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The Protection of Labour Rights in Trade Agreements. The Case of the EU-Colombia Agreement

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Abstract

In response to the disappointing progress at the multilateral level, trading powers like the EU have increasingly used their market access power as leverage to promote non-trade objectives with third countries. Through so-called 'Trade & Sustainable Development Chapters', the EU's new generation of regional and bilateral trade agreements include explicit provisions on labour rights promotion, Corporate Social Responsibility and environmental sustainability. While legal scholars have commented extensively on these provisions, little is known about their practical application. With regard to labour rights in particular, the ILO has noted the lack of empirical evidence on the effects of integrating labour rights provisions in trade agreements. Based on extensive desk research and a series of interviews in Brussels and Bogotá, the present article aims to bridge this gap by providing insights on how the practical application of labour provisions and monitoring mechanisms plays out in a particular country context. Our findings identify significant shortcomings in both the design and application of the current sustainability chapters, affecting not only their effectiveness but also the credibility of the EU as a normative actor as a whole.

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Introduction

The European Union's guiding norms are enshrined in EU primary law. These fundamental values include the respect for human dignity, freedom and democracy, equality and the rule of law, human rights, the sustainable management of global natural resources and the commitment to preserve and improve the quality of the environment (TEU, Art. 2). Article 21 of the Lisbon Treaty subscribes to these values, identifying them as 'general provisions on the Union's external action.' As such, any aspect of EU foreign policy, including trade, is required to consistently and coherently 'consolidate and support democracy, the rule of law, human rights and the principles of international law' (TEU, Art. 21, 2-b).

As the world's largest trading block, and the number one trading partner for over 80 countries, the EU's trade policies constitute an exceptionally powerful tool to contribute to the promotion and protection of human rights worldwide. Throughout its history, EU trade policy has continuously and increasingly sought to use this leverage to promote a normative agenda, admittedly with mixed results so far. As Joris Larik (2015: 69) recently noted, EU trade policy '*is certainly no end in itself, but a powerful means to 'higher ends''*.

Since 1995, EU bilateral and regional trade agreements have included human rights clauses. As an essential element of the agreement, the violation of a human rights clause allows the other party to take 'appropriate measures', including, 'as a measure of last resort', the suspension of the agreement (Bartels, 2005). More recently, beginning with the 2008 EU-Cariforum Economic Partnership Agreement (EPA), EU trade agreements have begun to include Trade & Sustainable Development Chapters (SD chapters from hereon), containing non-binding provisions on labour rights promotion, Corporate Social Responsibility (CSR) and environmental protection. SD chapters are now part of the 2008 EU-Cariforum EPA, the 2010 EU-Korea Agreement and the 2012 EU-Central America and the EU-Peru/Colombia agreements. Reportedly, they will feature as a template for any future trade agreements with the EU.

Legal scholars have commented extensively on the regulatory potential of these new provisions (Bartels, 2012; Velluti, 2015), highlighting their potential to contribute to the protection of human rights and environmental protection in third countries. However, the empirical evidence on the actual effects of these non-trade provisions is limited. With regard to labour rights in particular, a 2013 report by the International Labour Organisation (ILO) concluded that there is hardly any empirical work on the effects of labour provisions in trade agreements (ILO, 2013; see also Campling et al. 2015). This paper aims to provide a first step toward bridging this gap, by offering insights on the implementation of the labour provisions stipulated under the SD chapter of the EU – Colombia Trade Agreement.

This paper first discusses the scope and methodology applied. Subsequently, section two maps out the relevant labour provisions provided under the adopted agreement, as well as the key monitoring and enforcement mechanisms put in place to ensure their compliance. Section three then offers an assessment of labour rights protection in Colombia. Section four focuses on an assessment of the agreement to date, and identifies stakeholders' perceptions on the perceived changes observed in law, in practice and in relation to social dialogue.

I. Context, questions and methodology

The key objective of this case study is to gain a better understanding of what the integration of labour provisions in EU trade agreements entails in practice. How the practical application of such provisions and mechanisms play out in a given country context, and what types of changes they can generate in the domestic regulatory-institutional environment and beyond. While focusing on one particular country-case and on predominantly one particular set of labour rights (freedom of association and collective bargaining), this study aims to contribute to the broader scientific debate about the use of trade as a means to promote normative regulatory innovation.

In an early contribution, Meunier and Nicolaïdis (2006) have introduced the idea of governing *through* trade. This referred to the fact that the European Union uses market access power and its market size to 'export' its laws, standards, values and norms. When exercising power *through* trade, the EU uses the size of its domestic market as an asymmetric bargaining chip to 'force' domestic changes within the territory of its trading partner on issues such as good governance, environmental policy and human rights (see also Hafner-Burton, 2005 and Zwagemakers, 2012). The concept was further elaborated by Chad Damro, who coined the idea of 'Market Power Europe' (MPE) (Damro, 2012). MPE posits that the Union should be seen as exercising power *'through the externalization of its social and economic agendas'* (Damro, 2015: 696). Whether this governing through trade, in the case of bilateral trade agreements, generates any effect however, remains an outstanding question. Campling et al. (2015) have proposed a research agenda in this regard to close the knowledge gap. We contribute to this effort by looking at what, if anything, happens after the conclusion of a trade agreement in terms of labour rights protection.

