Restoring Trust in Trade

Liber Amicorum in Honour of Peter Van den Bossche

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• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

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First published in Great Britain 2019

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Bossche, Peter van den, honouree. | Prévost, Marie Denise, 1971- editor. | Alexovičová, Iveta, editor. | Pohl, Jens Hillebrand, editor.

Title: Restoring trust in trade : liber amicorum in honour of Peter van den Bossche / edited by Denise Prévost, Iveta Alexovičová and Jens Hillebrand Pohl.

Description: Oxford, UK ; Portland, Oregon : HART Publishing, 2019. | Includes index.

Identifiers: LCCN 2018038308 (print) | LCCN 2018039149 (ebook) | ISBN 9781509924202 (Epub) | ISBN 9781509924189 (hardback : alk. paper)

Subjects: LCSH: Foreign trade regulation. | Arbitration (International law) | World Trade Organization. | LCGFT: Festschriften.

Classification: LCC K4600 (ebook) | LCC K4600 .R47 2019 (print) | DDC 382—dc23

LC record available at https://lccn.loc.gov/2018038308

ISBN: HB: 978-1-50992-418-9
ePDF: 978-1-50992-419-6
ePub: 978-1-50992-420-2

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

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Restoring Trust in Trade: Introduction

JENS HILLEBRAND POHL, IVETA ALEXOVIČOVÁ AND DENISE PRÉVOST

> Entre le fort et le faible, entre le riche et le pauvre … c'est la liberté qui opprime et la loi qui affranchit.
>
> *Abbé Jean-Baptiste Lacordaire*

> International trade is an unequalled factor for the welfare of every civilised State.
>
> *Lassa Oppenheim*

> [I]f humanity is to thrive, there is no alternative to international institutions and rules that manage and regulate international trade to the benefit of all.
>
> *Peter Van den Bossche*

In the 25 years that have passed since Professor Peter Van den Bossche began teaching at the Maastricht University Faculty of Law, the multilateral trading system has undergone a profound transformation. Belonging to the first post-GATT 1947 generation of international trade lawyers, he and his peers took over from the 'founding generation' of the likes of the late Professor John Jackson, which oversaw the process of 'legalisation' and 'judicialisation' of what was originally international trade *diplomacy* and its definitive transition into what may more properly be called international trade *law*, leading to the creation of the World Trade Organization (WTO) in 1995.

Over the following decades, the multilateral trading system has witnessed a broad variety of challenges: from the teething troubles of the early days of the WTO, through the 'Battle of Seattle' confidence and public relations crisis at the turn of the century and the 'Doha doldrums' of the early 2000s, to the rise of mega-regional trade agreements in the 2010s and today's resurgence of economic nationalism and neo-protectionist tendencies in the wake of the global financial crisis.

As a scholar, counsellor of the WTO Appellate Body Secretariat, and, between 2009 and 2017, Member of the WTO Appellate Body, Professor Van den Bossche has in his different capacities addressed these and other challenges and tirelessly promoted trust in the multilateral governance model. Following in the tradition of Professor John Jackson, he has educated and sharpened the thinking of new generations of international trade lawyers. In his adjudicatory practice, his contribution to the development of a 'trustworthy' rules-based multilateral trading system has left a lasting legacy.

A recurring theme of both his scholarly and his practical interest has been the constant quest for an appropriate balance between trade and non-trade societal values and interests.[1] The current globalisation crisis era has witnessed expressions of increasingly eroding trust in the ability of the global trading system not only to strike a fair balance between such values and interests, but also to deliver welfare to the benefit of all. Restoring that trust and the trust in an orderly international trading system is needed more than ever to prevent the rise of destructive economic nationalism in the area of trade and investment and of harmful protectionist policies generally.

Reflecting on the challenges experienced by the multilateral trading system over these years, and in particular the recent anti-trade sentiment, it is useful to step back and consider the profound resilience and robustness of the overarching political commitment to trade multilateralism, which has managed to keep the WTO together as an organisation throughout these years and in spite of mounting criticism. In its nature and essence, that commitment appears, to an important extent, to be founded on an intellectual leap of faith – on *trust* in the very idea of international trade. This trust is, however, not to be taken for granted.

Trust is connected to the notion of *risk*. Risk and trust both relate to the unknown, to future uncertainty, of the calculable kind (risk in a narrow sense) as well as the incalculable kind (unknown or unknowable uncertainty). As a linguistic device, the word *trust* is used to capture a sentiment; one that is essential for all risk-taking and thus for any type of venture, enterprise or undertaking, including trade. In short, trust is necessary to overcome the paralysing effect of the unknown and to be willing to accept risk. Trust therefore makes risk-taking possible, in trade as well as in life.

For a long time, trade multilateralism was promoted by an increasingly general politico-economic acceptance of – or trust in – the (uncertain) fundamental utility of international trade. That *trust in trade* was in turn promoted by the compelling (but not indisputable) economic concept of comparative advantage and, more broadly, by the equally persuasive case for free trade in macro-economic theory and, by extension, by the liberal-capitalist economic order. At the same time, *trust in globalisation*, as a macro-societal and historical process, was reinforced by *trust in multilateralism* – in rules-based relations between states and, generally, in the rule of law at international level, multilateral diplomacy, international cooperation, and the primacy of consensus over conflict.

Recognising and emphasising the importance of trust for maintaining the current international trading system serves not only to explain the resilience of that system so far, but also to understand existing and future challenges and to

[1] See for example, PLH Van den Bossche, G Faber and NJ Schrijver, *Unilateral Measures Addressing Non-Trade Concerns: A Study on WTO Consistency, Relevance of Other International Agreements, Economic Effectiveness, and Impact on Developing Countries of Measures Concerning Non-Product-Related Processes and Product Methods* (The Ministry of Foreign Affairs of The Netherlands, 2007); and PLH Van den Bossche, 'The Appellate Body of the World Trade Organization' in GD Baere and J Wouters (eds), *The Contribution of International and Supranational Courts to the Rule of Law* (Leuven Global Governance series, Edward Elgar Publishing, 2015) 176–202.

identify the possibilities of strengthening that system by restoring the trust that has been challenged by recent crises and changes.

This collection of essays, written by friends of Peter Van den Bossche, including his mentors, colleagues and students, pays tribute to his work and contribution to the evolution and understanding of WTO law as a rules-based system eliciting trust, in his capacities as educator, scholar and adjudicator, and celebrates his many years of dedication to the Maastricht University Faculty of Law. These essays address thematically the overarching question of how to restore trust in trade, and in particular in the rules-based international trading system, *from a legal perspective*, focusing on the following three sub-themes: (1) how to ensure a robust institutional framework that promotes rational dialogue over power politics, (2) how to safeguard the integrity, effectiveness, impartiality and fairness of trade dispute settlement, and (3) how to nurture the evolution of substantive international rules that appropriately balance trade and non-trade interests and ensure that the benefits of trade are truly inclusive.

In this Introduction, the legal notion of trust in trade will be further explored as a preliminary matter, before turning to the explanatory relevance and legal implications of this notion by taking stock of the challenges to that trust currently facing the international trading system. In light of these challenges, this Introduction then outlines the thematic structure of the book and highlights the contributions of the following chapters to the core theme.

I. A Legal Conception of Trust in Trade

> Trust is based on reputation, and reputation is acquired on the basis of observed behaviour over time. Reputation is an asset, so people invest in it, in that they forego immediate gains for the purpose of enjoying benefits later. But it is not only people who can acquire a reputation, good or bad; institutions and groups can also acquire it and maintain it. It is not easy to model the link between personal, group, and institutional reputation. However, the link needs to be studied ….[2]

Trust, as described above, is not a legal concept. Nor is it a legal principle. When used in a legal context, it is rather from neighbouring disciplines that the word 'trust' is increasingly finding its way into legal scholarship, particularly from fields such as sociology, psychology, ethics, corporate social responsibility, institutional economics, international relations studies and political science.[3]

In these contexts, trust is treated as a sentiment; one that encourages risk-taking and thus promotes human action. While trust itself is in essence a sentiment, the

[2] P Dasgupta, 'Economic Progress and the Idea of Social Capital' in P Dasgupta and I Sarageldin (eds), *Social Capital: A Multifaceted Perspective* (World Bank, 1999) 333.

[3] For further discussion of the legal aspect of the concept of trust in trade, see J Hillebrand Pohl, 'Conceptualizing the complexity-reducing role of societal trust in transnational economic regulation: Towards an interdisciplinary research methodology', *International Journal of Public Law and Policy* (forthcoming).

attainment of trust in society may be regarded as a desirable result of appropriate governance (taken here to mean the development, application and interpretation of legal norms). As such, societal trust can be seen both ex ante as an objective to be promoted and ex post as a consequence of 'good' governance.

