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Strengthening Labour Rights Provisions in Bilateral Trade Agreements
Making the case for voluntary sustainability standards

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Abstract

Since 2008, most bilateral and regional EU trade agreements contain so-called Trade and Sustainable Development chapters. Such sustainability chapters typically include commitments to core ILO labour rights and provide specific monitoring mechanisms to ensure compliance. Several observers however, have voiced concern about the enforcement potential of these provisions in practice, beyond legal and institutional reforms. As a means to overcome this compliance gap, this article explores how the inclusion of existing Voluntary Sustainability Standards (VSS) in trade agreements could potentially enhance the monitoring and enforcement of labour provisions in EU trade agreements. Based on experiences captured in a case-study on the functioning of the 2013 EU-Colombia Trade Agreement, we argue that linking VSS to labour provisions in trade agreements could significantly contribute to rendering these provisions more effective. Linking labour provisions to the monitoring and auditing mechanisms of accredited but independent VSS, we argue, could help close a regulatory gap, add credibility to the provisions and help overcome capacity challenges in the implementing countries. In turn, the integration of VSS in trade agreements offers public regulators the opportunity to demand a strengthening of the quality of VSS in terms of their design and procedures.

Introduction

Public and private actors try to enforce labour rights through various instruments. Until recently they operated in different realms and independent from each other. Since they aim to enforce more or less the same international labour rights, such as the International Labour Organization's Declaration on Fundamental Principles and Rights at Work ('the ILO Declaration'), the debate on possible complementarities and synergies between private and public initiatives has emerged. This paper aims to contribute to this debate by analyzing how trade agreements, which contain labour rights protection provisions, can be strengthened in order to better enforce these provisions.

One can observe a proliferation of bilateral trade agreements which include non-trade objectives, such as the promotion of sustainable development, including the protection of the environment and of labour rights. The European Union (EU) is one of the leaders in this respect following the commitments made in the Lisbon Treaty (Damro, 2012; Wouters et al., 2015). EU trade agreements contain sustainable development chapters outlining which labour rights should be protected by the contracting parties. These agreements also stipulate, to some extent, how compliance with these provisions should be monitored and enforced. However, several commentators have been skeptical about the potential of these provisions to actually enforce labour rights (Velluti, 2015; ILO, 2013). In this respect, closing the so-called compliance gap seems to be especially challenging. Many countries comply with the conventions in legal terms (ratification), but not in practice (Hafner-Burton, 2013). Hence, there is a growing consensus that the current provisions are insufficient to really enforce labour rights. The question thus arises of how these agreements can be strengthened in terms of their monitoring and enforcement. In the context of this special issue we look at the role private voluntary sustainability standards (VSS) can play in this context and argue for the integration of VSS in trade agreements. We explore this proposal by focusing on a specific country as a case study, namely Colombia. This proposal fits within broader literature on integrating private regulatory initiatives in public policy to which this special issue contributes. Ponte and Daugbjerg (2015) and Schleifer (2013) observe the emergence of hybrid forms of governance which are based on deep, mutual dependence and interconnection between public and private elements. These new forms of hybrid governance fit within a broader

change towards a new form of transnational governance in which public and private actors 'co-regulate' (Schukat et al., 2014; Lambin et al., 2014).

The paper first introduces and discusses the two main public and private policy instruments which enforce labour rights, bilateral trade agreements, and voluntary sustainability standards. Next, we introduce the case of Colombia and briefly describe the methodology used for the case study. The main aim of the case study is to understand the factors that determine the ineffectiveness of trade agreements to enforce labour rights and how this can be addressed. Here we argue that VSS can offer a solution, and briefly discuss VSS in the context of Colombia. The following section provides a discussion of the implications of the proposal to integrate VSS in trade agreements. We end with a conclusion.

Public governance of labour rights: the case of trade agreements

Until the mid-1990s, EU trade policy was only concerned with economic interests. It was not until the second half of the decade that EU trade policy took a normative turn, with the inclusion of labour rights protection and other sustainable development concerns in EU trade agreements (Orbie, 2011, p. 165). A clear and well-researched element in this evolution has been the inclusion of human rights clauses in EU bilateral and regional trade agreements since 1995. Human rights clauses made the application of trade regimes conditional upon a party's respect for democratic principles and human rights, including universal political, civil, economic, and social (labour) rights. As an 'essential element' of the agreement, any violation of the human rights clause could trigger 'appropriate measures', including, 'as a measure of last resort', the suspension of the agreement (Bartels, 2005).