We focus on the EU-Colombia trade agreement as a case study for several reasons. Ever since the early 2000s, with domestic conflicts in a receding state, Colombia has witnessed an increase in economic growth. The national government has embarked on a process of economic liberalisation, including in its trade relations with some of the world's largest economies. A major concern in this regard has been about how increased trade openness affects labour rights. Both domestic and international organisations have repeatedly voiced concerns over Colombia's track record in this respect (Lizarazo et al., 2014: 831-834). Hence, it should come as no surprise that labour issues were high on the agenda during the negotiations of the EU-Colombia Trade Agreement. While labour rights featured as a crosscutting theme across the concerns voiced by various public and private stakeholders, the protection of organized labour in itself proved an especially thorny issue in the agreement's adoption. Essentially, critical opponents feared that a trade agreement with the EU would render legitimacy to ongoing violations of labour rights and of human rights at large (Rettberg et al., 2014). In response to such concerns, the EP called upon both Colombia and Peru for a 'transparent and binding road map on human, environmental and labour rights', focusing in particular on the implementation of a legal policy framework to guarantee freedom of association and the right to collective bargaining (EP, 2012a). Instead of establishing such a binding road map, Colombia presented to the EP an action plan on human, labour and environmental rights, which it was already implementing as part of its overall National

Development Plan. As such, the plan does not contain any new commitments, though includes 'concrete, verifiable, ambitious and realistic goals' and is monitored directly by the President's Office (Republic of Colombia 2012).[2] As a result, Colombia presents itself as a 'crucial-likely' case (Gerring, 2007: 115-122) to analyse the potential effects of labour provisions under a EU trade agreement.

To do so, we start from the agreement and look into the key labour rights covered therein (section 2). Next, we try to assess the effects on two accounts. First of all, whether the trade agreement result in any legal reforms (*de jure* effects). One could expect the trade agreement to trigger legislative reforms as a (genuine or false) signal of compliance by the other party (Simmons, 2009). Second, we focus on effects *in practice* since an elaborate legislative framework does not necessarily guarantee real traction on the ground (see for example Berliner et al. 2015; Marx et al. 2015). In this regard, the agreement can be expected to contribute to closing possible enforcement gaps. Given the relative recent nature of the agreement (entry into force in August 2013) and the fact that many domestic and international factors influence the protection of labour rights (Marx & Soares, 2015) one cannot isolate the effect of one trade agreement on the protection of labour rights. However, one can discuss the actions taken in follow up of the agreement and how actors and stakeholders involved in the process assess their potential. In other words, this paper aims to provide a nuanced and comprehensive account of the various perceptions of the use, effectiveness and credibility of the labour provisions provided under the trade agreement.

The findings presented are based on a comprehensive set of complementary primary and secondary sources and some 30 semi-structured interviews with a wide range of stakeholders in both Brussels and Bogotá. As such, we draw from the views of trade union representatives, officials in the executive branches of the EU and of the Colombian administrations, private sector umbrella organisations, development NGOs, as well as a select number of trade and labour experts in academia and the international organisations represented in Colombia.

II. Key labour provisions in the EU-Colombia trade agreement

Article 1 of the EU-Colombia trade agreement contains the standard essential elements clause that has been an integral part of EU trade agreements since 1995. It argues that respect for democratic principles, the rule of law and human rights should underpin both the domestic and international policies of the parties, constituting an 'essential element' of the trade agreement (EU-CO/PE 2012: Art. 1). According to Article 8(1), each party should take 'any necessary measure' to ensure an adequate implementation of the obligations under the agreement. As such, both contracting parties are bound to ensure that these rights are respected within their jurisdiction and understand that this may require active state intervention (Bartels, 2005: 147-149).

There is no dedicated monitoring mechanism to track compliance with the human rights clause, nor a subcommittee dedicated to human rights, as created for other thematic and technical issues under the

[2] More information on the run up to the EU-Colombia Trade Agreement, and the role of labour issues in that regard can be found in Brando et al. (2015).

agreement (Art. 15).[3] Given the lack of a specialized human rights subcommittee, it appears that human rights and democracy issues would fall under the auspices of the agreement's main organ, the Trade Committee. The latter comprises representatives of all three signatory parties but excludes any participation of civil society. The Trade Committee's mandate is to supervise, facilitate and evaluate the application of the agreement, as well as to supervise the work of the specialised subcommittees (Art. 12). A study commissioned by the INTA Committee of the European Parliament on the EU trade agreement with Colombia and Peru found it 'self-evidently inappropriate for the main organ of the agreement, […] to have the primary competence to deal with issues arising under the human rights clause'. Until the ratification of the EU-Andean Political Dialogue and Cooperation Agreement (2003) enters into force however, the Trade Committee seems to constitute the primary institutional mechanism to monitor the human rights provisions (Stevens et al., 2012: 49).[4]

Additionally, the agreement contains a Sustainability chapter (Title IX), which offers extensive provisions on labour (Art. 269), bio-diversity (Art. 272), trade in forest products (Art. 273), fisheries (Art. 274), Climate Change (Art. 275), migrant workers (Art. 276), regulatory protection (277), and trade favouring sustainable development (Art. 271), including CSR. Essentially, the chapter provides two types of provisions. First, it offers a set of minimum obligations to comply with multilateral standards and international law. Second, a number of provisions under Article 277 require the parties not to lower their current levels of environmental and social protection to encourage trade or investment. Finally, Article 279 notes that each party will commit itself to monitor, review and assess the impact of implementation through domestic mechanisms (Art. 279). Regarding labour protection, Article 269 commits the contracting parties to promote and implement 'in its laws and practice, and in its whole territory' the ILO's eight core labour conventions as stipulated in the ILO Declaration on Fundamental Principles and Rights at Work adopted in 1998. Article 269 reinstates that 'labour standards should not be used for protectionist trade purposes'.

It is worth noting that content-wise, the coverage of labour conventions under Title IX of the agreement is less comprehensive than under Article 8 of the GSP+ scheme previously applied to Colombia. Taking into account the labour rights covered under the essential elements clause however, all international conventions on labour rights apply equally under the current agreement. Either way, the ILO standards mentioned under Article 269 add nothing substantively new in terms of regulatory demands since they are already binding on both parties given their ILO –membership. Title IX is therefore perhaps not to be perceived as a conditioning force, though rather as a formal reaffirmation by the parties to uphold these labour standards within their own territory, in law and in practice.