Recognising the link between trust and governance also indicates the link between trust and the legal system. The extent to which the creation, application and interpretation of legal norms are aligned with societal values and interests (ie political morality, in the form of, inter alia, fairness, balance and inclusiveness) is an important basis for trust in a legal system.

However, it also follows – perhaps paradoxically – that legal interpretations and justifications, which *directly* appeal to societal values and interests without being anchored in argumentation on the basis of sources, concepts or principles of law, may actually be counterproductive. Such *argumentum ad populum* justifications are in fact prone to *undermine* the sense of security and predictability of – and hence the trust in – the orderly administration of the law and may also appear procedurally, if not substantively, unfair.

A reason for this can be traced to the fact that norms (and norm-bound administration of norms) themselves promote trust in future dealings. In this sense, trustworthiness takes the form of *security and predictability* promoted by confidence in the future regularity of other agents' conduct, or, in other words, reliance on the expectation that past patterns of behaviour may be extrapolated into the future. This sense of security and predictability may to an important extent – particularly in international trade – be promoted by *legal certainty* or the reassurance that agents' conduct will be *rules based* and conform to transparent requirements of international regulation, and applied and interpreted fairly, openly and in a manner that accords with expectations.

It follows then that trust is undermined when rules are not literally applied (flaws in linguistic argumentation), when legal concepts are incoherently applied vis-à-vis other rules and legal concepts (flaws in systemic argumentation), and when principles and policies are applied without concern for the integrity of the law in society (flaws in teleological argumentation). But perhaps even more apparently and more importantly, trust is undermined when the laws or the administration of laws are not perceived to safeguard the prevailing values and interests of society from which the law derives its legitimacy (politically immoral governance). This could be the case with governance that is self-serving, inefficient, inept or beholden to special interests. But it could also be because societal values and interests have evolved whereas the laws and the administration of justice are still rigidly safeguarding yesterday's morality – yesterday's values and interests.

Stated differently, trust may be undermined either for reasons *intrinsic* to the administration of the law (flaws in various types of argumentation or lack of judicial propriety) or for *extrinsic* reasons (evolution of societal values and interests beyond those safeguarded by the law).

When applied in the context of international trade, a legal conception of trust in trade as outlined above would be inextricably linked to the trust in the legal

anchoring of trade, which is inherently global in nature. This means that trust in trade from the perspective of such legal conception could not be understood without consideration of trust in the procedural (institutional and adjudicatory) and substantive legal framework governing global trade. That framework is essentially multilateral and multilayered in nature. Trust in trade from a legal perspective therefore comprises trust in a multilayered global institutional framework, with the WTO institutional framework as its central hub and regional institutions as its spokes and trust in an effective trade dispute settlement system, centred around the WTO dispute settlement system, as well as trust in the substantive body of rules governing international trade, again with WTO law at its core.

At this point, it is appropriate to consider *whose* trust in trade, or lack thereof, is involved. It is clear that the multilateral trading system is 'multilateral' as between the WTO Members and it is thus upon their trust that the WTO legal system essentially relies. Nonetheless, the WTO Members are accountable, in one way or another, to the expectations of their internal constituencies, whether local politico-economic elites and monied interests, organised interest groups and other 'agenda setters' and, in democracies, to the general public. Beyond internal interests, WTO Members are also dependent on external influences, notably in the form of other states and foreign economic agents, including lenders, investors and traders. It follows that the WTO Members' trust in trade is not isolated from the trust in trade, in all its various aspects, of these diverse internal and external influences.

This schematic outline of the notion of trust in trade from a legal perspective, for all its simplifications, will serve as a provisional reference point and conceptual framework in the following, but also as an accompanying reminder that international trade law is not and cannot be a (completely) autopoietic system, but that it will always exist more as a 'filter' of, than in clinical isolation from, the vagaries of prevailing political sentiment.

II. Trust in Trade Challenged

Can it be concluded that the global rules-based trading system is no longer trusted to protect societal values and interests and to balance them appropriately in case of conflict? If so, is it because that system has developed flaws or because those values and interests have evolved?

First it must be emphasised that, even if an erosion of trust in trade cannot be established empirically, sufficient indications can readily be observed in current societal discourse, in the form of challenges to the prevailing paradigm of international trade, to suspect that an erosion of trust may be under way. Some of the most widely publicised examples of such challenges are provided by the Trump administration's trade agenda and Brexit, as well as public opposition in continental Europe to new international trade deals, such as the EU–Canada Comprehensive Economic and Trade Agreement (CETA) and the Transatlantic

Trade and Investment Partnership (TTIP). Yet it is not immediately obvious that these various challenges have much in common intellectually.

While the Trump trade agenda most radically advocates a form of anarchy on the international plane,[4] signalling a future policy of selective and self-interested disregard for Appellate Body rulings,[5] combined with a preference for bilateral power politics over broad-based multilateral initiatives,[6] and national trade remedy enforcement over diplomatic engagement,[7] by contrast the Brexit anti-trade challenge is far more ambiguous and contradictory.

In spite of warm words for free trade and an absence of criticism directed towards the WTO and the multilateral trading system,[8] the essential thrust of Brexit is an abandoned commitment to the EU legal order and its defining freedoms,[9] and a downgraded political priority given to international economic relations, including trade. A popular preference for having fewer foreigners in the country is allowed to take precedence over trade and other economic interests. That preference is unquestioned but is evidently not grounded on economic reasoning.

Different again is the continental European opposition to CETA and TTIP. Perhaps reflecting different customs of societal discourse, this opposition has been more argumentation based and less obviously connected with broader grievances against immigration than its Anglo-American counterparts. Nonetheless, these arguments also reveal an eroding trust in the ability of international trade agreements to appropriately balance the competing interests of economic growth through trade and the protection of non-trade values and interests.

[4] 2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program, Office of the United States Trade Representative (2017) 2.

[5] ibid 3: 'The Uruguay Round Agreements Act states that, if a WTO dispute settlement report is "adverse to the United States, [the U.S. Trade Representative shall] consult with the appropriate congressional committees concerning whether to implement the report's recommendation and, if so, the manner of such implementation and the period of time needed for such implementation," confirming that these WTO reports are not binding or self-executing. … In other words, even if a WTO dispute settlement panel – or the WTO Appellate Body – rules against the United States, such a ruling does not automatically lead to a change in U.S. law or practice.'

[6] ibid 6: 'Plainly, the time has come for a major review of how we approach trade agreements. … But, going forward, we will tend to focus on bilateral negotiations, we will hold our trading partners to higher standards of fairness, and we will not hesitate to use all possible legal measures in response to trading partners that continue to engage in unfair practices.'

[7] ibid 4: 'The Trump Administration will not tolerate unfair trade practices that harm American workers, farmers, ranchers, service providers, and other businesses large and small. … And, when the WTO adopts interpretations of WTO agreements that undermine the ability of the United States and other WTO Members to respond effectively to these real-world unfair trade practices with remedies expressly allowed under WTO rules, these interpretations undermine confidence in the trading system.'

[8] See eg, Brexit: Trade in Goods, HL Paper 129, House of Lords, European Union Committee, 16th Report of Session 2016–17 (2017).

[9] See eg, Brexit and the EU Budget, HL Paper 125, House of Lords, European Union Committee, 15th Report of Session 2016–17 (2017) para 136: 'Individual EU Member States may seek to bring a case against the UK for the payments of outstanding liabilities under principles of public international law, but international law is slow to litigate, and hard to enforce. In addition, it is questionable whether an international court or tribunal could have jurisdiction.'

However, in spite of these various challenges, merely discrediting or seeking to discredit the prevailing paradigm of international trade, and its attendant normative framework of international trade law, does not imply that the demise of that paradigm is imminent. In his 1962 seminal work *The Structure of Scientific Revolutions*, which came to have a profound influence on the subsequent and prevailing understanding of knowledge, Thomas Kuhn once famously observed that no matter how discredited a prevailing scientific paradigm becomes, it will not be rejected before the emergence of a new paradigm to replace it.[10] With that parallel in mind, it is telling that the Trump-Brexit-CETA/TTIP challenges to the trading system have not been accompanied by any kind of proposed alternative system to replace it, nor by an intellectual framework of any kind to support such an alternative paradigm. What can be discerned so far is a mixture of scepticism about the wisdom of economic integration and about the possibility of mutually beneficial trading relationships, and scepticism about pluralism and harmonious cultural integration. There are also broader doubts beyond trade about the merits of multilateralism in international relations, in favour of power politics, disengagement from multilateral diplomacy and selective engagement on a bilateral basis. These inclinations have been mirrored domestically with a growing disregard for inclusive social dialogue and deliberative democracy, in favour of 'strong-man' politics (cf Hungary and Turkey), non-inclusive communication (facilitated by social media) and direct (referendum) democracy. Yet, in keeping with Kuhn's original insight, it cannot be ruled out that the current efforts to discredit the prevailing paradigm may be the proverbial canary in the coalmine, signalling that trust in conventional wisdom regarding the benefits of liberalised trade is waning.

