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Labour Clauses for Sustainability?

Colombian Trade Agreements Exemplify Potential and Limits

Evita Schmieg

Modern free trade agreements increasingly seek to address environmental and social concerns. While the EU pursues a dialogue-led “soft approach”, the United States relies on threats of trade sanctions. Colombia offers an interesting example in this connection. It has agreements with the United States, Canada and the EU, which the respective parliaments declined to ratify until they included provisions to improve the situation of labour and the trade unions. Controversy over the fundamental relationship between trade policy, sustainability and human rights has coloured the discussion in recent years. Experience already gathered with labour clauses permits conclusions to be drawn for the shape of future trade policy instruments, including those of the EU. The findings presented below confirm the importance of sustainability provisions in trade agreements and the significance of strengthening local institutions.

During recent years Europe has witnessed a burgeoning discussion about the question of including environmental and labour standards in free trade agreements (FTAs) in order to strengthen sustainability. In an options paper in July 2017 the European Commission named a range of goals that could be pursued by this route: (1) implementation of international conventions, (2) fair international competition (“level playing field”) and (3) sustainable use of resources. The question now is whether the EU should improve and continue its dialogue approach, or rather seek to include sanction options in trade agreements.

Colombia represents an interesting example, because the issue of labour is treated differently in important trade

agreements with the United States, the European Union and Canada. The United States and the EU are major and economically significant trading partners, with shares of 29.5 percent and 13.2 percent respectively; Canada is much more marginal, with 1.5 percent. The present contribution explores experience gathered with these different labour clauses, and includes observations from fieldwork and interviews conducted by the author in Colombia.

Labour Clauses in Colombia's Trade Agreements

The Colombian-Canadian Free Trade Agreement of 2008 was supplemented in August



2011 by a bilateral Agreement on Labour Cooperation. An Action Plan on labour standards was included in Colombia's 2011 Trade Promotion Agreement with the United States after the US Congress refused to ratify the latter until the Colombian government committed to addressing the problem of assassinations of trade union activists and the lack of prosecutions. The agreement of 2012 with the European Union contains – like all recent EU FTAs – a comprehensive sustainability title, which also covers labour issues. The European Parliament and some of the member states' parliaments felt its provisions were too weak, above all in view of the difficulties faced by trade unions in Colombia and the lack of a sanctioning mechanism. In June 2012 the European Parliament adopted a resolution on the EU–Colombia/Peru agreement calling for the EU's Andean partners to establish “a transparent and binding road map on human, environmental and labour rights”.

Different Anchors

What the EU and Canada demand is essentially that Colombia implement the core labour standards of the International Labour Organisation (ILO). Both countries' agreements with Colombia also provide for a broader exchange of information and a dialogue on labour issues. The Canadian agreement places considerably more concrete demands on the involved institutions.

The Action Plan attached to the US agreement is broadly based on the ILO Declaration on Fundamental Principles and Rights at Work. According to US-based researcher Kimberly Ann Elliott, US negotiators rejected a Colombian suggestion to take as the point of reference the ILO core labour standards – not all of which the United States has ratified. The US side, she says, feared that such a move would generate more resistance than support in Congress. Nevertheless, with thirty-seven concrete measures the Action Plan Colombia negotiated with Washington goes into a great deal more detail than its agreements with

Canada and the EU. Certain key elements were even formulated as preconditions for the agreement to come into effect. One of these was the reinstatement of the labour ministry, which occurred in 2011.

The internal discussion within Colombia initiated by the US Action Plan led in May 2011 to a Tripartite Agreement on Freedom of Association and Democracy. This updated an agreement concluded in 2006 between the Colombian government, the trade union federation CGT and the employers' association ANDI. The updated agreement explicitly sets out to fulfil the commitments made in the US Action Plan, the sustainability title in the FTA with the EU, and the rules of the International Labour Organisation. The internal debate appears to have greatly reinforced domestic political commitment to the respective demands, as does the fact that the issues were discussed at the highest political level. To this day, the Action Plan is referred to as the “Obama-Santos Plan” after the presidents serving when it was adopted.

In its 2012 resolution the European Parliament calls for Colombia to prepare a road map, suggesting that this take into account the US Action Plan. The demands included freedom of association, ending the obstruction of trade union activity (including a ban on “collective pacts”) and an end to impunity for killings of trade unionists. As such, the resolution is much more specific than the sustainability title in the EU agreement. It accords great significance to civil society in implementation, and calls for an institutionalised complaints mechanism. But mid-2012 was too late to initiate a discussion process, and the Colombian side did not take up the concrete demands (including civil society participation).

Large parts of the road map Colombia is implementing in the process of joining the OECD replicate the US Action Plan and the Canadian and European Union/Parliament demands. The Colombian government treats OECD accession as a top priority, complementing the 2016 peace agreement that ended the country's civil war. OECD membership is regarded an instrument of

national modernisation, in part on the basis of an expectation of greater foreign direct investment.