In terms of monitoring, the obligations under the sustainability chapter are covered by a Sub-committee on Trade and Sustainable Development, which operates under its own rules of procedure and meets 'as necessary'. The sub-committee reports to the Trade Committee and can suggest recommendations to

[3] Such subcommittees on human rights and democracy can be set up as in the EU-Moroccan Association Agreement (Association Council Decision No 1/2003 OJ L79/14, Annex 1).

improve the implementation of the provisions under Title IX. Most importantly, the Sub-committee is mandated to assess, 'when it deems it appropriate', the impact of the implementation of the agreement on labour and the environment. While pre-empt of any civil society participation, the Sub-committee should promote transparency and public participation. Accordingly, its decisions and reports are to be made public, 'unless the Sub-committee decides otherwise', and its proceedings should 'consider inputs, comments or views from the public'. Article 282 of the agreement stipulates in this regard that the Sub-Committee should convene once a year, 'unless otherwise agreed by the Parties', a session with Civil Society Organisations (CSOs) and 'the public at large' and enter into a dialogue on matters related to the implementation of the Sustainability Chapter.

Accompanying the government-to-government meetings by the Sub-committee, Title IX provides two separate but interrelated civil society mechanisms, notably domestic unilateral advisory groups and a bilateral CSO forum, organized back to back with the Sub-committee. The former includes domestic mechanisms, under which each party is bound to consult domestic labour and environment or sustainable development committees or groups, or create such forums if they do not exist yet (Art. 281). In the case of Colombia, an existing CSO-grouping was designated to serve as Domestic Advisory Group. Stipulations regarding the constitution and consultation procedures for these groups are to be in accordance with national law and should guarantee a balanced representation of relevant interests. With regard to the latter, bilateral meetings with CSO, Title IX foresees parallel meetings between the designated Sub-committee, CSOs and 'the public at large'.

Beyond monitoring and dialogue, Title IX does not provide binding unilateral enforcement mechanisms, nor can violations arising from the sustainable development obligations be addressed through the normal dispute settlement procedures established under Title XII of the agreement. If disputes were to arise, one party can invite the other for a governmental consultation, and if deemed necessary it can ask for the Sub-committee to convene to consider the matter (Art. 283). If a bilateral consultation cannot resolve the matter in a mutually satisfactory way, the complaining party may forward its grievances to a Group of Experts. Such a Group is then mandated to assess and provide a report on whether or not one of the parties has indeed failed to comply with the obligations formulated in the chapter, as well as identify *non-binding* recommendations to resolve the matter (Art. 284-285).

III. Labour protection in Colombia: policy and practice

In order to assess how the provisions described above 'land' in a given country context, we first look into the current state of affairs. Before analysing stakeholders' perceptions of the above-mentioned monitoring mechanisms, we discuss Colombia's legal-institutional framework for labour protection and its implementation in practice. Such a mapping exercise of the labour rights situation then allows us not only to identify outstanding challenges and structural deficiencies, it also provides us with the necessary contextual background for an adequate assessment of the effectiveness of the tools and mechanisms provided under the trade agreement.

A. Legal framework for labour protection

Colombia's legal and institutional framework for labour protection has become increasingly comprehensive over the past two decades. Dating back to the Constitution of 1886, labour contracts were considered as a lease between two contracting parties. In 1950, a Substantive Labour Code was consolidated to protect a set of fundamental labour standards, establishing labour law as a separate branch in the Colombian legislative framework. Colombian labour legislation has further developed on a needs basis, through ad hoc revisions and amendments in response to contemporary concerns. The latest version of the Code was adopted in 2011 (Jaramillo Jassir 2010: 63-7). Its most important reform however took place in 1990, when Law 50 introduced basic standards to protect workers' rights as a specified vulnerable group. Before that, Colombian labour legislation focused exclusively on the contractual relations between employers and employees. The main objective of Law 50 was to further develop labour stability, emphasizing the 'primacy of reality' over formal documents. In theory, this implies that laws are made as open as possible in order to ensure that basic worker's rights would have primacy over contractual issues between employers and their employees (Barona and Betancourt, 2010: 253-255). As such, Law 50 aims to protect a number of fundamental labour rights and to avoid abusive service contracts. In practice, however, critics have argued that such openness to interpretation, and the lack of specific policies to protect vulnerable social groups, has created loopholes in the legal framework (Garay 1998: 227-228).

Labour rights as defined under the Code were reaffirmed and established as constitutional by the National Constitution of 1991. It anchored the constitutional primacy of international labour treaties, allowing the judicial system to overrule any law, decree, or administrative act as unconstitutional if considered inconsistent with these conventions. Subsequently, in 1993, Law 100 defined the basis for a social security system, establishing workers' entitlements to health services, pensions, and risk management as intrinsic aspects of any labour contract.

Regarding the protection of the core ILO conventions, Colombian law recognizes and protects freedom of association and collective bargaining (FACB) rights through three key legal documents: the National Constitution of 1991 (Articles 25, 39, 53, 55 and 56), the Substantive Labour Code (Articles 8, 12, 353-358) and the Procedural Code of Labour and Social Security, established in 1948, recently reformed in 2001. Following recent pressures from both the ILO as well as from prospective trading partners like the US and Canada, Colombia has embarked on a substantive reform process to enhance labour protection. Most notably, in 2011 it has re-established a separate Ministry of Labour, which before had been unified with the Ministry of Social Security and Health into the Ministry of Social Protection in 2003. Furthermore, the government has put forward reforms to address the misuse of cooperative associations and temporary contract services, and has established a system of criminal penalties for employers who dodge their FACB obligations (USDL 2011: 3, 16-7).