It is in this last respect that the emphasis on trust in trade may usefully contribute to an understanding not only of the resilience of the multilateral trading system, but also of the potential causes of the threats to this system and of how to address them.

Applying the conception of trust outlined earlier to today's situation, it is submitted that if trust is being eroded for *intrinsic* reasons, because of poor governance, including a lack of balance in the interpretation of existing rules or systematic flaws in institutional decision-making, restoring trust in trade would require an overhaul of the operation of the WTO institutional bodies and organs. If, on the other hand, reasons *extrinsic* to good governance have prompted a loss of trust, the implication would be that at least some of the societal values and interests currently protected and considered by the multilateral trade regime have become outdated or that new societal values and interests are currently not sufficiently protected or considered. The implied solution to restore trust would then be to identify those 'outdated' or 'new' values and interests and seek to effectuate a rebalancing of substantive trade rules to reflect an updated set of societal values and interests.

[10] T Kuhn, *The Structure of Scientific Revolutions* (4th edn, University of Chicago Press, 2012) 77.

To what extent, then, are the current challenges to trust in trade intrinsic or extrinsic in nature? To begin with, is there much evidence of challenges of the former kind?

The WTO – most notably the dispute settlement system – is arguably facing one of the most severe *direct* challenges in its little over 20-year history, viz by the United States, one of the founders of the multilateral trading system. Ironically, this challenge is principally aimed at the trust in the Appellate Body. However, although this *new* challenge is in the form of familiar critique of the Appellate Body's procedural arrangements[11] and the exercise of its mandate, echoing earlier complaints about judicial activism, it in fact appears aimed at achieving something hitherto unimaginable: to impair the judicial integrity and effectiveness of the Appellate Body and by extension the entire WTO dispute settlement system. By politicising and holding up the appointment process for Appellate Body Members, the integrity of those (eventually) appointed may be put in doubt, while the delay in appointments causes delays in judicial decision-making, both of which serve to severely undermine the trust in the proper functioning of the dispute settlement system.[12]

While these actions appear aimed at *intrinsic* aspects of the WTO's dispute settlement system, by undermining the trust in the dispute settlement system they can be better understood as an *extrinsic* attempt to question the political morality (ie the balance of values and interests) currently underpinning the entire multilateral trading system and WTO law, which the Appellate Body is tasked with applying.

These challenges to trust in trade thus appear to signal the need to reflect changes in political morality – a rebalancing of the various societal values and interests upon which the international trading system relies – in updated legal norms governing trade. This reflection of a new balance cannot only take place through the interpretation of existing rules. While the Appellate Body has made a valiant attempt to reflect the 'contemporary concerns of the community of nations'[13] in its interpretations of provisions allowing scope for measures pursuing societal objectives, this effort has its limits. Clearly what is also needed is to address constraints to political decision-making at the WTO, in particular the WTO's function to provide a forum for negotiations on new trade rules. Here, the experience culminating in the failure of the Doha Round could credibly be interpreted to have undermined trust in the WTO's ability to shape international trade law in a manner that reflects the changing interests of its membership and evolving societal concerns.

[11] See eg, G Shaffer, M Elsig and M Pollack, 'Trump is fighting an open war on trade, His stealth war on trade may be even more important' *Washington Post*, 27 September 2017; cf Statements by the United States at the Meeting of the WTO Dispute Settlement Body as delivered in Geneva on 31 August 2017, Items 6 and 7.

[12] Shaffer et al (above n 11).

[13] Appellate Body Report, *US–Shrimp* (1998) para 129.

It does not require much effort to identify potential reasons why the existing implicit political morality reflected in the multilateral trading system and regional trade agreements has become discredited, apart from the WTO's 'legislative' paralysis. One obvious reason was the global financial crisis of 2008–09, which seriously undermined the authority of economic theoretical orthodoxy, without necessarily giving way to new theoretical approaches. As a follow-on effect, the macro-economic promises of trade liberalisation appear incapable of being trusted to produce benefits to all, whether because of more frequent and severe economic disruptions, pervasive structural unemployment, growing economic inequality or an increasing perception of venality and corruption of business and politics, leading to concerns that trade is not inclusive and the gains of trade, as a consequence, are unevenly spread.

While it is clear that trust in the prevailing rules-based system for trade, with the WTO at its apex, has been severely challenged recently, there is no credible alternative. The rule of law in international trade operates as a bulwark against power politics, unilateralism and beggar-thy-neighbour policies in trade and ensures the security and predictability that is indispensable in international economic relations. It is therefore essential to examine carefully the intrinsic and extrinsic factors likely to undermine support for the rule of law in trade and take seriously the concerns underlying them in order to restore trust in trade.

III. Restoring Trust in Trade

The analysis so far has indicated that the resilience of the trading system depends crucially on trust. That trust depends in turn on the ability of the trading system to achieve a fair balance between often competing societal values and interests, both economic and non-economic. These values and interests are not static but are constantly evolving. It follows that, in order to maintain a universally acceptable balance of values and interests, it is not sufficient that the WTO legal order was well designed from the beginning and well administered thereafter, it must also be capable of intelligently adapting to the demands of societal change.

Part I of this book addresses this requirement from the perspective of institutionalised trust and trust in institutions, by looking at governance structures in international trade, how the politico-economic context of global trade that the WTO regime seeks to institutionalise has evolved and how the working of global trade governance can be made more effective and inclusive so as to restore trust in the rule-making process.

Chapter 1 (by Mary E Footer) critically reflects on four areas for institutional reform of the WTO, identified at a 2005 Maastricht conference as vital for effective global economic governance, namely consensus decision-making; transparency, democratic legitimacy and participation of civil society in WTO decision-making; secondary law-making by WTO bodies; and the role of the WTO Secretariat.

It reviews the progress, or lack thereof, in these areas against the background of the changed circumstances in which the WTO finds itself today, which call into question the continued relevance of the WTO and undermine the trust of Members, their citizens and civil society in this system. The chapter makes several proposals to move the reform agenda forward, if only 'one step at a time'.

Chapter 2 (by Maarten Smeets and Mina Mashayekhi) discusses the main features of globalisation and how it has affected patterns of trade and investment in order to identify what needs to be done to ensure the continued relevance of the rules of the multilateral trading system for twenty-first-century trade. It argues that the increased interdependencies between markets resulting from globalisation, new technologies and innovation necessitate more liberal and open policies, policy coordination and coherence and appropriate social safety nets. In addition, substantive international trade rules need to evolve in ways that balance trade and non-trade concerns. The chapter asserts that to restore trust in trade, the WTO needs to secure solid, relevant, up-to-date, workable and enforceable rules embedded in a strong multilateral trading system and that its Members should ensure that trade liberalisation generates inclusive and sustainable growth.

Chapter 3 (by Jan Wouters and Tine Carmeliet) examines the recent rise of 'Gx bodies' (such as the G7, G20, etc), aggregate bodies that bring together only a limited number of countries and aim to coordinate efforts within and between different overlapping issue fields. It argues that Gx bodies are loci of power in the midst of the global economic governance architecture, well placed to perform coordination and steering and to thus complement the work of other players within global economic governance. However, in order to be able to provide solutions to global problems, it points to the need for Gx bodies to have both input and output legitimacy, in the form of inclusiveness and effectiveness, respectively, noting the trade-off between these two factors. The chapter makes concrete proposals to allow the Gx bodies to retain their relevance by providing world leaders with an appropriate forum and political impetus to achieve mutually advantageous deals, while ensuring decision-making that balances efficiency and inclusiveness in multilateral trade governance and, in that sense, restoring trust in trade.

Chapter 4 (by Anke Moerland) explores how governance structures of different geographical indication (GI) systems can help to create trust among participating actors. Starting from an analysis of the concept and role of trust in GI systems, the chapter identifies and examines weaknesses persisting in the EU GI system that undermine producers' ability to trust the system to fulfil its functions. It offers remedies that could enhance the trust of producer groups in the system of GI regulation. Its findings are not only relevant for GI-protected products, but may also be useful for the study of (global) value chain models in which trust plays an important role for the equal distribution of benefits among all stakeholders on an international scale.

Part II of the book turns its attention to the interpretation and enforcement of trade rules by asking how trade dispute settlement can operate with efficiency and

integrity in the face of institutional challenges and how it can balance trade and non-trade values and interests appropriately so as to restore trust in trade.