Verification

All the agreements provide for verification. The US system is the most sophisticated, with intergovernmental consultations several times a year as well as regional discussions and controls. The US Administration publishes annual progress reports on its website, while Congress tracks progress through frequent Congressional hearings. The US trade unions participate actively in the National Advisory Committee for Labor Provisions of U.S. Free Trade Agreements. In the case of Colombia they have already lodged a complaint.

The parties to the EU agreement meet regularly in committees established by the agreement to discuss all relevant questions; labour issues are discussed in the sustainable development subcommittee. The Colombian government reports legal reforms to the subcommittee, and progress has already been achieved. However, the EU Commission does not conduct checks of its own on the ground. So the intensity of discussion of labour issues and the political pressure to press ahead with reforms is a great deal weaker than in the scope of the US process.

Sanctions Mechanisms

The different agreements offer very different options for imposing sanctions in the event of violations of agreed labour clauses. In the US agreement the dispute settlement mechanism provided for the trade side of the agreement also applies to labour issues, so trade sanctions can be imposed in response to violations of labour standards. The agreement with Canada permits financial sanctions of up to \$15 million per year where a party fails to meet its obligations. This can be triggered where a party fails to properly enforce its own labour laws or contravenes any of five internationally recognised rights and principles – as long

as the violation concerned has an effect on trade. The fines flow into a fund for financing labour-related projects in the country where the clauses have been violated.

The agreement with the EU provides for a group of experts to resolve disputes. It may also include external experts, for example from the ILO. The group of experts prepares a report containing recommendations, and the country's government prepares an action plan to fulfil those recommendations. But the sustainability title is explicitly excluded from the agreement's general dispute settlement system, so trade and financial sanctions are not possible in that area. In this respect the EU has remained true to its traditional dialogue-led approach.

Progress on Labour Rights

Assessing whether agreed reforms have actually taken effect presents the trade partners and the OECD with considerable problems. These are discussed in the following in relation to a number of central issues.

Labour Administration and Labour Law

Colombia is required to beef up its labour administration, combat "informality" in employment (undeclared labour, informal firms and labour contracts) and properly enforce its labour laws. According to the country's labour ministry, the number of labour inspectors has doubled since 2010 and their salaries have been increased. As a result, it says, the total volume of fines imposed for violations of labour law has doubled since 2014. The OECD's Trade Union Advisory Committee (TUAC) notes that despite an increase in the number of inspectors, the number of inspections actually carried out has fallen, especially in rural areas. Only 62 percent of inspectors actually carry out inspections, it reports, and where fines are imposed they are mostly not collected: businesses appeal against the

penalty, delay the legal process, and wait for the statute of limitations to run out after five years. Colombian trade unions argue that this demonstrates the inefficiency of the labour administration and the lack of political will to bring about change.

Strengthening labour inspections represents an enormous challenge for the Colombian government. The state lost control of parts of the country during the long armed conflict, which it did not regain the instant the 2016 peace agreement was signed. As well as the lack of administrative infrastructure for fulfilling state tasks adequately, even the physical infrastructure is often missing. To address that difficulty, the United States backed its Action Plan from the outset with a development project overseen by the ILO. This will establish an IT system to create a framework for inspections and document their findings. This should reduce the time required to complete an inspection to seven months, from two to three years today.

The existing procedure with inspections managed at the local level produces neither comparability nor transparency. This also means that the figures cited for earlier inspections are unverifiable – and might explain the apparent discrepancy of more inspectors conducting fewer inspections. The IT system has so far been introduced in Colombia's departments and major cities, but not in lower tiers – especially those without internet access. An additional challenge is that fines are issued by the labour ministry, but collected by the National Vocational Training Agency (Servicio Nacional de Aprendizaje, SENA) – whose IT system is not connected to the new one in the labour inspection system. It is planned to remedy this by autumn 2018. That will improve transparency and potentially increase the pressure to actually collect the fines.

The trade unions and the government differ greatly in their assessment of the facts. The government points out that important processes have been set in motion. For the trade unions the yardstick of success is real improvement in the situation of the workers; changes confined to legal and

institutional spheres do not count. One reason for this is that in Columbia it is not at all unusual for contracts to be signed and laws promulgated – but never actually implemented.

Collective Bargaining and Freedom of Association

Colombia is expected to bring about change in the areas of both collective bargaining and freedom of association. The trade unions acknowledge that an agreement concluded in 2017 between the government and the public sector trade unions brought about improvements for more than one million workers. But, they say, the situation remains problematic in the private sector, where the practice of internal company pacts (“pactos colectivos”) continues. The term “collective” is misleading in this context because the ILO connotation of collective negotiations with trade unions does not apply in the Colombian context. Instead, “pactos colectivos” undermine trade unions by merely simulating a pretence of collectivity. As one interview partner put it: “it is neither a pact nor is it collective” (Ni es un pacto, ni es colectivo). In reality, they said, each employee went on their own to the head of HR to sign the “collective pact”.