B. Practical enforcement of labour legislation

The following section aims to assess how far the legal framework outlined above has effectively translated into a more adequate protection of labour rights in practice. We do so by focusing on two specific labour rights, freedom of association and the right to collective bargaining (FACB).

In its accountability report of 2014, the Colombian Ministry of Labour presented a brief overview of the government's achievements in FACB rights protection (MINT, 2014a: 16-7, 22-3). In relation to freedom of association, it notes that 791 trade unions were established in the period 2012-2013, representing a 48% increase compared to the 536 unions created between 2010-2011 (MINT, 2014a: 23; 2014b: 14). The report further notes that the number of labour contracts between employers and labour unions rose from 114 (between 2010-2011) to 1582 (between 2012-2013), and that registration procedures for new trade unions became less restrictive (MINT, 2014b: 15). In contrast, according to NGO reports, the percentage of unionized labour has fallen from 10% since the beginning of the 1980s to 4.4% in 2010. Moreover, according to the US Department of Labour (USDL), only 1.2% within this group of unionized workers is covered under some form of collective bargaining agreement (USDL, 2011: 16; JFC, 2015).

In order to elaborate more systematically on the protection of labour rights in practice, we collected additional data on FACB rights, drawing from Marx et al., 2015. We do so by building on the work done by David Kucera and Layna Mosley. Kucera (2001, 2002) developed a new indicator which specifically aimed to capture the degree to which two specific core labour conventions are protected, notably ILO conventions 87 (Freedom of Association and the Protection of the Right to Organise Convention) and 98 (Right to Organise and Collective Bargaining). Mosley (2011) then used this indicator to develop a time series, running from 1985 to 2002, on the protection of freedom of association and collective bargaining. We build on this by expanding the time-series until 2012, for which data is available. The index of freedom of association and collective bargaining (FACB) is based on 37 evaluation criteria and considers both *de jure* -protection in law- and *de facto* -protection in practice- violations. The coding of the index is based on a content analysis of three distinct sources: i) the annual Human Rights Reports by the U.S. State Department; ii) the ILO Freedom of Association cases and ILO Supervising Reports; and iii) the International Trade Union Confederation's (ITUC) Annual Reports on the Violation of Trade Union Rights. These sources are then used to code a 37 category-coding template based on the two respective labour rights at hand.[5]

Figure 1 below shows the overall trend in the protection of FACB rights (full line), the protection in law (dotted line) and the protection in practice (striped line). A higher score (10 or close to 10) refers to a better labour rights situation, with fewer FACB violations. A lower score indicates more (severe) violations. In other words, an upward trend indicates an improvement in the protection of FACB rights, while a downward trend reflects deterioration. In order to further refine the analysis, a distinction is made between two groups of categories. A first category covers violations in law while a second one covers violations in practice. The former concerns the incorporation of labour rights (derived from ILO conventions 87 and 98) into domestic law. The latter is measured by the remaining practice-categories, covering issues such as e.g. the number of union members discharged due to labour activism or an employer limiting the agenda in collective bargaining.

[5] A detailed description of the coding methodology can be found in Marx et al., 2015.

Figure 1. Trends in FACB protection in law and practice (1985-2012)

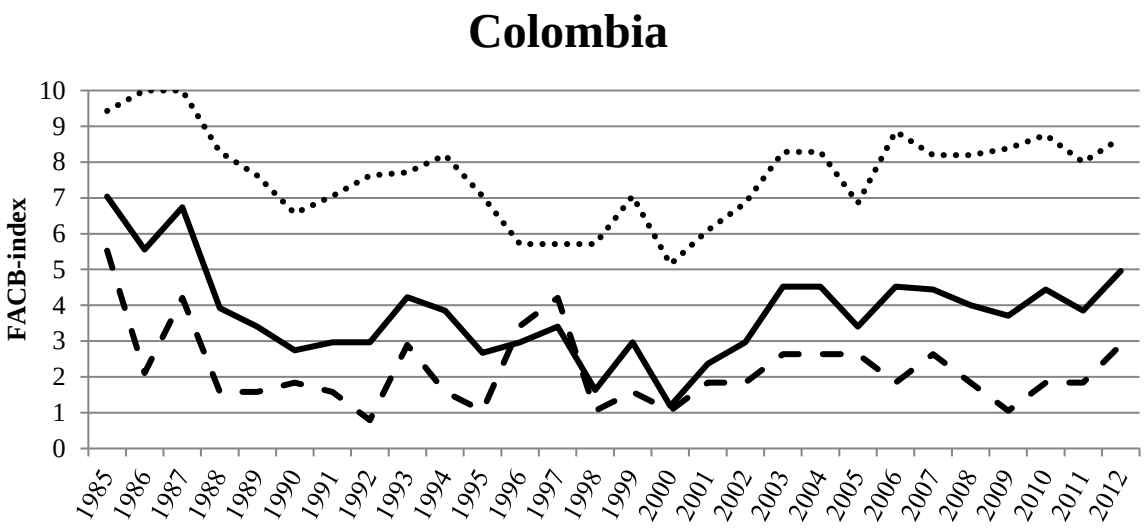

Figure 1 clearly shows that, despite slight improvements since 2000, there has been little progress in the overall protection of FACB rights over time. Indeed, compared to the early stages of the timeframe applied, the current situation reflects a significant deterioration in both the legal protection and in practice. Interestingly, the compliance gap between law and practice signals a significant lack of enforcement. We identify a set of three interlinked and mutually enforcing causal factors in this regard.

A first major factor to take into account is the increasing share of Colombians working in the informal economy. According to Justice For Colombia (JFC, 2015), an estimated eleven million people - out of Colombia's 18 million total workforce - are employed in the informal economy and thus lack the protection of any formal legal framework. Moreover, within the remaining seven million who do enjoy formal employment, only four million people work under permanent contracts, leaving the remaining three million employed under temporary service contracts. The ILO has argued in this regard that the perceived drop in unionisation has to do with anti-unionist discrimination at company level (ILO, 2011).