Concerning the protection of labour rights, the 1999 Trade Development and Cooperation Agreement (TDCA) with South Africa was the first EU trade agreement to feature the ILO Declaration. This was closely followed by the labour commitments provided under the Cotonou Partnership Agreement with the countries of the African, Caribbean and Pacific Group (ACP) in 2000 and the Free Trade Agreement with Chile in 2003 (Van Den Putte et al., 2013). Backed by the legal institutionalization of a more normative approach of the EU's foreign policy under the

Lisbon Treaty[1], the EU has become increasingly straightforward in using its commercial weight to promote social and environmental standards in its bilateral and multilateral trade negotiations and unilateral trade policies (Damro, 2012). As such, a 'new generation' of trade agreements was born, which include a specific legal chapter on 'Trade and Sustainable Development' (T&SD), explicitly specifying the ILO Declaration with which the contracting parties have to comply. T&SD chapters were first included in the 2008 EU-CARIFORUM Economic Partnership Agreement (EPA), and contain non-binding provisions on the protection of labour standards, Corporate Social Responsibility (CSR), and environmental protection. In addition, T&SD chapters generally contain monitoring and dialogue mechanisms to discuss progress, and include stakeholders from both the private sector and NGOs. Contrary to the US and Canadian model of labour provisions which are characterized by elements of conditionality in combination with cooperation agreements, the EU takes a somewhat softer, more promotional approach based on dialogue and cooperation (Agustí-Panareda, 2014, p. 7; ILO, 2013).

Looking into the reasons for the inclusion of labour rights provisions in EU trade agreements, one explanation is that the EU attempts to contribute to a global enhancement of working conditions from a universalist, human rights point of view (Harrison, 2007). This is also the official narrative of DG Trade and aligns the legal obligations under the Lisbon Treaty (see note 1). A second reason is to level the playing field and make sure EU firms are not confronted with competitors who do not comply with the ILO Declaration (Campling et al., 2015, p. 6-7). Either way, T&SD chapters are now likely to be part of any future trade agreement with the EU.

Considering most existing research on the inclusion of labour provisions in trade agreements has either been motivationally focused, revolving around the question of why such trade-labour linkages were established in the first place; or, looked into the institutional design and general functioning of existing agreements, yet less is known about these arrangements' potential to generate change in labour rights protection 'on the ground' in third countries. The question of how

[1] The 2009 Lisbon Treaty states that all policies of the European Union must contribute to the promotion and protection of human rights, including labour rights. For the Union's external policies in particular, Article 21 of the Treaty stipulates that the EU should consistently and coherently 'consolidate and support democracy, the rule of law, human rights and the principles of international law' (TEU, Art 21, 2-b). Article 201 (1) of the Lisbon Treaty further notes in this regard that EU Trade policy 'shall be conducted in the context of the principles and objectives of the Union's external action'.

labour provisions in trade agreements play out in practice is particularly relevant in view of recent criticism about the inclusion of labour provisions being of a predominantly symbolic nature; essentially there to appease interest groups within the EU and the EP, rather than being aimed at generating any significant impact (Campling et al. 2015, p. 7). One possible way to strengthen their impact, this article will argue, is to integrate private regulatory initiatives such as voluntary sustainability standards.

Private governance of labour rights: the case of voluntary sustainability standards

Voluntary sustainability standards (VSS) emerged in the 1990s as an instrument to govern transnational supply chains. Most initiatives are characterized by having an organization that defines social and ecological standards, and include a set of procedures to assess conformity with those standards. When products or production processes comply with the standards, a certificate is awarded which may or may not be used for external communication (a label). Some authors consider VSS '*one of the most innovative and startling institutional designs of the past 50 years*' (Cashore et al., 2004, p. 4). Among the most prominent and representative examples of these private, regulatory initiatives in the area of labour rights are the Fair Labour Association (FLA), Social Accountability International (SAI), and Fair Wear Foundation (FWF); however, there are many more which integrate the ILO Declaration in their regulatory framework.

There are two elements of VSS which make them interesting in the context of labour rights provisions in trade agreements. First, they develop labour standards on the basis of the same norms and principles which can be found in trade agreements. Notably, they are developed in reference to international conventions, treaties, declarations, and protocols. In this way, they integrate public rules and standards (such as the ILO Declaration), through a private, and therefore voluntary, set of procedures. Second, VSS develop a comprehensive institutional framework to monitor compliance with these standards. VSS put systems in place to monitor compliance with standards by rule-takers. Conformity assessment and monitoring are key components of any credible VSS. Monitoring in VSS is based on two interrelated aspects, namely the design of top-down monitoring and/or auditing systems, and the use of bottom-up complaint systems (Marx, 2014). Top-down monitoring refers to the assessment of conformity with standards and labour rights by independent third parties. This often takes the form of auditing sites according to an auditing protocol (for a

critical discussion see Locke, 2013; Marx & Wouters, 2016). Some VSS also use bottom-up complaint or dispute settlement procedures to complement monitoring via auditing (Marx, 2014).