Chapter 5 (by Giorgio Sacerdoti) argues that international trade regulation is the result not just of bilateral bargains, but also of the pursuit of a common interest of the participants in the uniformity, stability and predictability of the rules and the system. The WTO dispute settlement system is seen as epitomising this structure by providing a multilateral framework in which mainly bilateral disputes are resolved in a framework that involves all WTO Members and also allows the interests of the non-disputing parties to be taken into account. The chapter asserts that the smooth functioning of the WTO Appellate Body, which ultimately ensures respect for the rules, can be considered a common global good not just for the WTO Members, and that it is the duty of all WTO Members, in their individual and collective interest, to act in a way that supports its correct operation, opposing attempts by any individual Member to undermine the Appellate Body's functioning.

Chapter 6 (by Ernst-Ulrich Petersmann) turns the attention to the risks that power-oriented GATT/WTO traditions of 'member-driven governance' entail for the dispute settlement system of the WTO. Using the example of the US blockage of the WTO appellate review system, it argues that global public goods cannot legitimately be protected without judicial remedies, rule of law and democratic governance. It proposes that WTO Members use their competence of majority voting to adopt authoritative interpretations of WTO law in support of the judicial administration of justice in multilevel governance of the world trading system. It offers the view that multilevel judicial control of trade regulation legitimises 'Member-driven governance' by protecting the rule of law as approved by parliaments when they ratified the WTO Agreement.

Chapter 7 (by Thomas Cottier) addresses the role of equity in international economic law, in particular trade law, in addressing issues of distributive justice and of procedural fairness. Examining the methodology developed by courts in the field of maritime boundary delimitation, strongly focusing on individualised justice, the chapter evaluates its potential suitability to address and guide generally factor-intensive issues in international trade law, for example trade remedies or customs valuations. It suggests that equity could play a role in rendering the legal methodology used in international trade law more transparent and conducive to achieving overall fair results, thereby enhancing trust in, and legitimacy of, international economic law and related disputed settlement.

Chapter 8 (by Jens Hillebrand Pohl) explores, in the context of the threats to the proper functioning of the WTO dispute settlement system caused by the excessive caseload of WTO panels and the Appellate Body and the politicised delays in Appellate Body appointments, how to practically apply Article 25 of the Dispute Settlement Understanding as an alternative means of WTO dispute settlement if a prompt and effective legal remedy cannot be obtained through ordinary panel and Appellate Body proceedings. It argues that for Article 25 arbitration to be an

expeditious alternative to ordinary WTO judicial proceedings, a plurilateral arbitration agreement should be concluded rather than relying on ad hoc arbitration submission agreements. It provides a blueprint for such a plurilateral arbitration agreement.

Chapter 9 (by Marco Bronckers and Giovanni Gruni) examines the inclusion of sustainable development chapters in recent EU free trade agreements (FTAs), focusing on the mechanisms for enforcement of their provisions. It argues that enforcement weaknesses have eroded the confidence of civil society and other stakeholders in the ability of the EU to promote sustainable development through its FTAs and have thus undermined support for these trade liberalisation initiatives. It provides a model of what a more effective enforcement mechanism incorporating a private complaints procedure might look like.

Part III of the book looks at the future evolution of substantive trade law and asks how it can develop to reflect evolving societal concerns so as to restore trust in the ability of the trade regime to appropriately balance trade and non-trade values and interests.

Chapter 10 (by Gabrielle Marceau) reviews whether concerns regarding regulatory distinctions based on process and production methods (PPMs) are still relevant, in particular in the context of the evolution of the scope of international trade from tangible goods to intangible services and intellectual property rights, where more nuanced PPM-based regulation is prevalent, and of growing consumer awareness and concerns regarding the way products or services are produced. In order to meet the demands of this new international trade reality, it argues that WTO Members have been given more leeway to regulate based on PPMs and that legitimate PPM regulatory distinctions are accepted as an inherent part of today's trading system.

Chapter 11 (by Anselm Kamperman Sanders) examines the challenges posed by the Fourth Industrial Revolution (4IR), which is characterised by the convergence of new technologies, such as bio-, nano- and material technologies, Artificial Intelligence, Big Data, the Internet of Things and 3D printing, into new applications, domains and business models. The chapter proposes a reappraisal and strengthening of legal rules that shape intellectual property protection in our economies in order to maintain the trust of society in the regulation and application of groundbreaking technologies and new economic realities in the 4IR.

Chapter 12 (by Ellen Vos and Sabrina Röttger-Wirtz) discusses the international dimension of EU food law, in particular that provided by the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). It argues that an important factor leading to the ever-increasing role of science in EU decision-making, referred to as the 'scientification' of EU food law, is the requirement of the SPS Agreement that WTO Members base their food safety measures on science. The chapter discusses this use of science in the WTO and EU regimes as the legitimating factor for food safety regulation and questions whether its implications for the possibility to take into account other legitimate

concerns could be among the extrinsic reasons for the erosion of citizens' trust in trade.

Chapter 13 (by Gian Franco Chianale) examines the balance achieved between trade and non-trade societal values and interests in trade agreements by comparing the general and security exceptions provisions in the WTO Agreement with the general and security exceptions provisions in the new generation of FTAs that the EU has concluded or that it provisionally applies. In light of this comparison, the chapter argues that the EU has ensured that the enhanced trade liberalisation built into its trade agreements does not come at the expense of non-trade societal values and interests and has, in fact, strengthened their protection beyond that provided by WTO rules.

Finally, this book concludes with an *essai typologique* (by Joseph HH Weiler) on constitutional entrenchment of 'Eternal Clauses' from a biblical perspective. It examines the prohibition on 'adding to or diminishing' such immutable and therefore 'timeless' clauses, and its implications, in light of two biblical attempts at entrenchment, in Deuteronomy 13 and Galatians 1, which make use of an ingenious and surprising methodology.

9

Improving the Enforcement of Labour Standards in the EU's Free Trade Agreements

MARCO BRONCKERS AND GIOVANNI GRUNI*

I. Introduction

For several years now, the European Parliament has been calling for better enforcement of environmental and labour provisions in the EU's free trade agreements (FTAs).[1] Recently, the topic entered the political limelight within Member States. For instance, during his election campaign, French President Macron called for the creation of an 'EU prosecutor' to police sustainability obligations.[2] More recently, the new German coalition agreement between the CDU/CSU and SPD has insisted on 'binding social, human rights and environmental standards in EU trade, investment and economic partnership agreements'.[3] Private stakeholders[4] and academic observers[5] have pointed out weaknesses in the EU's enforcement

* We have benefited from exchanges with the editors of this volume, Adelle Blackett (McGill University) and Paul van der Heijden (Leiden University). The usual disclaimer applies.

[1] See para 22(a) Resolution on human rights and social and environmental standards in international trade agreements of 25 November 2010 (2009/2219(INI)) and paras 22(c) and (d) Resolution on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility of 5 July 2016 (2015/2038(INI)).

[2] En Marche, Official Programme on Industry, available at: http://en-marche.fr/emmanuel-macron/le-programme/industrie.

[3] Borderlex, 'Trade: German coalitions deal', 7 February 2018, available at: http://borderlex.eu/blog-german-coalition-deal-chablis-vs-beef/.

[4] See submission of the European Trade Union Confederation (ETUC) on the Non-paper of the European Commission services on Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs), 11 October 2017, available at: www.etuc.org/documents/etuc-submission-non-paper-commission-services-trade-and-sustainable-development-tsd#.WtRdzdNuaik.

[5] For an analysis of existing labour standard clauses in EU FTAs see L Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (2013) 40 *Legal Issues of Economic Integration* 297; L Bartels, 'Human Rights, Labour Standards and Environmental Standards in CETA' in E Vranes, A Orator and D Fuhrer (eds), *Mega-Regional Agreements: TTIP, CETA, TiSA: New Orientations for EU External Economic Relations* (OUP, 2017); L Bartels, 'Social Issues: Labour, Environment

record as well. These enforcement weaknesses have undermined the confidence of civil society and other stakeholders in the ability of the EU to promote sustainable development through its FTAs and have thus weakened support for these trade liberalisation initiatives.

In response to this societal pressure, the European Commission issued two non-papers, in 2017 and 2018.[6] The Commission envisages several improvements in the implementation of FTA sustainability chapters. Some of its proposals are worthwhile indeed. For example, the Commission emphasises the need for more transparency of its enforcement actions. Most attention, though, has been devoted to the question of whether infringements of the sustainability chapters in the FTAs should be subject to (trade) sanctions. Ultimately, the Commission maintains its view that this is not desirable.

No attention is given in these Commission papers to the rather more pressing issue, in our view, of an effective private complaints procedure. This is the focus of our chapter. Rather than an absence of trade action at the end of an investigation, the main problem in the enforcement of the EU's sustainability chapters seems to us to be a lack of timely opening and pursuit of investigations following well-documented complaints of private stakeholders. In developing our proposal, we will refer in particular to the enforcement of labour standards included in the FTAs.