A second explanation refers to the lack of governmental commitment to address discriminatory practices and turning a blind eye to legal loopholes. The latter relate to certain contracting practices, which allow employers to circumvent the standing labour legislation, in particular with regard to freedom of association and collective bargaining. These practices include the use of associated work cooperatives in which workers are (forced to be) self-employed, which prohibits them to form unions. This practice has been criticised by the ILO and the US Department of Labour (USDL 2011: 7-8; ILO 2011; ENS 2015: 4-8). Similarly, the use of collective pacts (ENS 2014: 30, 32, 34-38) between non-union workers and their employers are used to circumvent collective bargaining and undermine core ILO conventions (CGT 2015: 10-11; ILO, 2014).

Violence against labour activists constitutes a third factor that may explain the identified compliance gap. While physical violence as such has diminished considerably in recent years, problems of impunity and threats against labour activists remain rampant. Impunity in particular was identified by the UN

Human Rights Council as a 'structural problem' of Colombia's judicial system (HRC, 2013: 11). Aware of these concerns, the Colombian government has made concrete steps to address these issues, including the creation of a specialised Labour section to the Human Rights Unit of the Prosecutors Office in 2006. This special section is mandated to investigate and prosecute exclusively violent crimes against labour activists. Furthermore, since 2009, Colombian law has expanded the coverage of labour-related crimes, including threats, and allowed for more stringent punitive measures against them (USDL, 2011: 4, 21, 25).

Despite such legal and institutional measures, nearly 1.000 threats against unionists have been recorded since 2011, while six labour activists have disappeared (ENS, 2014: 62; AFL-CIO, 2014: 7). Moreover, the impunity of these violations remains at 86.8% for murders and at 99.9% for threats (AFL-CIO, 2014: 7; ENS 2014: 63; Oidhaco, 2014: 10). The US Government Accountability Office notes in this regard that, while the number of homicides on labour activists has dropped, threats to possible unionists have increased and constitute a strong deterrent for workers to unionize (GAO, 2014: 55). A 2011 ILO mission to Colombia confirmed that, despite an overall decrease in violence against organized labour, the impunity of offenders and threats against unionists has not been addressed in practice (ILO, 2011: 2-3). The government's difficulties to address these threats has led some to argue that violence against organized labour has in fact not decreased, yet simply 'transformed its manifestations' (Oidhaco, 2014: 10).

In sum, Colombia has established a fairly robust legal and institutional framework to protect labour rights, though compliance with this system is problematic. The lack of enforcement of its well-developed legal-institutional framework is in fact a well-known weakness among stakeholders. Discussing this compliance gap, interviewees pointed to a lack of governmental capacity to implement and monitor its legislation. The perception is that this has partially to do with the geography of the country - a large country in size with a challenging geography to monitor compliance with labour law –, but mainly with the fact that, labour rights are but one of many human rights challenges in Colombia. Keeping in mind the on-going peace talks with the *Fuerzas Armadas Revolucionarias de Colombia* (FARC), resources to enforce legislation are limited and any government agency working on labour, human rights or justice-issues reportedly is chronically overburdened.

IV. Stakeholder assessment of the trade agreement's effectiveness

Taking into account the above considerations, we now turn to an analysis of how various stakeholders perceive the agreement's potential to contribute to improving labour protection in Colombia. As mentioned in the introductory sections, we do so based on twenty-seven semi-structured interviews, conducted in both Bogotá and Brussels with a wide range of stakeholders and observers. These include NGOs, labour unions and academics from both sides of the parties involved, Colombian officials from the Ministries of Trade, Industry and Tourism (from hereafter the Ministry of Trade) and the Ministry of Labour, EU MS officials, as well as third country delegates, officials from the EU Delegation, and representatives from international organisations such as the UN Office of the High Commissioner on Human Rights. Based on these interviews, a number of concrete criticisms of the agreement's institutional mechanisms and their monitoring and enforcement are set out below.

A. On monitoring and enforcement

As discussed in Section two, an intergovernmental sub-committee on Trade and Sustainable Development monitors the labour and environmental commitments provided in the agreement. This Sub-Committee has met twice so far, once in Lima in February 2014 and once in Bogotá in June 2015. Judicial means and dispute-settlement provisions to enforce the agreements implementation are provided for, first, by way of bilateral consultations, and secondly, through the establishment of a Panel of Experts. Yet, none of the provisions in the Sustainability Chapter are bound by a binding unilateral enforcement mechanism, nor can violations arising from the obligations under the sustainability chapter be addressed through the normal dispute settlement mechanism established under Title XII of the agreement.[6]

Most interviewees found the labour provisions under the sustainability chapter to lack the appropriate monitoring and enforcement mechanisms to usefully and credibly contribute to improvements in Colombia's labour situation. While the agreement does provide laudable commitments to international standards, non-state actors argued that, as long as these commitments cannot be properly enforced through more stringent monitoring and enforcement mechanisms, they risk adding yet another layer of legal-institutional commitments without any practical traction. Some interviewees therefore deemed the sustainability chapter to be little more than lofty words, or even a 'half-hearted exercise by the EU to tick the box on its treaty obligations'. Many perceived the current sanctioning mechanisms to be weaker than those provided for under the former GSP+ regime. Indeed, while GSP+ allowed the EU to withdraw trade preferences in case of systematic violations of ILO standards, the sustainability chapter does not provide any such sanctioning measures, nor does it provide a binding mechanism for dispute settlement.