In terms of effectiveness, these VSS have at least two potential weaknesses which could be addressed by integrating them into public regulation such as trade agreements. First of all, the adoption rates of VSS by organizations is rather low in most countries. Integrating a requirement in trade agreements to comply with one or more VSS could significantly influence their adoption rate. Secondly, the integration of VSS may strengthen the design of VSS in terms of how they develop and enforce standards. Notwithstanding the similarities in the process of granting sustainability certificates, there is significant variation in how VSS are designed and which actors and stakeholders are involved. These differences relate to who sets standards (Dingwerth, 2007), who assesses the conformity with standards ex-ante (1st party conformity assessment versus 3rd party conformity assessment) (Van Waarden, 2011), how ex post verification is organized through complaint systems (Marx, 2014), and how transparent the initiatives are in terms of providing public information on certification (Auld and Gulbrandsen, 2010).

Such difference in design might affect their effectiveness, particularly with VSS which mostly rely on auditing as an enforcement mechanism, which have been criticized for being less effective. Criticism has focused on broadly three distinct aspects related to the weaknesses of auditing (Locke, 2013). First, several studies and authors have criticized the selectivity in the improvement of labour rights. They argue that one can observe improvement on certain aspects but not on others (Barrientos and Smith, 2007). Especially so-called process rights, such as freedom of association, are difficult to achieve through voluntary standards. Although, it should be noted that there are some studies which show a positive impact on process rights such as the case study by Barenberg (2008) on the Worker Rights Consortium (WRC) and freedom of association.

Second, the quality of information in auditing has been questioned, since an auditing approach does not sufficiently take into account the voice of local stakeholders (workers, communities, etc.). Additionally, these audits quickly become routine and standard practices, often overlooking crucial information (Locke, 2013: chapter 2). In addition, some observers (Locke, 2013) argue that, due to an inherent conflict of interest (auditors are paid by the business enterprises), they have strong

incentives to 'underreport' practices and give in on the stringency of their audit reports in order to please the ones who order the audits.

A third element which possibly influences the effectiveness of auditing is the competition between systems. As Fransen (2011) notes, when analyzing private labour governance systems, no real steps are taken to address competition between systems and have convergence on monitoring and auditing. In a comparative study, Fransen (2011) shows that systems differ significantly in how they organize auditing in terms of stringency. This points to variation in effectiveness of these systems and raises questions about some forms of auditing. The issue here is not that auditing as such is bad and should be replaced, but rather that auditing might be a necessary component of a monitoring mechanism, but not a sufficient one, and needs to be complemented with other forms of monitoring. These concerns can be addressed when stipulating the requirements for the design (and set of procedures) of VSS in order to be accredited under a trade regime, as has been done by the EU in a number of policy areas such as forestry products (FLEGT) and biofuels (RED).

Case Study of Colombia

In order to further explore the reasons for integrating VSS into trade agreements we focus on a specific case of the EU-Colombia trade agreement[2] in order to identify the factors which make enforcement/compliance cumbersome or problematic, and how private initiatives could contribute to address this issue. The case study identifies several factors which are related to the design of the agreement as well as with regard to the knowledge, willingness, and capacity of trade partners to enforce the labour commitments stipulated under the trade agreement. The EU-Colombia agreement was chosen since it is an example of a new generation trade agreement that contains several articles on compliance with ILO labour rights and on how to monitor compliance. In addition, since Colombia is confronted with many labour rights violations, one can expect that the trade agreement will have an observable impact in terms of addressing labour rights violations. The case study is based on a review of existing primary and secondary sources, and some 30 semi-structured interviews conducted in Bogotá and Brussels (March-May 2015). In order to provide a comprehensive assessment of the labour provisions under the agreement, and of the monitoring

[2] This is part of a joint agreement between on the one hand the EU and on the other hand Peru and Colombia

and enforcement mechanisms provided to ensure their compliance in practice, we interviewed a wide range of relevant stakeholders, including representatives from the Colombian government, EU officials, labour unions, NGOs, business representatives, and academic experts. The case study identifies several factors which hamper the effective enforcement and monitoring of labour provisions in practice. In addition, we look at the current state of VSS coverage in Colombia on the basis of secondary literature and data gathered from the International Trade Centre (ITC).

The EU-Colombia Trade Agreement

The EU-Colombia agreement was signed in June 2012, and was approved by the European Parliament in December 2012. The Colombian Congress ratified the agreement in June 2013, allowing the government to implement it as of August 2013. Given Colombia's infamous track record on human and labour rights, labour rights featured prominently throughout the negotiation process (USDL 2011; ILO 2011), and as a result, the adopted agreement includes several provisions on human and labour rights. Article 1 contains the standard 'essential elements' clause on human rights, whereas Title IX contains a so-called Trade & Sustainable Development chapter which offers specific provisions *inter alia* on labour rights (Art. 269). Article 279 of the chapter notes that each party has the primary responsibility to monitor, review, and assess the impact of implementing these provisions within its own territory through domestic mechanisms.

