The Panel of Experts will be in charge of monitoring activities, in addition to its tasks laid down in Article 13 (Government Consultations) and Article 15 (Dispute Settlement). The Panel of Experts reports on the basis of information provided by the Parties as well as other interested parties such as trade unions, employers' organizations and NGOs.

Article 11: Cooperation[104]

Recognising the importance of co-operating on trade-related aspects of social and environmental policies in order to achieve the objectives of this Agreement, the Parties commit to initiating co-operative activities as set out in Annex 1.

Article 12: Institutional Mechanism[105]

1. Each Party shall designate an office within its administration which shall serve as a contact point with the other Party for the purpose of implementing this Chapter.

2. The Parties shall establish a Committee on Trade and Sustainable Development. The Committee on Trade and Sustainable Development shall comprise senior officials from within the administrations of the Parties.

3. The Committee shall meet within the first year of the entry into force of this Agreement, and thereafter as necessary, to oversee the implementation of this Chapter, including co-operative activities undertaken under Annex 1.

[101] EU-Korea.
[102] Insertion Boltzmann Institute of Human Rights.
[103] Insertion Boltzmann Institute of Human Rights.
[104] EU-Korea.
[105] EU-Korea.

4. Each Party shall establish a Domestic Advisory Group on labour with the task of advising on the implementation of this Chapter. [Besides senior officials],[106] the Domestic Advisory Group comprises independent representative organisations of civil society in a balanced representation of labour, [non-governmental][107] and business organisations as well as other relevant stakeholders.

5. Members of the Domestic Advisory Group of each Party will meet at a Civil Society Forum in order to conduct a dialogue encompassing sustainable development aspects of trade relations between the Parties. The Civil Society Forum will meet once a year unless otherwise agreed by the Parties. The Parties shall agree by decision of the Committee on Trade and Sustainable Development on the operation of the Civil Society Forum no later than one year after the entry into force of this Agreement.

6. The Domestic Advisory Group will select the representatives from its members in a balanced representation of relevant stakeholders as set out in Article 13(4). The Parties [will][108] present an update on the implementation of this Chapter to the Civil Society Forum. The views, opinions or findings of the Civil Society Forum [will][109] be submitted to the Parties directly or through the Domestic Advisory Group.

Article 13: Government Consultations[110]

1. The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt to arrive at a mutually satisfactory resolution of any matter that might affect its operation. The Parties shall ensure that the resolution reflects the activities of the ILO or relevant multilateral environmental organisations or bodies so as to promote greater cooperation and coherence between the work of the Parties and these organisations. Where relevant, subject to the agreement of the Parties, they can seek advice of these organisations or bodies.[111]

2. Either Party may request consultations with the other Party with respect to any matter affecting the operation or interpretation of this Agreement. If a Party requests consultations with regard to a matter, the other Party shall afford adequate opportunity for consultations and shall reply promptly to the request for consultations and enter into consultations in good faith.

Article 14: Panel of Experts[112]

1. Unless the Parties otherwise agree, a Party may, 90 days after the delivery of a request for consultations under Article 13, request that a Panel of Experts be convened to examine the matter that has not been satisfactorily addressed through government consultations. The Parties can make submissions to the Panel of Experts. The Panel of Experts should seek information and advice from either Party, the Domestic Advisory Group or international organisations as set out in Article 13, as it deems appropriate. The Panel of Experts shall be convened within two months of a Party's request.

2. The Panel of Experts that is selected in accordance with the procedures set out in paragraph 3, shall provide its expertise in implementing this Chapter. Unless the Parties otherwise agree, the Panel of Experts shall, within 90 days of the last expert being selected, present to the Parties a report. The Parties shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter. The implementation of the recommendations of the Panel of Experts shall be monitored by the Committee on Trade and Sustainable Development. The report of the Panel of Experts shall be made available to the Domestic Advisory Group of the Parties.

[106] Insertion Boltzmann Institute of Human Rights.
[107] Insertion Boltzmann Institute of Human Rights.
[108] Change by Boltzmann Institute of Human Rights.
[109] Change by Boltzmann Institute of Human Rights.
[110] US-Jordan.
[111] EU-Korea.
[112] EU-Korea.