II. Modelling a Private Complaint Procedure

To date, academic observers have made various suggestions as to how a private complaint procedure might look. Here is a brief overview that can help to situate our proposal.

Some observers have reflected that the model of Investor–State Dispute Settlement (ISDS) might be extended to cover trade and sustainability obligations.[7]

and Human Rights' in S Lester, B Mercurio and L Bartels (eds), *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies* (CUP, 2015); G Gruni, 'Law or Aspiration? The European Union Proposal for a Labour Standard Clause in the Transatlantic Trade and Investment Partnership' (2016) 43 *Legal Issues of Economic Integration* 399; G Gruni, 'Labour Standards in the EU-South Korea Free Trade Agreement' (2017) 5 *Korean Journal of International and Comparative Law* 100.

[6] See the two non-papers of the European Commission services, 'Trade and sustainable development chapters in EU free trade agreements', 11 July 2017, available at: http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf; and 'Feedback and way forward on improving the implementation and enforcement of trade and sustainable development chapters in EU free trade agreements', 26 February 2018, available at: http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf.

[7] On the 'enforcement disparity' between investors' rights and labour standards in FTAs see H Gött, 'An Individual Labour Complaint Procedure for Workers, Trade Unions, Employers and NGOs in Future Free Trade Agreements' in H Gött (ed), *Labour Standards in International Economic Law* (Springer, 2018) 185.

We concluded that this was not particularly helpful. For one thing, that model has been criticised on various grounds, for instance in that it gives individual foreign complainants the power to select arbitrators in a dispute with a foreign government.[8] That debate need not cloud our proposal. More practical problems with the expansion of ISDS to cover sustainability obligations have been raised as well, such as the high cost of these proceedings for private complainants.[9] Fundamentally, one also has to recognise that investors in ISDS pursue their own economic interests. That is not necessarily the case when a private complaint is raised in the EU about the violation by a third country of a labour standard included in an FTA. Such a complaint is not only, or perhaps even primarily, about preserving an economic interest of the EU-based complainant.

According to the Court of Justice of the European Union, an important consideration for the inclusion of sustainability provisions in trade agreements has been the 'reduction of major disparities' between the costs of producing goods and services in each of the signatories.[10] But that cannot be the only goal, as a difference of production costs is to be expected between developing and developed countries, and can also play a perfectly legitimate role in the competition between sectors amongst developed countries.[11] Sustainability provisions, like labour standards, have other goals too. Notably they reflect shared aspirations between trading partners on the organisation of their societies, which make deeper economic integration acceptable on both sides. This was recognised by the European Commission in its first non-paper of 2017.[12]

Even if we agree with some of its premises, we also distance ourselves from the collective action procedure the think tank Friedrich-Ebert-Stiftung proposed in 2017.[13] It would give social partners (rather than individual private parties) the right to bring complaints directly to an international tribunal the members of which would be selected up front by governments (without the involvement of the

[8] JD Fry and JI Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes' (2014) 30 *Arbitration International* 189; M Waibel, 'ICSID Arbitrators: The Ultimate Social Network?' *EJIL Talk*, 25 September 2014, available at: www.ejiltalk.org/icsid-arbitrators-the-ultimate-social-network/; M Langford, D Behn and RH Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 *Journal of International Economic Law* 301.

[9] See A Marx, F Ebert, N Hachez and J Wouters, *Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements* (Leuven Centre for Global Governance Studies, 2017) 81–82.

[10] See *Opinion 2/15* [2017] ECLI:EU:C:2016:992, para 159. The Court probably emphasised these trade effects because it was considering divisions of competence between the EU and its Member States. Linking sustainability provisions to trade helped to construe exclusive competence for the EU regarding these provisions under Art 207 TFEU.

[11] See, for instance, Art 13.2(2) EU–South Korea FTA: 'The Parties note that their comparative advantage should in no way be called into question [by environmental and labour standards]'.

[12] See European Commission services, 'Trade and sustainable development chapters in EU free trade agreements', 11 July 2017, 8.

[13] PT Stoll, H Gött and P Abel, 'Model Labour Chapter for EU Trade Agreements', 28 June 2017, 39, available at: www.fes-asia.org/fileadmin/user_upload/documents/2017-06-Model_Labour_Chapter_DRAFT.pdf.

social partners) after local remedies had been tried unsuccessfully.[14] This seems to us to be a bridge too far, given the fledgling state of the sustainability chapters in the EU's FTAs. Instead of proposing such far-reaching access of private parties in the FTA itself, we opt for a different solution. Social partners can trigger an investigation at EU level, where the European Commission remains in charge of any further dispute settlement proceedings brought under the FTA.

Against this background, we side with those[15] who have taken inspiration from the EU's Trade Barriers Regulation (TBR).[16] This mechanism allows for private complaints from EU industries about violations by the EU's trading partners of multilateral or bilateral trade agreements.[17] The TBR preserves the state-to-state character of dispute settlement between governments. However, it does entitle certain complainants with a serious case about a trade agreement violation to an in-depth investigation by the European Commission, if necessary, followed by government-to-government consultations. Should consultations fail, international dispute settlement and perhaps sanctions by the EU might follow, even though the point of a TBR case for private complainants is to obtain a positive solution, notably a settlement of their grievances once they have been thoroughly investigated, rather than obtaining trade sanctions from the EU against the third country. What we propose is a modification of the TBR so that it can be used as well for private complaints brought against violations of sustainability provisions in the EU's FTA.

While following the TBR model, we are cognisant of the characteristics of labour rights in the FTAs. Compliance is not only of interest to EU industries, but also to labour unions. As indicated above, their violation is not only, or even primarily, a trade concern. And to date, even if the EU has accepted adjudication by independent expert panels of labour rule violations in some recent FTAs, this is always without sanctions and older FTAs do not have third-party adjudication. In addition, resort to international dispute settlement is more burdensome, costly and time consuming than domestic procedures to enforce international obligations such as the TBR. Accordingly, procedural rules and, ultimately, the remedies currently found in the TBR ought to be adapted. Therefore, in our model for a private complaint procedure, we will also propose a change to the international dispute settlement mechanisms regarding labour rules in the EU's FTAs.

[14] See Art X.37 of the proposal.

[15] L Bartels, 'A Model Human Rights Clause for the EU's International Trade Agreements', February 2014, available at: www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf; L Ankersmit, 'A Formal Complaint Procedure for a More Assertive Approach Towards TSD Commitments', ClientEarth, 27 October 2017 (Version 1.1).

[16] Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015, OJ L272/1 (TBR).

[17] Art 1 TBR.

A. Admissibility of a Private Complaint

It is important to design appropriate admissibility thresholds since the Commission has limited resources and cannot be expected to investigate thoroughly and in a time-limited fashion each and every complaint it receives. Furthermore, engaging with a third country on the grounds that it may have violated its international obligations towards the EU also taxes diplomatic relations. Thus, complaints without sufficient merit should be filtered out.

i. Representativeness

The TBR has been used in the EU since 1994,[18] when it replaced the New Commercial Policy Instrument, but presently only industrial stakeholders are allowed to bring a private complaint.[19] We propose including an additional category of private complainants with regard to the enforcement of labour standards: representative EU social partners (trade unions and employers' organisations). When a social partner filed the request, the European Commission would first check if the social partner was an interested party.

It is of interest that labour unions are now beginning to find their place in the EU's trade instruments. Thus, with the new reform of the Trade Defence Instrument (TDI),[20] trade unions will be given the right to lodge an application for the initiation of an anti-dumping or anti-subsidy investigation even if only jointly with a Union industry.[21] With regard to TDI proceedings there is in fact case law requiring that a potential party to the investigation should demonstrate an objective link between the product concerned and its activities.[22] This is because the intervening organisation (Union industry or trade union) should be able to show that the outcome of the TDI investigation affects them. Accordingly, in the TDI interested trade unions would be trade unions representing employees of companies producing the product subject to investigation or that are suppliers of producers of the product subject to investigation.[23]

[18] For an introduction to the TBR see M Bronckers and N McNelis, 'The EU Trade Barriers Regulation Comes of Age' (2001) 35 *Journal of World Trade* 427.

[19] Arts 3 and 4 TBR.

[20] Regulation (EU) 2016/1036 of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L176/21; Regulation (EU) 2016/1037 of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L176/55.

[21] Regulation 2016/1036 Art 5 and Regulation 2016/1037 Art 10; European Parliament, Committee on International Trade, Provisional agreement resulting from interinstitutional negotiations, 22 January 2018, available at: www.emeeting.europarl.europa.eu/committees/agenda/201801/INTA/INTA(2018)0122_1P/sitt-7666743.