In terms of monitoring, the obligations under the sustainability chapter are covered by a sub-committee on Trade and Sustainable Development, which brings together the respective governmental partners and operates under its own rules of procedure and meets 'as necessary'. Importantly, the Sub-committee is mandated to assess, 'when it deems it appropriate', the impact of the implementation of the agreement on labour rights. Accompanying the government-to-government meetings by the Sub-committee, Title IX provides two separate, but interrelated, civil society mechanisms; notably Domestic Advisory Groups (DAG) and a bilateral CSO Forum, which is organized back to back with the meetings of the Sub-committee and involves the respective DAGs from each party (the EU, Colombia, and Peru). The former includes domestic mechanisms, under which each party is bound to consult domestic CSOs in the labour, environmental, and sustainable development field (Art. 281).

The way these monitoring provisions are operationalized is problematic. Trade unions have argued that the tripartite social dialogue mechanisms put forward by the Colombian government has been insufficiently inclusive to ensure any relevant outcomes (CUT 2014, p. 4-7; CGT 2015, p. 15). Several interviewees therefore stressed the need to make the monitoring mechanisms more inclusive. Colombian trade unions and NGOs further stated that they have conflicting feelings concerning these provisions and mechanisms, especially since they are government-driven. The emergence of this type of monitoring institutions is a necessary step for improvement, yet they lack sufficient credibility without a stronger involvement of civil society (Amengual and Fine 2016).

In addition to a lack of credible independence and CSO involvement, two other concerns were raised regarding the functioning of the monitoring mechanisms. First, concerning effectiveness, the issue was raised that these new institutions should be more result-driven. Several interviewees raised concerns about the potential actual impact that these new spaces for social dialogue would be able to offer in terms of leveraging stronger support for the protection of labour rights (Orbie et al., 2016). As a European trade union representative argued, Colombian trade unions are rightfully critical and less likely to engage with these types of dialogue mechanisms, since they know from experience that the actual impact of these dialogues is limited. While acknowledging the existence and potential benefits of these spaces, the current functioning of similar systems has left trade unionists with little hope for any real impact. While civil society is indeed often invited to attend and listen to *parts* of the dialogues, they have little to no real voice when it comes to the decision-making. A second issue relates to financial and human resources and the lack thereof to truly engage in the meetings. Trade union representatives in Colombia, for instance, complained that for the CSO forum organized in Lima (2014), neither the Colombian government nor the EU offered any support to ensure the attendance of Colombian union representatives. These representatives were invited to the event but could not attend due to lack of resources (DAG, 2015).

As a result, most interviewees found that the labour provisions under the sustainability chapter lack the appropriate monitoring and enforcement mechanisms to usefully and credibly contribute to significant improvements in Colombia's labour situation. A union representative noted that the agreement lacks the teeth required "*to enforce the nice language in the Agreement on labour rights.*

Without monitoring and sanctioning mechanisms such language is useless" (R.H., interview 1 April 2015). As long as the labour commitments cannot be properly enforced through effective monitoring - and perhaps sanctioning- mechanisms by *both* parties, the majority of interviewees considered them to be little more than paper tigers, often perceived by academics and trade union representatives as a half-hearted way for the EU to 'tick the box' on its treaty obligations. In the words of one academic, '*their heart isn't in it, it's a legal treaty obligation and that's it*' (R.U., interview 15 April 2015). The overall concern, in this respect, is that the monitoring mechanisms envisioned under the trade agreement were formulated top-down, focusing on the role of the Colombian government (especially the Ministry of Commerce) in the monitoring and enforcement of labour rights, while disregarding the potential involvement of civil society as a substantial actor in these processes.

Beyond the mere design and implementation of the agreement's labour and monitoring provisions, interviewees on the EU-side also pointed to the limited legal scope and political commitment of their inclusion. There is no obligation or mandate for the EU to monitor compliance with labour rights provisions in Colombia. Labour rights compliance are to be considered the responsibility of the respective parties, each within its own territory. In addition, EU officials noted that trade agreements are not intended as a tool or policing mechanism to enforce labour rights in partner countries. Their inclusion under the agreement's sustainability chapter is there, first and foremost, to indicate that labour standards are of mutual concern to the contracting parties; and, secondly, to provide a commercial level playing-field. It was further noted in this regard that the trade agreement with Colombia is to be seen as a *partnership* agreement, not of preferential access regime, and is therefore different in nature and spirit from other trade regimes such as the unilateral Generalized System of Preferences (GSP+), particularly when it comes to the conditionality and the monitoring of compliance with labour rights. As such, the labour provisions included in T&SD Chapters simply imply little more than that the contracting parties rhetorically acknowledge, as equal partners, to the same commitments, each ensuring their compliance and enforcement within their territory.