Even if the Colombian government were to exhibit strong political will to put an end to this practice it remains a great challenge to distinguish when a trade union is operating truly freely within a company, and when it only appears so. According to the National Trade Union College (Escuela Nacional Sindical, ENS) more than two thousand new trade union organisations have been created since 2013. In order to assess their real role it is necessary to check the respective agreements and the circumstances under which they came into being. The ENS concluded that many “pactos colectivos” had simply been renamed as trade unions and failed to satisfy the ILO criteria. This demonstrates the limits to controls instigated by FTA partners, such as representatives of the US Department of Labor. A proper assessment of progress

means getting deep into the weeds of internal data and processes.

Violence against Trade Unionists

One important demand is to end the persistent violence against Colombian trade unionists along with the culture of impunity for such crimes. Although the number of killings of trade unionists has roughly halved since 2010 (to fewer than twenty annually) and the government points to a national protection programme (with 475 members in 2016), TUAC reports that the number of cases of threats against individuals linked to trade unions has in fact increased – from 118 incidents in 2014 to 181 in 2015.

Impunity also remains an issue. Although the government reports an increase in the number of convictions, the United States, Canada and TUAC point to the persistently high number of cases that actually go unpunished. The problem is further exacerbated by the culture of violence that exists in the country after five decades of armed conflict. Individuals prominently involved in indigenous affairs, environmental campaigning or social activism have also been targeted with violence and assassination threats.

Public Dialogue

Other successes of the trade agreements are easier to identify. For example they contribute to transforming the culture of stakeholder dialogue and the role of civil society. The agreement with the EU and – especially – the European Parliament's resolution both call for civil society in the partner countries to be closely involved in implementing the FTA. To this end the Colombian government intended to consult the already existing Standing Committee on the Coordination of Wages and Employment Policy (Comisión Permanente de Concertación de Políticas Salariales y Laborales, CPCPSL). This tripartite body – analogous to the structure of the ILO – includes the

government, which uses it almost exclusively to *inform* civil society. But the debates over the trade agreements also led to the creation of an additional internal consultation group (grupo consultivo interno) independent of the government. Here the dialogue between European and Colombian trade unions played a particularly important role. A meeting of civil society representatives from the EU, Colombia, Peru and Ecuador in Lima in November 2017 adopted a resolution underlining the interests of civil society and demanding effective enforcement of laws, greater participation by civil society and a complaints mechanism for the latter.

Recommendations on the Issue of Labour in FTAs

A central place for labour standards:

Labour clauses in FTAs can certainly play a role in improving the situation of workers. In 2016 such provisions were found in 76 FTAs, out of more than 260 notified to the World Trade Organisation. A study prepared by the ILO investigated the effects of such clauses. Fairly unsurprisingly, no labour market impact was registered at the highly aggregated level, apart from an increase in the labour force participation rate. But case studies show that the combination of technical cooperation, verification mechanisms and civil society participation has contributed to improving the labour rights situation in various sectors. That is also the experience in Colombia, as confirmed by local fieldwork. About half the measures required by the US Action Plan have now been implemented. They mostly concern the level of structures and laws, but the first practical successes are also being seen.

Greater leverage through conditionality and (financial) sanctions:

The United States has had good experience with conditionality in the sense of tying trade agreements to particular conditions. This is an

instrument that large, economically powerful trade partners can use to ensure that objectives that have already been agreed internationally are actually achieved. The EU should in future demand that countries that are in a position to do so ratify the ILO core labour standards.

Sanction mechanisms are supposed to heighten the incentives to adhere to agreed rules. But it is unclear whether that actually occurs. Since the turn of the century the United States has included the possibility of trade sanctions in many FTAs, also covering labour standards. Washington has taken only one case to the final stages of arbitration, however, and it is anything but encouraging. The case, against Guatemala, dragged on for nine years and was ultimately rejected. The panel concluded that Guatemala was failing to adequately enforce its labour laws, but ruled that the case was not relevant to trade and sanctions were therefore not permissible.

Trade sanctions are a double-edged sword anyway. Because they reduce market opportunities and potentially result in loss of jobs they tend to worsen the situation for workers. As a rule they affect developing countries, as the weaker partners in trade agreements. Whether such an effect is regarded as “successful” depends on the objective pursued. Where labour clauses are intended to create a level playing field and protect one side’s workers from unfair competition, trade sanctions certainly have the potential to produce results. But they are not suited to improving the situation of labour in the partner country. That is more likely to be achieved through financial sanctions, especially where the fines are used for projects benefiting workers – as proposed in the Canada-Colombia Agreement. In future trade agreements the EU should therefore seek to include financial sanctions for violations of labour standards in the dispute settlement mechanism, but not trade sanctions.