[22] Case T-256/97 *Bureau Européen des Unions de Consommateurs (BEUC)* [2000] ECLI:EU:T:2000:21.

[23] See W Muller, 'The EU's New Trade Defence Laws – A Two Steps Approach' (forthcoming 2018) *European Yearbook of International Economic Law*.

The difference between our proposal and the model being introduced in the TDI is that in our proposal trade unions would have a right to file a complaint independently, without other social or industrial partners. In our view, trade unions have their own interests in bringing a complaint with regard to labour standards violations and are in a position to autonomously provide sufficient evidence of the violation. Another reason to allow trade unions to act independently is that in a modified TBR procedure, accommodating labour standards, the interests justifying the complaint of a labour union differ from the interests of labour unions in TDI proceedings. In TDI proceedings trade unions would intervene mainly to protect employment and avoid job losses. In contrast, with regard to labour standards included in the EU's FTAs they have a broader interest, also in the protection of shared values and fundamental rights.

In view of these broader interests, one need not necessarily limit the admissibility of a labour union complaint to situations where its members manufacture the same products as the ones involved in the alleged violation of the labour right in the third country. We propose that the European Commission would accept complaints from social partners that are considered representative on the basis of the recognition procedure of Article 154 of the Treaty on the Functioning of the European Union (TFEU). This Article provides that whenever the Commission is proposing EU legislation in the social policy field, management and labour unions shall be consulted. Such consultation can also lead to the conclusion of agreements between social partners and EU institutions.[24] To put this procedure into operation the European Commission had to identify the social partners to be consulted whenever required by EU law. This led to the creation of a list[25] on the basis of studies that the EU Foundation for the Improvement of Living and Working Conditions (Eurofund)[26] conducts on social partners to identify social partners that are organised at EU level and capable of being consulted and negotiating agreements.

We submit that the same employer organisations and trade unions that are selected to take part in such procedures and have extensive institutional experience in dealing with labour issues at EU level are also in a position to have the legal right to take action for the violation of one of the labour standards protected under EU FTAs. There is in fact already an institutional infrastructure in place allowing the European Commission to interact with these social partners.[27] The use of this list of social partners would reduce drastically the number of persons allowed to

[24] Art 155 TFEU. See C Barnard, *EU Employment Law* (OUP, 2012) 47.

[25] List of European social partners' organisations consulted under Art 154, available at: http://ec.europa.eu/social/BlobServlet?docId=2154&langId=en.

[26] Eurofund, 'Representativeness of the Social Partners in the European Cross-Industry Social Dialogue' (2013), available at: www.eurofound.europa.eu/sites/default/files/ef_files/docs/eiro/tn1302018s/tn1302018s.pdf.

[27] European Union, 'Consulting European Social Partners: Understanding How it Works', available at: http://ec.europa.eu/social/BlobServlet?docId=7208&langId=en.

bring an action under the proposed procedure. The list includes umbrella organisations such as Business Europe and the European Trade Union Confederation as well as sectoral social partners.

Under our proposal, umbrella organisations would have legal standing to trigger an investigation for violations occurring in any economic area. Sectoral organisations would have legal standing for violations perpetrated in their sector of competence. Each organisation would be allowed to file a complaint independently. However, the European Commission could merge different complaints in the same procedure at a later stage.

We would not be in favour, at least not at this stage, of the EU Parliament's proposal to grant civil society the right to complain about labour standards violations by third countries.[28] Social partners participate in various fora at domestic level, in the EU and in the International Labour Organization (ILO) for the creation and implementation of labour standards. If they see a reason for the EU not to pursue a complaint against the labour practices in a third country, their reticence should be given due weight. However, we would welcome civil society intervention in any proceedings that would be undertaken against the third country. Their perspectives could indeed contribute to more informed decision-making by EU authorities.

ii. Merits

When the European Commission receives a complaint from a representative social partner it needs to conduct another check to filter out frivolous complaints by assessing whether the complaint appears to have sufficient merit. In order to decide on admissibility, it is sufficient for the Commission to conduct a preliminary analysis, which in the present TBR is based on sufficient evidence to initiate a procedure.

The TBR requires a petitioner to show that the FTA obligation establishes a right of action for the EU; a requirement that would not need to be adapted. In fact, according to the TBR, such a right of action exists when the relevant international rules 'either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question'.[29] This flexible formula captures violations of various types of labour standards currently found in FTAs: not just 'hard' obligations, but also 'softer' yet still meaningful standards.

In fact, in the area of labour rights various types of provisions can be distinguished in the EU's FTAs: hard and self-standing obligations, obligations that refer

[28] See Resolution on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility of 5 July 2016 (2015/2038(INI)), para 22(c).

[29] See Art 2(1)(a) TBR.

to other international agreements, qualified obligations that require an impact on trade or investment, and softer obligations or affirmations. The EU–Canada Comprehensive Economic and Trade Agreement (CETA), for instance, includes 'hard obligations' to 'embody and provide protection'[30] under listed labour standards and to 'implement'[31] ILO Conventions the parties ratified, but also vaguer obligations to 'promote awareness' of labour obligations.[32] Other agreements, such as the EU–South Korea FTA, include mere declarations of intent where the parties, for instance, 'reconfirm that trade should promote sustainable development'.[33] Such declarations barely have any legal significance. Accordingly, it would be useful for the EU to reassess in its existing FTAs, and in the FTAs to come, whether the softer standards it may want to include are meaningful enough to create a right to seek an elimination of non-complying practices. If an international standard would not even allow that, we would submit that there is good reason to renegotiate or scrap such standard rather than to 'pollute' an international treaty with something unlikely to produce any meaningful legal consequence.

A crucial point, however, is that the private complaint procedure should not require the demonstration of any effects on, or links with, trade, global trade patterns or social dumping.[34] Presently, petitioners under the TBR have to demonstrate some sort of trade effect.[35] Already in respect of violations of trade agreements within third-country markets, this requirement is not to be interpreted stringently.[36] Yet, this requirement would be entirely misplaced in respect of complaints concerning labour rights violations. In fact, experience has shown that it is very difficult to demonstrate the trade impact of labour right violations.[37]

Furthermore, as the Commission itself recognised in its non-paper of July 2017, labour standards in FTAs are not only, or even primarily, driven by economic concerns.[38] Again, private complaints should not only be admitted in order to challenge undue cost disparities or trade distortions. Such trade distortions are difficult to prove, and they are not the only or primary concern. Labour standards are fundamentally included in FTAs to reflect shared values amongst trading partners which have decided to establish closer relations; or standards

[30] Art 23.3 CETA.
[31] ibid.
[32] Art 23.6 CETA.
[33] Art 13.6 EU–South Korea FTA.
[34] Dominican Republic–Central America–United States Free Trade Agreement, Arbitral Panel established pursuant to chapter twenty in the matter of *Guatemala – Issues Relating to the Obligations Under Art 16.2.1(a) of the CAFTA-DR*, 14 July 2017, available at: http://bit.ly/2tiQos4.
[35] See Art 3 TBR.
[36] Bronckers and McNelis (above n 18) 441–42.
[37] See *Guatemala – Issues Relating to the Obligations Under Art 16.2.1(a) of the CAFTA-DR* (above n 34); S Polaski, 'Twenty Years of Progress at Risk. Labor and Environmental Protections in Trade Agreements' (GEGI Policy Brief 004, 2017).
[38] See above text at n 12.

to which at least the EU is particularly attached and views as a prerequisite to establishing closer relations. Either way, the investigation of a private complaint would be underpinned by the objectives and values that the EU should promote under Article 21 of the Treaty on European Union (TEU) and in its social policy objectives of Articles 153, 154 and 155 TFEU.[39] Accordingly, sufficient evidence of the existence of the violation should be enough to trigger an in-depth internal investigation without the need to prove its trade impact.

It is of interest that the soft dispute settlement procedures included in recent EU FTAs such as CETA[40] or EU–Japan[41] do not impose trade impact as a threshold condition. The EU should maintain this approach when reforming the TBR to accommodate complaints about labour standards.

iii. The Union Interest

There is no need to modify the additional requirement present in the TBR that the investigation should be 'in the interest' of the European Union. This leaves some discretion to the European Commission in deciding whether to open an in-depth investigation. Yet, the impact of this discretionary element in the Commission's assessment should not be overstated, as experience in the trade area has shown.[42] Indeed, once a private petitioner has shown it is entitled to bring a complaint (ie it is duly representative), and has brought sufficient evidence that a third country is likely to violate its FTA labour standards obligations, it would be politically very difficult for the Commission to decide that it would not be in the interest of the Union to even investigate such a complaint and to make inquiries with the third country. It should be recalled here that the Commission is obliged to publish a reasoned decision in the Official Journal, and that such a decision is subject to judicial review.[43]

B. Internal Investigation by the Commission

The present TBR defines the procedural steps to be taken by the European Commission when investigating the violations alleged in a private complaint it has declared admissible.[44] Most of these provisions can be utilised in an investigation of labour standards violations.