As a result, several observers have argued that the monitoring and sanctioning mechanisms of the trade agreement are weaker than those included in the GSP+ regime, which applied to Colombia

before the bilateral agreement came into force (Fritz 2010, p. 19). While GSP+ allowed the EU to withdraw trade preferences in case of systematic violations of ILO standards, the sustainability chapter does not provide any such sanctioning measures, nor does it provide a binding mechanism for dispute settlement (Stevens et al. 2012, p. 21; Raison 2010, p. 159-60). Indeed, some argue that, since the sustainability chapter offers less rigorous monitoring and sanctioning mechanisms compared to the GSP+, it seems farfetched to expect a more effective protection of labour rights under the new trade agreement (Saura Estapà 2013, p. 12-22). In the same vain, Fritz has argued that '*the lack of provisions for sanctions makes the number of standards included in the sustainability chapter irrelevant*' (Fritz 2010, p. 19). Likewise, Jorge Gamboa Caballero, union leader of the CUT (Central Unitaria de Trabajadores de Colombia), pleaded during the negotiation phase that before even thinking of ratifying a new trade agreement, the EU should make better use of the monitoring mechanisms available under the GSP+ regime and increase pressure on the Colombian government to improve the situation of its workforce (Gamboa, 2010, p. 79).

The capacity and willingness of the Colombian government to enforce labour rights

The enforcement provisions in the agreement are weak and put the responsibility for enforcement firmly in the hands of the Colombian government. However, Colombia, like many developing countries, faces significant incentives not to comply with labour rights provisions as pressures of competitiveness in the global market can force developing countries, especially emerging middle-income countries looking for foreign investment, to disregard labour standards, often despite legal and institutional improvements (Blanton and Peksen 2016; Blanton and Blanton 2016). Besides a lack of willingness to enforce labour rights, a state might also lack the capacity to enforce these rights (Bourgeois et al. 2007). We briefly discuss below the problems with capacity and willingness in complying with labour rights in the Colombian case.

First, the state may lack the capacity to implement the enforcement of labour rights. Many developing or emerging countries face "*a severe dearth of the requisite scientific, technical, bureaucratic, and financial wherewithal to build effective domestic enforcement systems*" (Chayes and Chayes 1993, p. 194). The latter was echoed in several interviews we conducted. Colombia does not have the technical capacities nor the knowledge to monitor the compliance with labour

standards. In addition, it is a vast country with many difficult to reach and remote areas. It does not have the required tools for data collection, inspection capacities, nor a specified objective-based strategy that can ensure that the general commitments will transform into better protection of labour rights. Also, the general lack of quantifiable indicators in the trade agreement concerning the protection of labour rights makes it difficult to design monitoring instruments, or to properly measure whether the standards are met or not. On top of this, a diplomatic representative stated that '*the Colombian government has so much to do, and pretty much every human rights, labour and justice agency is overburdened*' (A.L., interview 20 April 2015). Aware of the difficulties faced by the government to implement and monitor the labour standards put forward by the agreement, several interviewees also suggested that the EU could offer its expertise and technical assistance to improve the Colombian government's capacity in this regard. Representatives from the Ministry of Labour noted that '*the involvement of the EU or other partners'* in monitoring the Colombian situation would be fundamental to ensure full compliance. They mentioned that the Ministry plans '*to ask the EU how they expect us to monitor the implementation and impact of those provisions and we hope to learn from their experience in that regard*' (J.R.A., interview 14 April 2015).

Besides incapacity, interviewees also pointed to a reluctance to enforce labour rights, questioning the credibility of the government's commitments to enforce its domestic legal framework on labour rights, let alone the labour provisions under the trade agreement. As such, it was suggested that the lack of implementation is not exclusively due to issues of incapacity (as government officials would stress), but that it also stems from an overall sense of disinterest, a lack of political prioritization and a lack of incentives for companies to comply with labour legislation (Baltzer, 2015). Several interviewees considered '*the legal, normative framework on human rights in Colombia as good as perfect,'* while its monitoring and enforcement being *'a different story entirely, particularly in the vast remote areas where governmental presence is low, absent or contested*' (J.H., interview 16 April 2015) NGO and trade union representatives argued that the Colombian government signs laws and creates institutions to show formal compliance, while leaving sufficient loopholes in the system so that businesses can continue operating as usual. These "strategic ratifications" of conventions and commitments with little further implementation is especially worrisome in the Colombian case; every new restriction comes with an outlet that allows

businesses to comply with law, while avoiding changing its actual relation with the employee. The 'decoupling' of the legal protection of labour from its implementation is the fundamental reason why one business representative admitted that it is all in all fairly simple for employers to comply with legal requirements without applying any substantial changes in practice, even when existing laws are not weakened, or even still when new more restrictive regulations are ratified (Blanton and Blanton, 2016).

Secondly, the reluctance or unwillingness for effective enforcement is also illustrated by internal state dynamics. The main actor involved from the Colombian side in the follow-up to the trade agreement is the Ministry of Commerce; not an inter-ministerial body including, for instance, the Ministry of Labour. Several interviewees noted that this Ministry of Commerce is not as well-equipped to assess compliance with labour rights, and might even have incentives to not fully engage with the provisions in the SD chapter. An improvement for enforcing the labour rights provisions of the agreement would be by developing a more direct involvement of the Colombian Ministry of Labour (2015) which plays an important role in organizing social dialogue. The Sub-commission of International Affairs within the Ministry of Labour offers a space where workers, unions, and businessmen can present and discuss their concerns regarding all impacts of international relations on the labour standards in Colombia. However, this does not effectively feed into the mechanisms established under the trade agreement since these belong to the responsibility of the Ministry of Commerce.