Dialogue mechanisms: Norms and institutions must change if society is to progress. Colombia for example lacks experience in

negotiating compromises between groups in society. The fact that trade unions do not (and cannot) influence government actually makes it easier for them to adopt extreme positions, such as complete rejection of FTAs. But real influence on the political process is only possible where functioning institutions exist for stakeholder dialogue, as well as practical experience with such dialogue and a willingness to compromise. The EU agreement and the European Parliament’s resolution could make a modest contribution to promoting societal dialogue in Colombia.

In its FTAs the EU must also demand that civil society in the partner countries be involved in an organised form in formulating and implementing trade agreements. One important instrument here would be complaints mechanisms for civil society groups. These could be modelled on an OECD instrument: the National Contact Points for the OECD Guidelines for Multinational Enterprises. This would have the advantage of using a plurilateral instrument, rather than unilaterally imposing the ideas and wishes of the stronger partner. It would also mean that one OECD instrument had already been introduced, should the partner country be interested in joining the organisation.

Coherence of demands: The requirements placed on the partner country must be coherent. This means avoiding a situation where different bilateral trade agreements place different requirements on a country’s internal politics. Especially in the case of large trading nations, there is a danger that they will seek to use such agreements to enforce their own labour and environmental standards in the weaker partner country. Such a constellation can be avoided if the requirements are based on internationally agreed standards. In the area of labour standards the EU should therefore continue to rely on agreements concluded under the auspices of the ILO.

Experience from development cooperation: Trade partners should coordinate with one another and ideally pursue a

multilateral approach over issues where they demand that their counterparts change their internal policies. Great challenges arise where a country concludes bilateral trade agreements with several different parties, each generating different requirements concerning political reforms and associated verification mechanisms. In the case of Colombia it was positive that the trade partners orientated their demands largely on the US Action Plan. But even then, the effort required to implement the agreements is multiplied. Parallel reporting requirements and discussion processes arise and different verification missions have to be hosted, sometimes simultaneously. This may prove too much for the often weak administrations in developing countries. It is therefore important that future trade policy avoid repeating the mistakes that development cooperation is only just learning to overcome.

In 2005 the donor countries adopted the Paris Declaration on Aid Effectiveness. In essence it provides for recipient countries to define their own development strategies (ownership). The role of the donors is to support these strategies and coordinate and simplify their own processes. The case of Colombia illustrates what this would ideally require: harmonisation of required labour protection reforms on the basis of international agreements, joint verification of progress achieved, and exchange of information and assessments. The simplest way to realise such a process would for the trade partners to draw on the expertise of international organisations and grant them a central role in implementation; in the context of labour that would mean the ILO.

Control of implementation: Political pressure to actually implement labour clauses is generated above all through concrete demands and agreements, along with verification of their realisation. The corresponding controls place considerable administrative and financial burdens on bilateral partners and may encounter limits, as demonstrated by the aforementioned example of implementation of trade union rights in

Colombia. A coordinated joint approach by the various trade partners is therefore more efficient.

Cooperation among European institutions: European Parliament's 2012 resolution relied on the additional powers granted under the Treaty of Lisbon. But from the outset the EU Commission took the position that the sustainability title it had negotiated adequately addressed the issues, including labour standards. Afterwards too, the Commission and the European External Action Service (EEAS) continued to show little interest in discussing the content of the resolution and the Colombian road map, even though the resolution calls on the Commission to support Colombia with implementation and report regularly on progress. The reluctance of Commission and EEAS to engage with the resolution is regrettable. It means that, in the case of Colombia, Europe is holding back from exerting as much influence as it potentially could on this important issue. Looking ahead, it would be desirable for the EU institutions to act more cooperatively (and naturally to respect the division of powers between executive and legislative).

Support for partner countries: Europe must give financial and technical support for sustainable change in partner countries. Limited administrative capacities, inadequate enforcement of legislation and weak institutional infrastructure are all typical development problems that hamper efficient governance. Often external support is required in order to realise far-reaching reforms and consistent implementation of legislative initiatives, including in the area of labour. This is traditionally a matter for development cooperation. As contemporary trade policy encroaches into partners' internal affairs, it should draw on the instruments and experiences of development policy to support reform processes and strengthen state and/or private capacities.

Sustainability in production and consumption: Labour clauses in FTAs are only a second-best solution, because modern trade is simply not sustainable. That is not a defect of trade policy or the agreements in question, but the logical consequence of patterns of production and consumption based on prices that fail to reflect the true costs to society. The international Sustainable Development Goals identify where change is needed. The long-term goal of sustainable production and consumption must not be lost sight of.

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