3. Upon the entry into force of this Agreement, the Parties shall agree on a list of at least 15 persons with expertise on the issues covered by this Chapter, of whom at least five shall be non-nationals of either Party who will serve as chair of the Panel of Experts. [At least one of the experts shall be a representative of the ILO.][113] The experts shall be independent of, and not be affiliated with or take instructions from, either Party or organisations represented in the Domestic Advisory Group. Each Party shall select one expert from the list of experts within 30 days of the receipt of the request for the establishment of a Panel of Experts. If a Party fails to select its expert within such period, the other Party shall select from the list of experts a national of the Party that has failed to select an expert. The two selected experts shall decide on the chair who shall not be a national of either Party.

Article 15: Dispute Settlement[114]

1. The Parties shall make every attempt to arrive at a mutually agreeable resolution through consultations under Article 13 whenever

    a. dispute arises concerning the interpretation of this Agreement;

    b. Party considers that the other Party has failed to carry out its obligations under this Agreement;

    c. Party considers that measures taken by the other Party severely distorts the balance of trade benefits accorded by this Agreement, or substantially undermine fundamental objectives of this Agreement.

2. A Party seeking consultations pursuant to subparagraph 1 shall submit a request for consultations to the contact point provided for under Article 12. If the Parties fail to resolve a matter described in subparagraph 1 through consultations within 60 days of the submission of such request, either Party may refer the matter to the Committee on Trade and Sustainable Development, which shall be convened and shall endeavor to resolve the dispute.

3. If a matter referred to the Committee on Trade and Sustainable Development has not been resolved within a period of 90 days after the dispute was referred to it, or within such other period as the Committee on Trade and Sustainable Development has agreed, either Party may refer the matter to a dispute settlement panel. Unless otherwise agreed by the Parties, the panel shall be composed of three members [from the list of experts][115]: each Party shall appoint one member, and the two appointees shall choose a third who will serve as the chairperson.

4. The panel shall, within 90 days after the third member is appointed, present to the Parties a report containing findings of fact and its determination as to whether either Party has failed to carry out its obligations under the Agreement or whether a measure taken by either Party severely distorts the balance of trade benefits accorded by this Agreement or substantially undermines the fundamental objectives of this Agreement. [Besides the submissions of the Parties, the panel may take into consideration other relevant information and receive amicus curiae briefs by other interested parties.][116] Where the panel finds that a Party has failed to carry out its obligations under this Agreement, it may, at the request of the Parties, make recommendations for resolution of the dispute. The report of the panel shall be non-binding.

5. If, in its report, a panel determines that there has been a persistent pattern of failure by the Party complained against to effectively enforce its labour standards, the Parties may agree on

[113] Insertion by Boltzmann Institute of Human Rights.
[114] US-Jordan.
[115] Insertion by Boltzmann Institute of Human Rights.
[116] Insertion by Boltzmann Institute of Human Rights.

a mutually satisfactory action plan, which [shall][117] conform with the determinations and recommendations of the panel.[118]

6. If the Parties have not agreed on an action plan under subparagraph 5 within 60 days of the date of the Panel report, or the Parties cannot agree on whether the Party complained against is fully implementing an action plan agreed under subparagraph 5, either Party may request that the panel be reconvened by delivering a request in writing to the other Party. The Committee on Trade and Sustainable Development shall reconvene the panel on delivery of the request to the other Party.[119]

7. If the Parties

   a. have not agreed to an action plan, no Party may make a request under subparagraph 6 earlier than 60 days, or later than 120 days, after the date of the Panel report.

   b. have agreed on an action plan, a request under subparagraph 6 may be made no earlier than 180 days after the date of the action plan.

8. Where a panel has been reconvened under subparagraph 7, it

   a. shall determine whether any action plan proposed by the Party complained against is sufficient to remedy the pattern of non-enforcement and

      (i) if so, shall approve the plan, or
      (ii) if not, shall establish such a plan consistent with the law of the Party complained against, and

   b. may, where warranted, impose a monetary enforcement assessment in accordance with Article 16.

9. If the dispute settlement panel under this Agreement or any other applicable international dispute settlement mechanism under an agreement to which both Parties are Party has been invoked by either Party with respect to any matter, the mechanism invoked shall have exclusive jurisdiction over that matter.

10. If such a mechanism fails for procedural or jurisdictional reasons to make findings of law or fact, as necessary, on a claim included in a matter with respect to which a Party has invoked such mechanism, subparagraph 9 shall not be construed to prevent the Party from invoking another mechanism with respect to such claim.