Voluntary sustainability standards in Colombia

The case of Colombia shows that there are both willingness and capacity issues at play when it comes to enforcing the labour rights as stipulated under the Sustainability Chapter. In addition, the agreement between the EU and Colombia lacks a strong enforcement architecture resulting from the partnership logic of the agreement, which makes each party the sole responsible agent over enforcement within its territory. An alternative to the EUs promotional approach towards the protection of labour rights provisions in trade agreements is the 'conditional approach' of the United States (ILO 2013: 21). The US-Colombia agreement contains a separate and conditional plan (Labor Action Plan) that explicitly defines the requirements to be fulfilled in order to comply with the agreement (see USG 2011). In addition, it provides technical and financial support to

comply with the requirements. The conditional approach includes trade sanctions which can be the outcome of dispute in the context of the regular dispute settlement mechanism of the US trade agreement (ILO 2013: 33). Interviewees from the Colombian Government, the U.S. Embassy in Colombia, and trade union representatives in Colombia agreed that this conditional approach might be more effective than the EU approach in enforcing *de jure* compliance with the labour rights requirements. These perceptions confirm other assessments which consider the US approach to be more effective (Giumelli and van Roozendaal 2016: 15, 19). However, there remains an issue that the U.S.'s 'conditional' approach also cannot really resolve. The 'forced diffusion' of labour standards results in formal legal compliance but lacks the capacity to enforce compliance with standards in practice (van Roozendaal 2015: 27-28). Its focus on committing *only* the government to make appropriate amendments in law and institutional structures is insufficient to deal with the implementation of labour standards in practice.

This leads us to consider alternative instruments that may supplement and support the domestic legal structure and its enforcement mechanisms. We focus in this respect on the potential added value of involving a third party with enforcement capacity in the form of VSS. According to the International Trade Centre Standards map, some 64 VSS are already currently active in Colombia in various sectors (including palm oil, coffee, flowers, forest products and textiles), some of which are key Colombian export sectors and highly vulnerable to violations of human and labour rights such as child labour, forced labour, and violations in the area of freedom of association and collective bargaining (Forero 2014; see also Rangel, 2012).

In addition, Colombian business representatives repeatedly emphasized during interviews that compliance with labour standards results more from market pressures and VSS schemes, rather than from political pressure or legislative reforms. Working with existing initiatives designed to enforce labour rights in economic activities and value chains could help bridge the enforcement/compliance gap in the context of the trade agreement, we argue, as interviews revealed that VSS and mechanisms of corporate social responsibility (CSR) are two of the most relevant factors in the current shift of labour policies in Colombian business. The following examples from two sectors aim to further illustrate this point.

First, the Colombian flower sector engages actively with VSS. They established their own VSS Floverde ('Green Flower') that is recognized by the Rainforest Alliance, a leading VSS. An interviewee from Asocolflores (the largest flower guild in Colombia), considered '*VSS and not the trade agreements to be the fundamental reason why the labour and sustainability standards have increased in the sector during the last 20 years*' (K.M., interview 20 April 2015). In the coffee sector, VSS also play a fundamental role, especially in ensuring proper monitoring of labour rights regulations and the development of stronger collective bargaining mechanisms among them (Ponte 2004, p. 63-64, 68). Although the farmers' primary incentive to join a VSS is usually the price premiums they receive on certified coffee, the impacts VSS have had on the coffee sector go further, and include improved environmental protection, fostering technical and knowledge diffusion, building local networks, and making small-scale farmers more resilient to market changes (Rueda and Lambin 2013).

This is not to argue that these sectors are fully sustainable and that there are no longer labour rights violations. There are still several problems and the impact of VSS could be strengthened (see discussion in section 1). At least three issues can be identified in our case study of Colombia. First, monitoring of compliance with labour rights could be strengthened by involving local stakeholders and strengthening unions. As Korovkin and Sanmiguel-Valderrama (2007, p. 125, 132) observe, local and international CSOs are not sufficiently taken into account in monitoring practices of VSS, and the strengthening of monitoring is a general concern with regard to VSS (Marx & Wouters, 2016). A second issue relates to the demand for certified products. One interviewee active in the flower sector identified Russia as a relevant example in this context. Russia is an important actor on the Colombian flower market but hardly demands any certified flowers, providing disincentives to engage with stringent VSS systems (see also Álvarez Hincapié et al. 2007, p. 84-87; NewForesight 2011, p. 47-50). Thirdly, not all VSS are equal in terms of effectiveness. Marx and Wouters (2015) demonstrate that there is significant variation between VSS in design and enforcement capacity. This relates to how they set standards, how they monitor conformity with those standards (3rd party auditing), and which mechanisms they have in place to report non-compliance (transparency and information disclosure procedures and complaint/dispute-settlement). Some VSS have an elaborate set of procedures and mechanisms