In response to such criticism, EU officials stressed that, contrary to the GSP+ scheme, the trade agreement in place constitutes a partnership between equals, rather than a preferential market access regime. The agreement is therefore different in nature and spirit, most notably when it comes to conditionality and the monitoring of compliance. Essentially, the responsibility to monitor compliance with labour provisions is the exclusive competence of the respective parties, each for its own constituency. There is thus no obligation or mandate for the EU to monitor developments in, or compliance with, labour protection in Colombia. Moreover, EU officials stressed that trade is too blunt a tool anyway to adequately enforce labour rights, and that the labour provisions in the agreement are there to indicate a mutual concern among two contracting parties – as well as to contribute to a

[6] EU officials were keen to note that, in addition to the monitoring mechanisms provided under the trade agreement, the EU has made justice and human rights one of the key thematic areas for its political and development cooperation with Colombia. On the ground, the EUD since late 2012 chairs a Human Rights Working Group (HRWG), which conveys both the political and development section of the Delegation, together with the EU MSs. Since 2012 there is also an annual Human Rights Dialogue which brings together high-ranking officials of the EU External Action Service (EEAS) and the Colombian Ministry of Foreign Affairs. These meetings can in theory also touch upon trade-related human rights issues following the implementation of the EU-Colombia trade agreement (EU-CO, 2012). So far none of the Human Rights Dialogues have directly addressed labour issues however (EEAS, 2014 and EEAS, 2015).

commercial level playing field for Colombian exports - rather than as a policing tool to help regulate or address violations.

On the Colombian side however, this approach raises several critical questions. First, a number of interviewees, including officials within the relevant ministries, indicated that Colombia's responsibility to monitor compliance with international labour standards would require capacity support and training since it does not have the experience and know-how required to effectively monitor labour protection, particularly since the labour stipulations provided under the agreement are of such a general nature.[7]

Secondly, interviewees also voiced concerns about the role of the Ministry of Trade as the designated representative to the Sustainability sub-committee. Officials within the ministries noted that, while the Ministry of Trade is in charge of the implementation of the overall trade agreement with the EU, it is not necessarily the best-placed agency within the Colombian government to discuss labour (and environmental) issues. Moreover, and despite coordination and burden-sharing efforts, interviewees noted that information flows across ministries had not always been an adequate guarantee of an optimal involvement of, and input from, labour experts from the relevant services. Interestingly, similar issues were raised on the EU-side, where the sectional organisation of the EU delegation would sometimes hamper a straightforward coordination on human rights -related trade issues.

Thirdly, in a similar vein, Colombian government officials noted that technical input to and from the EU currently go through the Ministry of Trade's mediation, while there are no formal channels for the Ministry of Labour to interact with their EU counterparts directly. Government officials noted in this regard that the US-Colombia Free Trade Agreement does provide such direct involvement, facilitating the Ministry of Labour to liaise and cooperate directly with the US Department of Labour on the Labour Action Plan (LAP) linked to – though not part of– the 2012 US-Colombia Trade Agreement. Officials from the Colombian Ministry of Labour claimed to be in contact with MEPs, EU member state officials and European trade union federations to discuss the impact of the trade agreement as well as the aforementioned roadmap, yet so far there had been no direct contact with Commission services at DG Employment, DG Trade or DG International Cooperation and Development.

Fourth and finally, it was argued that the Sub-Committee was set up in a rather top-down manner and that formal annual meetings among government representatives could hardly constitute a credible monitoring mechanism without full transparency and an adequate and regular involvement of civil society. In accordance with Article 282 of the Trade Agreement, the Sub-Committee is required to meet with CSOs at an open session and during the first meeting of the Sub-Committee in Lima in February 2014, the three parties (Peru, Colombia and the EU) discussed *inter alia* procedural matters, including the rules of procedure for such an open session. The latter rules of procedure state that the parties should 'provide for an inclusive representation of the relevant interests among participants […], including by promoting a balanced attendance of economic, environmental and social stakeholders, and by ensuring the Chairs […] maintain a balanced allocation of speaking time among these interests'. The

[7] Interviewees from the Colombian Ministry of Trade indicated that they wished to address this matter, and ask the EU for guidance, during one of the following meetings of the Trade & Sustainable Development Committee.

procedure further stipulates that the agenda of the open session *may* include a dedicated slot for CSO members 'to present updates on their activities' (EU-CO/PE 2014).

Following the first open session of the Sub-Committee (in Lima, February 2014), interviewees argued that CSO involvement had been severely limited. Due to a lack of resources and without support from the EU or the Colombian government, Colombian union representatives had not been able to make it to Lima. CSO representatives who did attend the open session complained that they had not been given the chance to take part in the discussions actively. Besides limited participation, many observers noted that the joint statements made available in the aftermath of the Sub-Committee meeting, offered little more than a summary of procedural decisions and a repetition of generic commitments regarding the implementation of the Sustainability chapter (EU-CO/PE 2014).A second Sub-Committee meeting, organized in Bogotá in June 2015, did slightly better in this regard., Overall however, public information about the contents of these meetings remains of a generic nature. Concerning labour matters, Colombia reportedly 'emphasized activities carried out to strengthen labour inspections, collection of fines, actions against inappropriate intermediary practices, social dialogue with mechanisms such as the Committee on Resolution of Conflicts (CETCOIT), collective bargaining in the public sector, protection of trade union leaders and the fight against impunity' (EU-CO/PE 2015). While these constitute the key challenges for labour protection in the country, little information is provided on what was specifically discussed.

More interesting perhaps, are the cooperation activities in areas of mutual interest under Article 286 of the agreement. According to the joint statement following the June meeting in Bogotá, a 'preliminary interest was indicated' to cooperate on the following labour topics: CSR and the supply chain for the mining sector, best practices in labour inspection, mobilisation from informal to formal work, the prevention and eradication of child and forced labour, the prevention and resolution of labour conflicts, as well as mechanisms to measure labour and environmental impacts of the implementation of the Agreement. Particularly the latter issue of impact assessment is an interesting and promising indication, since it seems to respond to requests in that direction voiced by both MEPs, as well as by the Colombian government (EP, 2012b).