11. The Parties, within 180 days after the entry into force of this Agreement, shall enter into discussions with a view to developing rules for the selection and conduct of members of panels based on Art. 14(3) and Model Rules of Procedure for such panels. The Committee on Trade and Sustainable Development shall adopt rules to this effect.

Article 16: Monetary Enforcement Assessments[120]

1. Any monetary enforcement assessment shall be no greater than 15 million dollars (U.S.) or its equivalent in the currency of the Party complained against.

2. In determining the amount of the assessment, the panel shall take into account:

   a. the pervasiveness and duration of the Party's persistent pattern of failure to effectively enforce its labour standards;

[117] Change by Boltzmann Institute of Human Rights.
[118] Based on Canada-Chile.
[119] Based on Canada-Chile.
[120] Based on Canada-Chile and Canada-EU (Canada Draft).

b. the level of enforcement that could reasonably be expected of a Party given its resource constraints;

c. the reasons, if any, provided by the Party for not fully implementing an action plan;

d. efforts made by the Party to begin remedying the pattern of non-enforcement after the final report of the panel; and

e. any other relevant factors.

3. All monetary enforcement assessments shall be paid in the currency of the Party complained against into a fund established by the Committee on Trade and Sustainable Development and shall be expended at the direction of the Committee to improve or enhance the labour law enforcement in the Party complained against, consistent with its law.

Article 17: Suspension of Benefits[121]

1. Where a Party fails to pay a monetary enforcement assessment within 180 days after it is imposed by a panel:

   a. under Article 15(7)(a), or

   b. under Article 15(7)(b), any complaining Party may suspend, in accordance with subparagraph 4, the application to the Party complained against of benefits in an amount no greater than that sufficient to collect the monetary enforcement assessment.

2. Where a Party has suspended benefits under paragraph 1(a) or (b), the Committee on Trade and Sustainable Development shall, on the delivery of a written request by the Party complained against to the other Parties and the Committee, reconvene the panel to determine whether the monetary enforcement assessment has been paid or collected, or whether the Party complained against is fully implementing the action plan, as the case may be. The panel shall submit its report within 45 days after it has been reconvened. If the panel determines that the assessment has been paid or collected, or that the Party complained against is fully implementing the action plan, the suspension of benefits under subparagraph 1(a) or (b), as the case may be, shall be terminated.

3. On the written request of the Party complained against, delivered to the other Parties and the Committee on Trade and Sustainable Development, the Committee shall reconvene the panel to determine whether the suspension of benefits by the complaining Party or Parties pursuant to paragraph 1 or 2 is manifestly excessive. Within 45 days of the request, the panel shall present a report to the disputing Parties containing its determination.

4. In considering what tariff or other benefits to suspend pursuant to Article 17(1)

   a. complaining Party shall first seek to suspend benefits in the same sector or sectors as that in respect of which there has been a persistent pattern of failure by the Party complained against to effectively enforce its labor laws; and

   b. a complaining Party that considers it is not practicable or effective to suspend benefits in the same sector or sectors may suspend benefits in other sectors.

[121] Based on NAALC.

Annex 1: Implementation and Cooperation Mechanisms

Article 18: Cooperation Measures[122]

1. The Committee on Trade and Sustainable Development shall promote cooperative activities between the Parties, as appropriate, regarding:

    a. child labour;

    b. the equality of women and men in the workplace;

    c. migrant workers of the Parties;

    d. human resource development;

    e. work benefits;

    f. social programs for workers and their families;

    g. employment standards and their implementation;

    h. occupational health and; safety

    i. legislation relating to the formation and operation of unions, collective bargaining and the resolution of labour disputes, and its implementation;

    j. labour-management relations and collective bargaining procedures;

    k. forms of cooperation among workers, management and government;

    l. the provision of technical assistance for the development of their labour standards; and

    m. such other matters as the Parties may agree.

2. In carrying out the activities referred to in paragraph 1, the Parties may, commensurate with the availability of resources in each Party, cooperate through:

    a. seminars, training sessions, working groups and conferences;

    b. joint research projects, including sectoral studies;

    c. technical assistance; and

    d. such other means as the Parties may agree.

3. The Parties shall carry out the cooperative activities referred to in paragraph 1 with due regard for the economic, social, cultural and legislative differences between them. They shall jointly select, implement and fund all projects falling within the category of cooperative activities referred to in paragraph 1.