(credible ones), while others have hardly any monitoring and enforcement procedures and mechanisms (non-credible ones). The credibility of VSS also plays an important role in Colombia. A study carried out by Ibañez and Blackman (2016, p. 23-25) for instance, shows that the fundamental difference in better protection of labour rights in the coffee sector in Colombia is not between certified and non-certified farms, but rather between farms using well-established international certification standards (credible VSS) and farms using less established certification regimes.

Discussion

In the following section we discuss some of the potential implications of integrating VSS in trade agreements. We discuss implications with regard to who is targeted in a trade agreement, how the integration of VSS can occur, and what opportunities arise for public regulators to strengthen VSS as a policy instrument.

First, integrating VSS in trade agreements would target firms more directly. Firms would be required to obtain VSS certification as a result from a trade agreement. This would imply a shared responsibility of states and firms to comply with the provisions in T&SD chapters of trade agreements. In practice however, this implies that not all, but in principle, all exporting firms would require certification. However, several variations on implementation schemes are possible. One could exempt, in a first instance, small firms, or firms which only export small amounts of products. In addition, one could play with the implementation time schedule and start with only requiring large firms to get certified and have a different time period for other firms. In any case, the certification requirement would imply significant costs for firms since certification can be expensive and time-consuming. In this context, accompanying measures in terms of providing technical or financial capacity support might be required depending on the country and sectoral context.

Second, the integration of VSS in trade agreements (public regulatory instrument) offers the possibility for public actors to improve the effectiveness of these standards through strengthening the institutional enforcement design (monitoring/sanctioning) of these standards. The inclusion of voluntary standards in trade agreements should address the issue of distinguishing credible

voluntary standards from greenwashing initiatives. Several authors have raised concern about the proliferation of standards and their wide variety in terms of comprehensiveness and enforcement (Marx and Wouters, 2015). Hence, only credible systems should be recognized and accredited in the context of trade agreements (Mavroidis and Wolfe, 2016). There are already some examples on how this can be achieved. For example, in the case of sustainable public procurement, EU directives stipulate requirements on how social and environmental standards should be set and enforced in order to be recognized for sustainable public procurement (D'Hollander & Marx, 2014).

It is worth noting in this regard that other regulatory instruments of the EU already integrate VSS in their regulatory design and accredit VSS. One example is the 2009 EU Renewable Energy Directive (RED) (2009/28/EC). Under RED, the European Commission set up an accreditation system for VSS in order to proof compliance of biofuel providers with the directive. The list currently comprises 19 VSS including inter alia BonSucro, Roundtable of Sustainable Biofuels, and Roundtable on Sustainable Palm Oil. RED constitutes an interesting example of how hybrid transnational labour governance could take shape. In essence, in the context of biofuels, the EU is confronted with a similar challenge as in the context of trade agreements. Products entering the EU market cannot be assessed on their 'sustainability performance' since such performance hinges on the production process. This means that the sustainability of products (compliance with environmental and social standards) has to be assessed at the production stage and, arguably, across the value chain (Ponte and Daugbjerg, 2015). Since VSS provide this type of monitoring and assessment capacity, they offer a regulatory service which is absent for the EU as a (public) actor. This way, VSS close a regulatory gap which cannot be closed by the contracting partners in a trade agreement because of issues of sovereignty. In other words, they enable public actors to transcend the scope of their national regulatory capacities. As Ponte and Daugbjerg (2015) and Schleifer (2013) point out, this type of hybrid governance is based on deep and mutual dependence and interconnection between public and private elements. However, one should not blindly follow the example of RED in the case of trade agreements. Some authors (Schleifer, 2013) have been critical of the RED approach and have questioned in particular the quality of its accreditation system, which is said to be too flexible in admitting also weaker VSS regimes. Under RED the European Commission imposes a set of baseline requirements which, as Schleifer (2013, p. 541)

observes, '*did not set the bar very high*'. As a result, biomass certification schemes in the context of RED continue to differ significantly in terms of stakeholder participation (highly inclusive versus less inclusive systems), scope of standards (some include social and labour criteria while other do not), and auditing practices (self-auditing versus third party auditing). The accreditation of VSS with weak monitoring and enforcement mechanisms can lead to a race to the bottom in terms of standard-setting, since weaker standards are often preferred by firms due to lower costs of certification. As such, the incorporation of any accreditation system within the sustainability framework of a trade agreement should be carefully developed in order to ensure that it sets the bar high enough to improve labour practices on the ground.