B. Civil society involvement

Like most recent EU trade agreements, the deal with Colombia provides two separate but interlinked mechanisms for civil society to monitor the implementation of the labour and environmental provisions under Title IX. The first of these mechanisms is a domestic advisory group (DAG) which includes labour, environmental and business representatives. The second is transnational in the sense that it brings together CSO representatives from both sides of the agreement to jointly discuss sustainability issues during an annual 'Civil Society Dialogue', organized back to back to the meeting of the Sub-Committee on Trade and Sustainable Development.

Whereas most interviewees acknowledged that mechanisms like the DAG offer a potential forum to raise labour issues, both domestically as well as vis-à-vis the EU, experiences with similar forums for social dialogue made most of the interviewed non-state actors rather sceptical. Common concerns in this regard revolved around a lack of outreach and inclusiveness to different types of NGOs, and an

overall lack of transparency and insufficient accountability from the Colombian authorities. While Colombian and EU officials were keen to point out several, recently established forums for multi-stakeholder social dialogue, notably the Sub-commission of International Affairs and the Tripartite Commission for Conflict Resolution for ILO Complaints (CETCOIT), labour unions and NGOs indicated mixed feelings about these mechanisms and identified several shortcomings in need of improvement.[8] Trade unions have argued for instance, that the tripartite social dialogue mechanisms put forward by the Colombian government have not been sufficiently inclusive to ensure that something of relevance comes out, especially because of its lack of independence from governmental structures, which restrict the potential free and non-coerced expression of the parties involved (CUT 2014: 4-7; CGT 2015: 15). A European labour representative argued in this regard that given past experiences, Colombian labour activists are rightfully sceptical and less likely to engage with 'these types of dialogue mechanisms'.

Since the setup of the respective DAGs was part of the first Sub-Committee meeting in February 2014, domestic CSO mechanisms had to be established afterward. In the case of Colombia, the decision was made to use an existing forum for social dialogue to assume the role of DAG under the trade agreement. Notably, the governmental representatives for the Sub-Committee on T&SD convene civil society and the public at large to discuss the issues arising from the implementation of Title IX of the Agreement. This summon is open to all who wish to attend (upon prior registration) (MCIT, 2015). It was thus not until the second Sub-Committee meeting in June 2015, that a first Civil Society Dialogue could take place. In the absence of the Peruvian DAG however, only the DAGs from Colombia and the EU met to discuss their mandate and future cooperation. In a joint statement, they requested that 'the Parties adopt all appropriate measures to strengthen the capacities of the Domestic Advisory Groups to enable as many individuals as possible to attend the annual meetings […], as well as the capacities of civil society to participate fully in monitoring the implementation of the Agreement' (DAG 2015).

To do so, members of the Civil Society Dialogue suggested a number of measures 'to be taken before the next meeting' in Brussels in 2016. These included financial support, the use of modern media - notably video conferencing – and the right to prior information. The latter seemed particularly pressing since neither the Peruvian, nor the Colombian government had responded to letters of their DAG's chair, neither had they shared information about their respective domestic mechanisms, which would have greatly facilitated contact among the two DAGs prior to the meeting in Bogotá. Finally, the joint statement of the EU and the Colombian DAGs requests 'that the governments of Colombia and Peru reconsider the composition and rules of operation of civil society groups which would serve as their respective Domestic Advisory Groups'. It was noted that these rules and composition should have been

[8] The two institutions mentioned above are branches of the National Commission on Concertation of Wage and Labour Policies (CPCPSL) within the Ministry of Labour. Both include members of government, trade unions, pensioners' unions and business guilds (MINT 2015). The CETCOIT is intended as a body where labour disputes can be settled domestically before they are taken to the ILO (Colombian Embassy, 2012). There are three members for each of the three sectors of the tripartite (government, unions, and guilds), and they are in charge of studying the conflicts that arise in relation to ILO Conventions No. 87 and 98 and intervene in these conflicts before they are submitted to the ILO (MINT 2015). The Tripartite Sub-commission of International Affairs on Labour was created in 2012 as well and functions as a bridge between the Colombian government and the transnational organizations and conferences dealing with labour issues. It is the institution responsible for answering to the ILO (MINT 2015).

established in consultation with the CSOs concerned, in order to allow the DAGs to effectively fulfil their mandate under the Agreement.

C. Identified shortcomings

While perhaps too early to discuss the functioning of the monitoring and CSO mechanisms under the EU-Colombia Agreement, many of the concerns outlined above seem to echo criticisms about the effectiveness and added value of similar sustainability chapters under other EU trade agreements. With regard to the functioning of the monitoring and enforcement mechanism provided under the Agreement, there seems to be a lack of close monitoring and follow up on the implementation and enforcement of labour provisions – particularly since labour rights as such are not part of the EU's Human Rights Strategy with Colombia. This contrasts with the approach applied in the US-Colombia trade agreement. First, the US uses relatively high-level quarterly visits to discuss progress with their Colombian counterparts. Secondly, while sanctioning and hard conditionality are by no means ideal instruments to foster increasing recognition of labour rights protection, experience from the US-Colombia Agreement shows that, from time to time, they offer a necessary tool 'to get their [the Colombian government, ed.] attention'.[9] Hence, a binding bilateral dispute-settlement mechanism, like the one provided under Title XII of the EU-Colombia Agreement could include the provisions under the Sustainability Chapter – effectively elevating labour and environmental provisions to the level of those provisions constituting, or consistent with, the adequate application and interpretation of the Agreement.