Article 19: Cooperation with the International Labour Organisation[123]

The purpose of the present article is to facilitate collaboration between the parties to the agreement and the ILO Secretariats in areas of common interest. Such cooperation shall include:

1. the exchange of relevant information, documentation, books, studies, research results and good practices, as a means to promote cooperation and complementarity in their work;

[122] Based on Canada-Chile.
[123] Asean.

2. Cooperation in the implementation of programmes and projects, including but not limited to occupational health and safety, HIV/AIDS and the workplace, employment implications of trade agreements, labour market reforms and industrial relations, the [International Programme on the Elimination of Child Labour (IPEC)],[124] youth employment, vocational training, social security and labour migration;

3. Research studies, including gathering statistics, on matters of mutual interest;

4. Representation at specified meetings of each organization based on formal invitation;

5. Mutual cooperation in all other aspects that are consistent with the objectives of both organizations and the spirit of this Article.

[124] Insertion Boltzmann Institute of Human Rights.

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ANNEX: RELEVANT INTERNATIONAL STANDARDS

I. ILO Core Labour Standards[125]

The "Declaration on Fundamental Principles and Rights at Work" from June 1998 is a consequence of the World Summit for Social Development in Copenhagen 1995, where the international community demanded universal social rules to accompany globalisation. The progress of the Member States with regard to compliance with their duties will be reviewed by means of a regular follow-up mechanism.

The ILO "Declaration on Fundamental Principles and Rights at Work" refers to eight conventions, which are also known as the Core Labour Standards:

Freedom of Association and Collective Bargaining

No. 87: Freedom of Association and Protection of the Right to Organise Convention (1948)
No. 98: Right to Organise and Collective Bargaining Convention (1949)

Abolition of Forced Labour

No. 29: Forced Labour Convention (1930)
No. 105: Abolition of Forced Labour Convention (1957)

Equal Remuneration and Non-Discrimination in Employment and Occupation

No. 100: Equal Remuneration Convention (1951)
No. 111: Discrimination (Employment and Occupation) Convention (1958)

Prohibition of Child Labour

No. 138: Minimum Age Convention (1973)
No. 182: Worst Forms of Child Labour Convention (1999)

In addition, the states have to prepare an annual report. Apart from that, employees, third countries or ILO delegates have the opportunity to complain to the ILO about individual states that do not comply with the Conventions. Following a detailed inspection, a report including recommendations and a time schedule for the implementation is published.
(Information platform humanrights.ch,
http://www.humanrights.ch/home/de/Themendossiers/TNC/Richtlinien/ILO/idcatart_8861-content.html
)

II. ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

Since its existence, the ILO has passed a number of Conventions for working environment. Die Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977) refers in particular to the problems of multinational companies and covers almost all areas of

[125] See BAK Position Paper.

employment rights. A number of different conventions and recommendations, which are significant for the Tripartite Declaration, have been listed in an Annex. The Declaration addresses governments and enterprises. The focus is on moral-ethical obligations and a fully developed reporting system.
(Information platform humanrights.ch,
http://www.humanrights.ch/home/de/Themendossiers/TNC/Richtlinien/ILO/idcatart_8861-content.html)

III. ILO Declaration on Social Justice for a Fair Globalization

In 2008, the International Labour Conference adopted the far-reaching "Declaration on Social Justice for a Fair Globalization". It aims at a new strategy for strengthening open economies and open societies based on social justice, productive employment for all, sustainable corporate management and social cohesion. The Declaration recognises welfare benefits through globalisation, which enable many countries to achieve high growth rates and to create new jobs. At the same time, however, many countries also show a growing inequality of income, as well as an increasing uncertainty in the working environment, which is often characterised by high unemployment, a growing informal sector, continued poverty and insufficient social protection. To enable all people to participate in the advantages of globalisation, the Declaration demands that greater efforts are made to implement the ILO Decent Work Agenda (see below).
(http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_094186/index.htm)

IV. ILO Priority Conventions

The ILO has selected four of its numerous Conventions as "priority" instruments, in order to encourage the Member States to ratify them. The following Conventions were rated as particularly important for the functioning of the International Labour Standards System:

- No. 81 and No. 129: Labour Inspection Convention;
- No. 122: Employment Policy Convention; and
- No. 144: Tripartite Consultation Convention

(http://www.ilo.org/global/What_we_do/InternationalLabourStandards/Introduction/ConventionsandRecommendations/lang--en/index.htm)

V. Decent Work Agenda

Overview of the "Decent Work" concept:

- Promotion of all international employment rights (including Core Labour Standards)
- Full productive and freely chosen employment
- Social security (health and unemployment insurance and pension plan)
- Social dialogue (state, trade unions, industry)
- Horizontal: gendering

Decent work comprises four main elements: full productive and freely chosen employment, the right to work, including the core labour standards; social protection and social dialogue. This also includes the consideration of the gender dimension across these four elements. International standards already exist in each of these areas, in particular of the ILO and the UNO, which determine general principles,

practical proceedings or rights. Based on these international standards, international organisations are currently working on determining appropriate indicators.