[39] ACL Davies, *EU Labour Law* (Edward Elgar, 2012); S Sciarra, 'Notions of Solidarity in Times of Economic Uncertainty' (2010) 39 *Industrial Law Journal* 223.

[40] Art 23.10 Comprehensive Economic and Trade Agreement (CETA).

[41] Art 17 Ch 16 EU–Japan Economic Partnership Agreement.

[42] Bronckers and McNelis (above n 18) 449–51. See ECJ, Case 70/87 *Fediol IV* [1989] ECLI:EU:C:1989:254.

[43] Art 13.4 TBR.

[44] See notably Art 9 TBR.

The European Commission has the duty to inform the third country involved of the complaint. It also has the power, when necessary, to perform an investigation in the third country unless the country concerned objects.[45] Furthermore, the European Commission has an obligation to hear the parties concerned if they have made a written request for a hearing.[46] In principle, this system allows the European Commission to hear social partners in the EU and in the third country so that they can contribute to the evidence collected in the case. The nature of labour rights obligations might require slight adaptations to ensure that the petitioners are heard by the Commission and to support the participation of the social partners and private persons affected by the violation in the third country. Thus, we could imagine an obligation on the European Commission to reach out and collect evidence from these interested parties, even if they did not register their intention to take part in the investigation after the publication of the notice in the Official Journal. There are experiences in other countries where this advanced model of fact-finding concerning labour standards violations is already a reality. For example, in the context of the enforcement of the Canada–Colombia Agreement on Labour Cooperation (CCOALC), a side-agreement to the Canada–Colombia FTA, Canadian authorities performed extensive investigations within Colombia.[47]

It also seems appropriate to stipulate explicitly that the Commission is to examine whether the ILO has made any relevant findings regarding the alleged labour standard violations. The ILO has shied away from third-party adjudication on the compliance of Members with its norms.[48] But the ILO does have supervisory mechanisms, though in most cases these are ultimately consensus driven – and consensus has become more difficult to find amongst social partners, especially after the 2012 stalemate on the right to strike.[49] Still, it would be useful for the Commission in its investigation to take on board any fact-finding or reflections in ILO reports that could help to shed light on the alleged violations.

Regarding the type of evidence to be collected, the TBR would require some adaptations as well. Presently, the Commission is supposed to consider only trade-related factors (eg, volume of imports or exports, prices, impact on the Union industry, effects on trade) to establish whether the complaining industry has shown that it is injured by the third country's violation of its international obligations.[50] These factors are not particularly relevant for an investigation into violations of

[45] Art 9.2 TBR.

[46] Art 9.5 TBR.

[47] Review of public communication CAN 2016-1 Report issued pursuant to the Canada–Colombia Agreement on Labour Cooperation, 2017, available at: www.canada.ca/en/employment-social-development/ services/labour-relations/international/agreements/2016-1-review.html.

[48] See generally A Koroma and P van der Heijden, 'Review of ILO Supervisory Mechanism' (ILO, 2015).

[49] P van der Heijden, 'De ILO: Struikelend op Weg Naar de 100' (2017) 36 *Tijdschrift Recht en Arbeid* 3, 6.

[50] Art 11 TBR.

labour standards. As explained above, such violations may not, or not primarily, cause economic injury within the EU, but rather disrupt shared values that underlie the FTA with the third country. Establishing the violation itself, as well as such factors as its gravity and/or frequency, should be sufficient for a finding that the EU has a right of action against the third country concerned.

After an investigation of five or seven months,[51] there are several possible outcomes under the TBR. First, the Commission can conclude that there was no violation of the labour standard included in the FTA and that no further action should be taken.[52] Second, without necessarily admitting to a violation, the third country might propose to take measures that would remove the need for the EU to take further action.[53] Third, the EU and the third country might find that the best way to resolve the dispute is to conclude a new agreement between them.[54] Finally, the Commission might find there is a violation, even though this is not accepted by the third country. In that case, the Commission would normally want to initiate international dispute settlement proceedings under the FTA before taking any further action.[55]

C. International Dispute Settlement

In the event the third country does not remedy the violation of the FTA's labour standards found by the Commission, the proposed procedure would move on to dispute settlement. To begin with, formal consultations are to be held, involving the FTA's trade and sustainable development committee.[56] If within a short period (say three months)[57] the consultations do not resolve the issue, the new FTAs envisage dispute settlement in the form of independent third-party adjudication.[58]

CETA, for instance, provides that the Panel should submit a 'final report setting out the findings of fact, its determinations on the matter including as to whether the responding Party has conformed with its obligations under this Chapter'.[59]

[51] Art 9.8 TBR.
[52] Art 12.1 TBR.
[53] Art 12.2 TBR.
[54] Art 12.3 TBR.
[55] Art 13.2 TBR. Ankersmit (above, n 15) ch 5, points out that where the agreement does not make provision for a dispute settlement procedure, the Commission might immediately propose to the Council to (partially) suspend or terminate the agreement in accordance with Art 218(9) TFEU and Arts 60(1) and 65 Vienna Convention on the Law of Treaties.
[56] See for instance, Art 23.9 CETA.
[57] See for instance, Art 23.10 CETA.
[58] There is no longer reason to think that the Panel of Experts is not there to determine whether there is a violation and it is only expected to find a 'shared solution'. Compare L Puccio and K Binder, 'Trade and Sustainable Development in CETA' (European Parliament Research Service Briefing PE 595894, January 2017) 8.
[59] Art 23.10(11) CETA.

Compared with the general dispute settlement system of the FTA, the only things missing are sanctions, as discussed below.

Taking enforcement of FTA labour standards more seriously is not just a matter of shoring up dispute settlement procedures though. As discussed above, it also requires taking a second look at the patchwork of labour standards that have so far been included in the EU's FTAs, ranging from hard obligations to statements of intent that are as soft as butter.[60]

Finally, in the event an FTA refers explicitly to an ILO norm this should not stop adjudication by an international tribunal established under the FTA. This is similar to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which incorporates parts of the World Intellectual Property Organization (WIPO) Conventions, such as the Paris Convention on Industrial Property[61] and the Berne Convention on Copyright.[62] Compliance with these conventions can therefore be sought in World Trade Organization (WTO) dispute settlement proceedings.[63] However, when dealing with ILO-based norms, FTA supervisory bodies or FTA panels should be encouraged to seek relevant information from the ILO,[64] while keeping in mind the limitations inherent in its consensus-based supervisory mechanisms.[65]

D. Sanctions

As the Court of Justice recalled, should an EU treaty partner breach the sustainability provisions in an FTA, the EU would be entitled under general public international law to suspend other commitments in the FTA or even terminate the agreement.[66] Yet the EU's political institutions do not seem to consider this to be a viable threat to induce the EU's treaty partners to comply with their sustainability obligations. There is no public record of this ever having been seriously considered. In fact, rather than relying on principles of general international law, the debate in the EU has been whether to include any specific sanctions in its FTAs. For many years it was an article of faith for the EU to reject this. It was therefore noteworthy for the Commission to raise the possibility that the EU might change this policy in its first non-paper of 2017. However, in its second non-paper of 2018 the Commission ultimately dismissed this idea.[67] In our view the Commission's reasons are not convincing.

[60] See above text at nn 30–33.
[61] Art 2.1 TRIPS.
[62] Art 9.1 TRIPS.
[63] Art 64 TRIPS.
[64] See Art 23.10(9) CETA.
[65] See text above at nn 48–49.
[66] See *Opinion 2/15* (above n 10) para. 161. See also above n 55.
[67] See text above at n 6.

For one thing, the Commission notes that when other countries coupled sustainability obligations with sanctions in their FTAs, these obligations were narrower in scope than the norms that the EU managed to include in its FTAs.[68] Yet the Commission makes no attempt to analyse whether its broader-based provisions on environmental protection or labour rights have actually been able to achieve more. As discussed above, some of these provisions are so weak that they would seem to be virtually meaningless.

The other thing noted by the Commission is that trade sanctions do not guarantee that the non-complying country will change its offending practices.[69] Of course, the absence of sanctions does not guarantee this either. In fact, sanctions would only come into play if other means to induce compliance have failed. But then, the Commission argues, it is difficult to calculate the level of trade sanctions, or economic compensation, in response to a breach of social or environmental standards.[70] This is the nub of the problem. As the Commission itself recognised in its first non-paper, these sustainability standards have not, or not primarily, been included for economic reasons.[71] Accordingly, it is indeed problematic to design compensatory sanctions. In fact, trade sanctions are in many ways counterproductive, even if the economic damage resulting from violations of trade-related obligations can be estimated more accurately.[72] Yet in its reassessment in 2018 the Commission should not have confined itself to trade measures when considering sanctions.