At the level of the EU Delegation in Colombia, the follow up of the sustainability chapter could be strengthened. To do so, the EU Human Rights Focal Point could collaborate more closely with the Trade and Development sections at the Delegation. Again the US approach offers a noteworthy example in this respect. Since late April 2015, an attaché of the US Department of Labour has been seconded to the US embassy to Bogotá, whose sole responsibility it is to monitor the implementation of the Labor Action Plan.

Concerning CSO engagement, we identify three critical concerns. First of all, there seems to be an overall lack of accountability of both Colombian government agencies and of the EU towards the domestic and transnational CSO mechanisms. Essentially, how DG Trade on the EU side, and the respective ministries on the Colombian side are supposed to deal with inputs from civil society is unclear under the Trade Agreement's current stipulations. Article 280 (7) simply states that 'the Sub-Committee shall be open to receive and consider inputs, comments or views from the public on matters related to this Title'. With regard to the Domestic Mechanisms, Article 281 then adds equally broad that 'procedures for the constitution and consultation of such committees or groups […], shall be in accordance with domestic law' (Art. 281). Similarly, how CSO mechanisms at national and transnational level can formally ask one of the Parties to enter into bilateral consultations, in case of labour violations related to the implementation of the Trade Agreement for instance, is unclear as well. At present, civil society and 'the public at large' are considered as secondary parties to the agreement. The inputs they

[9] Several interviewees observed a decreasing willingness on the Colombian side to implement and safeguard labour regulation once the trade agreement with the US had been signed.

provide through the appropriate channels are welcome, though in no way can the governmental Parties be held accountable to act upon them.

Secondly, there is a perceived lack of the formal coordination, information sharing and allocated resources required to allow these CSO mechanisms to effectively fulfil their mandates. While annual meetings are useful, the Parties should enable them, in every way, to set up a more regular dialogue, to construct an agenda based on issues of mutual concern, well ahead of their physical meetings. Similarly, it was considered vital for the usefulness of the CSO mechanisms, that the Parties disclose any relevant information in order to allow for a meaningful debate, among the DAGs as well as vis-à-vis the Sub-Committee.

Finally, when it comes to assessing the impact of the Agreement, there seems to be a lack of clarity about what this entails concretely. First, According to Article 279 of the Sustainability chapter, each Party has to monitor, review and 'assess the impact of the implementation of this Agreement on labour and environment, as it deems appropriate, through its respective domestic and participative processes' (Art. 279). Each party is thus obliged to monitor and assess the impact of the trade agreement on its domestic labour and environmental situation. In addition, Article 280 on the Sustainability Chapter's institutional and monitoring mechanisms, clearly stipulates that, in order to 'carry out the follow-up of this Title, the Sub-Committee is required to 'assess, when it deems it appropriate, the impact of the implementation of this Agreement'. While DG Trade releases annual implementation reports to brief the Council and the EP on the progress made against the different chapters of the Agreement, little is known about the impact of the trade agreement, let alone its impact on the labour situation.

In March 2014, a delegation of the European Parliament's International Trade Committee (INTA) visited Peru and Colombia to assess the process of implementation of the Trade Agreement, focusing in particular on the commitments on sustainable development. During their visit, the INTA members reportedly observed that 'while the purely trade provisions seemed to have been implemented correctly, further progress on the commitments […] in terms of labour rights and social dialogue was needed'. The MEPs further concluded that it was evident that 'the Commission has not (yet) developed a proper mechanism to monitor the implementation of the Trade and Sustainable Development Chapter' (EP, 2014). The lack of clarity on the development of a proper impact assessment of the Agreement is particularly problematic given the lack of a proper ex-ante impact assessment of the final Agreement as it was implemented. At the time of writing there was no indication that the Commission had initiated any type of impact assessment procedure.

V. Conclusion

Roughly eight years after the Cariforum EPA introduced the concept of so-called Sustainability Chapters, an increasing number of stakeholders have started questioning their relevance in terms of impact. Hence, the European Parliament, civil society organisations and a number of EU MSs, have indicated the need for more stringent rules on trade and sustainability, particularly when it comes to the monitoring and enforcement of the provisions under the Sustainability Chapters.

This paper aims to contribute to this debate by providing an analysis of the implementation of labour provisions under the EU-Colombia Trade Agreement with a focus on the protection of freedom of assembly and the right to collective bargaining. As such, we presented an assessment of Colombia's labour situation as well as a critical analysis of stakeholders' perceptions of the provisions under the Sustainability Chapter to address these challenges.

A vast majority of the stakeholders consulted in Brussels and Bogotá considered the EU labour rights language in the agreement to be too broad to be meaningful. Labour provisions were not formulated in a Specific Measurable Achievable Relevant and Time-bound (SMART) way, which hampers their monitoring, progress tracking and benchmarking. The perceived lack of an adequate monitoring and enforcement framework further adds to the shared notion among stakeholders that the EU's approach constitutes little more than 'window dressing', or even, as one correspondent called it, 'a box-ticking exercise' on treaty obligations. While not all interviewees voiced such radical criticism, most agreed that, since the labour provisions under the agreement are ratified by both parties under international conventions, their reference in the Sustainability Chapter adds little in terms of hard law. This is particularly relevant since Colombia has in fact developed a full-fledged legal-institutional framework for labour protection, though suffers from a significant compliance gap when it comes to enforcing this regulatory system in practice.

In addition, the analysis raises questions about the usefulness of a rigidly formalistic and top-down annual monitoring mechanism, designed to monitor compliance with international labour standards which are *de jure* already in place. We found some evidence that the provisions on social dialogue are potentially important for monitoring and enforcement but that they need additional support to play a more significant role. The absence of a binding enforcement mechanism, and the lack of adequate engagement with CSOs, hampers the Agreement's overall contribution when it comes to following up on, and contributing to, a better *de facto* compliance with labour provisions.

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