Promotion of international labour rights:

- ***8 ILO Core Labour Standards + other elements***
  - Occupational Safety and Health Convention (Convention No. 155; Occupational Health Services Convention No. 161; Convention concerning Specific Health Hazards; Adoption of the ILO Strategy on Health Risk Prevention, CIT, June 2003; Preparation of a Convention on a framework for the Promotion of Safety and Health Protection in the Workplace, CIT, June 2005);
  - Labour Inspection Convention (Conventions No. 81 and No. 150);
  - Minimum Wage-Fixing Machinery Convention (Conventions No. 26, No. 95 and No. 131, Recommendation No. 135);
  - Maternity Protection Convention (Convention No. 183, Millennium Development Goal 3);
  - Migration for Employment Convention (fundamental social rights; Conventions No. 97 and No. 143; Resolution and Action Plan for the Employment of Immigrants in the Context of Globalization, CIT, June 2004; Multilateral Framework of the ILO on the Migration of Workers, March 2006).

- ***Equal opportunities:***
  - Workers with Family Responsibilities Convention (No. 156);
  - Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159);
  - Indigenous and Tribal Peoples Convention (No. 169);
  - Working hours, night work, rest times and vacation (several Conventions and Recommendations).

- ***Specific sectors:***
  - Maritime Labour (2006 Consolidated Maritime Labour Convention)
  - Sector specific conventions, in particular for agriculture, construction industry, hotel and catering industry, mining industry, fishing industry and healthcare.

- ***Full Productive and Freely Chosen Employment:***
  - Employment Policy (Conventions No. 122 and No. 168);
  - Global Agenda for Employment (adopted by the ILO Supervisory Board in March 2003);
  - Informal Economy (Resolution concerning decent work and the informal economy, CIT, June 2002);
  - Job Creation in Small and Medium-Sized Enterprises (Recommendation No. 189);
  - Promotion of Cooperatives (Recommendation No. 193);
  - Youth Employment: Youth Employment Network (YEN, Initiative of World Bank, UNO and the ILO);
  - Resolution and Action Plan for Youth Employment, CIT, June 2005;
  - Millennium Development Goal 8, subtarget 16: Promoting full and productive employment and work for young people;
  - Occupational orientation und education (Human Resources Development Convention No. 142 and Recommendation No. 195);
  - Employment Services (Conventions No. 88 and No. 181);
  - Termination of Employment Convention (Convention No. 158, Recommendation No. 166).

- ***Social security***

- Adoption, Action Plan and Global Campaign on Social Security and Coverage for All;
- Minimum Standards for Social Security (Convention No. 102, Council of Europe's Code of Social Security and Protocols for the European region);
- Equality of Treatment (Social Security) Convention and Maintenance of Social Security Rights Convention (No. 118 und No. 157);
- Special occupations: medical care and medical costs, pensions, occupational accident benefit and occupational disease benefits, unemployment (several Conventions);
- Specific sectors: in particular the 2006 Consolidated Maritime Labour Convention;
- Millennium Development Goals 4, 5 and 6 on Health.

▪ ***Social Dialogue***
- Effective promotion of collective negotiations (Conventions No. 98, No. 151 and No. 154, Recommendations No. 91, No. 92 and No. 163, Declaration of 1998; Resolutions of the ILO on Collective Working relations und Social Dialogue);
- Tripartite Consultations (Conventions No. 144 and No. 122);
- Information of workers' representatives in enterprises (Convention No. 135 and Recommendations No. 94 und No. 129).

▪ ***Horizontal: Gendering, "Mainstreaming" of equal opportunities for men and women:***
- Completion of the specific initiatives such as equal treatment concerning remuneration and employment (Conventions No. 100 and No. 111);
- Beijing Platform for Action (1995) and follow-up measures;
- Millennium Development Goal No. 3.

(http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Feature_stories/lang--en/WCMS_071241/index.htm)

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