In stipulating the requirements to which VSS have to adhere in order to be accredited under a trade agreement, the EU can go further and demand actions that would increase the effectiveness of these systems, especially with regard to complementing the auditing system with other means of monitoring (Marx and Wouters, 2016). The latter is necessary, since several scholars have criticized voluntary standards which rely solely on third party auditing for a lack of effectiveness (Locke, 2013). This might include requirements that strengthen the auditing potential of voluntary standards by, for example, establishing mechanisms of complaint, grievance, and remedy for non-compliance with standards. This might include requirements to install procedures for 'bottom-up' monitoring that would involve local stakeholders such as CSOs and unions in the monitoring process; and would in this way strengthen the social dialogue provisions which are currently already in the trade agreement. Relevant examples of how this can be achieved can be seen in the role of advocacy groups at the transnational level gaining a relevant role in increasing labour standards in the apparel industry in Guatemala and Mexico (Rodríguez-Garavito, 2005). In addition, requirements concerning transparency and accountability of VSS can be included in an accreditation protocol (Ibarra Padilla, 2014).

The integration of VSS in trade agreements can establish a system of multiparty 'accountability politics,' where the government, the VSS, *and* civil society all play a role in ensuring that the commitments and standards are met by the other parties (Rodríguez-Garavito 2005, p. 228). This way, the "responsibility" to ensure the monitoring and enforcement of labour standards, which is otherwise left in the hands of the domestic government exclusively - as is the case for the EU-

Colombia trade agreement - transforms into a system of co-enforcement, where the capacities and willingness of the different actors (the government, the VSS and the CSOs) complement each other (Amengual and Fine 2016).

Conclusion

International labour rights are transnationally enforced through several public and private instruments including through bilateral trade agreements (Trade and Sustainable Development Chapters). Over the years, the provisions covering labour rights have expanded and deepened significantly, now including stronger monitoring and enforcement instruments. The political support and commitment for the integration of these labour rights provisions in trade agreements has been universal in the EU. Van den Putte (2015) details how all European parties in the European Parliament, for different motives, support and insist on the provisions of labour rights provisions in the trade agreements concluded by the EU.

Depending on the legal framework in place in the partner country at hand, such efforts may lead to legislative changes. There is, however, little evidence of significant changes in practice in the case of Colombia (Marx et al., 2016). Based on a case study of the EU-Colombia agreement, we identified a set of factors that could explain the rather weak enforcement of labour rights under this type of governance through trade mechanisms. Some relate to the broader design and mandate of the monitoring mechanisms provided by these types of trade agreements overall, while others point to country-specific issues of capacity and prioritization.

In order to address these issues, this paper proposes to strengthen the labour rights provisions in trade agreements by linking them to existing VSS. Such an approach is in line with proposals to strengthen the enforcement of sustainability standards in the EU's GSP+ as recently discussed by Schukat et al. (2014, p. 420). As Ponte and Daugbjerg (2015) and Schleifer (2013) point out, this governance approach is based on integrating public and private elements in the regulatory design, and fits within a broader change to a new form of transnational governance in which public and private actors 'co-regulate' (Schukat et al., 2014) and complement each other (Lambin et al. 2014).

Such an approach would allow the EU to better govern the global protection of labour rights through its trade agreements. This would not only apply to the case of Colombia (or Peru), but also to other EU trade agreements. In reality, in order to be non-discriminatory, the EU should apply this approach to all trade agreements. Whether this will spillover to other non-EU trade agreements is hard to say, but it is unlikely to happen in the short term. Brown (2015), for example, shows that, in trade agreements pursued by Asian countries, labour rights do not feature at all. However, given the EU's market power as the world's biggest trading and investment bloc, the inclusion of VSS in its trade agreements would arguably have significant effects on global VSS coverage. In addition, firms exporting to the EU would probably apply the same (labour) standards to the production processes of products which are exported to non-EU countries (Mosley, 2011), creating spillover effects.

Linking sustainability commitments under trade agreements to existing VSS systems would not only close a regulatory gap, as contracting partners do not have jurisdiction over each other's compliance with the agreed commitments, but they could also help addressing issues of capacity or even resistance among partners to monitor labour rights protection. VSS do not only operationalize labour rights into specific standards, but more importantly also enforce them (monitoring, sanctioning and withdrawing certificates), and thus provide capacity to enforce regulation. Moreover, allowing an independent third party to monitor and evaluate compliance with trade stipulations would significantly increase the level of accountability and credibility of these types of sustainability chapters. In this way, VSS will add enforcement capacity to trade agreements and widen the responsibility for implementing the labour rights provisions in trade agreements to firms, instead of relying on states exclusively.

Consequently, the integration of VSS in trade agreements offers public regulators the opportunity to formulate requirements towards VSS, in terms of design and procedures related to standard-setting, implementation, monitoring and enforcement in order to strengthen the effectiveness of VSS. In sum, the integration of VSS in trade agreements might strengthen both instruments in terms of protection labour rights, while strengthening the complementarity between public and private instruments.

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