We endorse the proposal of the European Parliament that an FTA panel should have the means to oblige a non-complying country to make financial payments as a temporary inducement until the date it brings itself into compliance with the labour standard it has been found to violate.[73] This is not unprecedented. As the Commission itself noted, albeit only in its first non-paper of 2017,[74] Canada, for example, envisages fines in the event of infringements of the sustainability chapters in its FTAs (other than CETA, notably because of resistance by the EU!). Furthermore, the EU itself has useful experiences too with financial penalties in the event of EU law infringements by Member States. These can be demanded by the Commission and imposed by the European Court. The amount of the penalties

[68] See European Commission services, 'Feedback and way forward on improving the implementation and enforcement of trade and sustainable development chapters in EU free trade agreements' 26 February 2018, 3.

[69] ibid.

[70] ibid.

[71] See above text at nn 37–38.

[72] For an extensive analysis of the downsides of using trade retaliatory measures see M Bronckers and F Baetens, 'Financial Payments as a Remedy in WTO Dispute Settlement Proceedings. An Update' in J Bourgeois, M Bronckers and R Quick (eds), *WTO Dispute Settlement: Time to Take Stock* (College of Europe Studies, Peter Lang, 2017) 67–98. An earlier version of this analysis was published in (2013) 16 *Journal of International Economic Law* 281.

[73] See Resolution (above n 1) para 22(d).

[74] European Commission services, 'Trade and sustainable development chapters in EU free trade agreements', 11 July 2017, 3.

depends on factors such as the severity of the infringement, its duration, and the ability to pay of the offending country (ie its GDP).[75]

These experiences could be a source of inspiration when conceiving a penalty scheme in relation to violations of FTA labour standards. The penalties that the offending country would pay could go into a fund which could be controlled by an independent body (eg the ILO), which helps, for instance, to finance the development of international labour standards.

Finally, there are good reasons why the FTA should still include the option of imposing trade sanctions, including the suspension of trade preferences or of the entire agreement, if the country violating the labour standard does not bring itself into compliance and refuses to make financial payments. In our proposal, trade sanctions are in principle not to be used to enforce labour standards. However, the remedies in the general state-to-state dispute settlement mechanism could be extended to the sustainability chapter as extrema ratio. The EU's FTA with Canada, for instance, includes several provisions to ensure compliance with the final panel report concerning trade obligations. These include, after the expiration of a reasonable period for compliance, the right of the offended party to suspend obligations.[76] In the WTO system, retaliation must be equivalent to the level of nullification or impairment of benefits, which means that the retaliatory response may not go beyond the level of harm caused by the other party.[77] This idea of economic injury to calculate the amount of the retaliation can be adapted to sustainability obligations, so that the value of the retaliation could approximate the financial penalties that the offending country is refusing to pay. For instance, a financial penalty of €10 million could be replaced by tariff increases on imports from the offending country amounting to €10 million.

So as to avoid any misunderstanding: sanctions are the final part, but not the main element, of the reform we are proposing here. We are also not suggesting that private complaint procedures, coupled with sanctions, can or should replace dialogue between governmental and social partners in the implementation of international labour standards in the EU's FTAs. We do submit that more effective enforcement can be a useful complement to improve the implementation of these standards.

III. Managing Expectations

Having made these proposals for including private complaints about labour standard violations in the TBR, as well as adaptations to the dispute settlement

[75] For the Commission Communications on this topic see documents available at: http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/financial-sanctions/index_en.htm. The Commission published an update of its calculations of lump sums and penalty payments in Communication [C(2017) 8720], available at: http://ec.europa.eu/atwork/applying-eu-law/docs/c_2017_8720_en.pdf.

[76] Art 29 CETA.

[77] WTO, Countermeasures by the prevailing Member, available at: www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm.

mechanism applicable to such labour standards in the EU's FTAs, we should caution against exaggerated expectations. Even if the regular dispute settlement system in the EU's FTAs, involving third-party adjudication, were to come to apply to the FTA's labour standards, this does not mean that we can expect to see a flurry of cases soon – let alone multiple sanctions against FTA partners not properly upholding labour standards. Generally speaking, there is very little litigation under FTAs, even under their trade provisions. One recent study found only one example over the period 2006–17;[78] and no dispute settlement case has ever been brought under an FTA concluded by the EU. Furthermore, the one case brought under an FTA's labour standards, by the United States against Guatemala,[79] was unsuccessful.

One plausible hypothesis for this dearth of activity is that, in a bilateral context, successful claimants lack the support of (many) other countries to press the losing country for compliance, support that they do have in a multilateral forum like the WTO.[80] This may be an important explanation for why smaller or less powerful countries are reluctant to take on big FTA partners like the EU. But it does not explain why the EU itself seems loath to initiate dispute settlement proceedings under its many FTAs. One conjecture has been that when it is in an asymmetrical power relation with smaller FTA partners, the EU might feel that it has other ways to express its displeasure and obtain relief.[81] Others have pointed out that enforcement of its rights, either in the WTO or under FTAs, does not seem to have been a priority for the EU in recent years.[82] It would seem that the EU has become averse to litigation and has built up a preference for negotiation (with the risk of having to pay twice or more for the same concession, as critics like to point out). Whatever the reasons for this shifting attitude, a probable side-effect has been that the TBR has fallen into disuse as well over recent years.[83]

Having said all this, we do believe it is worthwhile for the EU to endow well-supported private complaints about third-country violations of labour standards with procedural safeguards. In part this requires an adaptation of an already existing legal instrument, the TBR. This will also require a different mindset amongst EU authorities, and notably the Commission, that more effective enforcement of international treaty obligations *can* make a difference.

[78] See G Vidigal, 'Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement' (2017) 20 *Journal of International Economic Law* 927 (citing *Costa Rica v El Salvador*, decided in 2014 under CAFTA).

[79] *Guatemala – Issues Relating to the Obligations Under Art 16.2.1(a) of the CAFTA-DR* (above n 34) 23.

[80] ibid.

[81] For an early, revealing analysis see T Broude, *From Pax Mercatoria to Pax Europea: How Trade Dispute Procedures Serve the EC's Regional Hegemony* (October 2004) available at: http://dx.doi.org/10.2139/ssrn.724641.

[82] See M Cremona, 'A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon', Swedish Institute for European Policy Studies 56 (Report No 2, 2017); SJ Evenett, *Paper Tiger? EU Trade Enforcement as if Binding Pacts Mattered* (New Direction, 2016).

[83] The summer of 2017 saw the opening of a rare, new investigation by the Commission into a complaint brought by the European paper industry against a Turkish import licensing scheme. OJ 2017, C218/20.

IV. Conclusions

With this proposal we suggest that better enforcement of the labour standards included in the EU's FTAs can be achieved by adapting an existing private complaint procedure (the TBR) at EU level in the trade area, and by adjusting the dispute settlement provisions attached to the labour rights chapters in the EU's FTAs.

To start with, we recommend using the categories of Article 154 TFEU to identify representative social partners having legal standing to trigger a TBR investigation. Coupled with the other existing admissibility requirements in the TBR, this would assure the avoidance of frivolous claims and reduce petitions to a number that remains manageable for the European Commission in terms of its resources and the diplomatic cost.

Whenever the Commission's investigation is not able to persuade the third country to comply with its labour standards obligations, the Commission would have to consider starting a legal action under the international dispute settlement procedure available in the FTAs. In this regard, we propose a shift away from the enforcement model in the trade and sustainable development chapters of the EU's present FTAs and a move towards fully fledged third-party adjudication and remedies. This would include proper dispute settlement in front of a panel of independent experts as well as economic sanctions and the possibility of retaliation in the event of non-compliance with the final ruling of the panel. On remedies, we take the position that trade retaliation, which is currently envisaged in the standard FTA dispute settlement, should be avoided as much as possible. Instead, inducing the other FTA party to comply with a panel ruling should be achieved through the recurring payment of a financial penalty to a fund overseen by an independent body (such as the ILO). Only in the event that the offending country refuses to pay the financial penalties should traditional retaliation become available as extrema ratio.

Finally, those who favour more rigorous enforcement by the EU of labour standards included in the EU's FTAs will have to engage more broadly with the EU's lacklustre enforcement of its rights under international agreements generally. Perhaps the growing interest from civil society and domestic politicians in more robust implementation of the labour rights obligations in the EU's FTAs could help to reinvigorate the enforcement of other parts of these agreements as well.

Labour standards, which are based on (shared) values rather than levelling the playing field, are the perfect example of an area of treaty-making which, if effectively enforced, would contribute to restoring trust in international trade agreements and in EU external action in this field.