

# Taking Labour Rights Seriously in Post-Brexit UK Trade Agreements

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Protect, Promote, Empower

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# Taking Labour Rights Seriously in Post-Brexit UK Trade Agreements: Protect, Promote, Empower<sup>1</sup>

James Harrison, Ben Richardson, Liam Campling, Adrian Smith, Mirela Barbu

## Abstract

This paper explores how labour rights should be addressed within the UK's post-Brexit trade agreements. It argues that the rhetoric in the UK and key trading partners, most notably the EU and the US, about making 'trade work for all' ought to be translated into meaningful commitments in the trade deals that the UK seeks to conclude. However, there are dangers this will not happen, including the possibility of reproducing the weaknesses and limitations of labour provisions found in current EU and US trade agreements. The paper therefore advances three principles of 'protect, promote and empower' to guide analysis of how progressive trade-related labour rights could be legally enacted by the UK government and its trading partners.

**Keywords:** trade agreements, labour rights, workers, Brexit, UK trade policy

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## Introduction

The UK has triggered Article 50 of the Lisbon Treaty and is negotiating its departure from the European Union (EU). The precise nature of the UK's post-Brexit relationship with the EU is yet to be determined. But the UK government has repeatedly stated that it wants to “take advantage of the opportunity to negotiate our own preferential trade agreements around the world” which would entail leaving the EU's Single Market and Customs Union.<sup>2</sup> This strategy was cemented in the government's legislative agenda set out in the Queen's Speech of June 2017 which contained a Trade Bill explicitly to establish an independent trade policy – a power that was first transferred to the European Economic Community back in 1973.<sup>3</sup>

Our focus here is on what this means for UK trade relations – and specifically its bilateral or free trade agreements – rather than its implications for the wider relationship with the EU (e.g. on freedom of movement or jurisdiction of the European Court of Justice). In this respect, the existing academic and policy literature has tended to pose questions about whether, and in what circumstances, a new set of independent UK trade agreements will create commercial opportunities for British-based firms, and whether these will outweigh the losses from a more distant relationship with the EU. A number of studies thus consider, from the perspective of business, which countries the UK government should be prioritising trade deals with, what type of deals it may be able to broker, and to what extent this will boost exports.<sup>4</sup>

There remains far less analysis of the UK's independent trade power from the perspective of labour.<sup>5</sup> Some studies by campaign groups have sought to estimate employment change resulting from future trade arrangements though have been accused of a lack of rigour.<sup>6</sup> Other

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<sup>2</sup> HM Government (2017) *The United Kingdom's Exit from and New Partnership with the European Union*, London: Her Majesty's Stationery Office, p.46.

<sup>3</sup> Cabinet Office and Prime Minister's Office (2017) 'Queen's Speech 2017', 21 June 2017. Available at: <https://www.gov.uk/government/speeches/queens-speech-2017>

<sup>4</sup> See Douglas J. Cumming and Shaker A. Zaher (2016) 'International Business and Entrepreneurship Implications of Brexit', *British Journal of Management*, 27: 4, pp. 687–692; Richard Baldwin (ed.) (2016) *Brexit Beckons: Thinking Ahead by Leading Economists*, London; Centre for Economic Policy Research; Gregor Irwin (2016) *British Trade Policy after Brexit: Ruthless Prioritisation Required*, London: Global Counsel.

<sup>5</sup> For labour-centred analyses in terms of the wider legal and organisational implications of Brexit see Tonia Novitz (2017) 'Collective Bargaining, Equality and Migration: The Journey To and From Brexit', *Industrial Law Journal*, 46: 1, pp. 109-133; Rebecca Gumbrell-McCormick and Richard Hyman (2017) 'What About the Workers? The Implications of Brexit for British and European Labour', *Competition and Change*, 21: 3, pp. 169-184.

<sup>6</sup> See Jonathan Portes (2017) 'Brexit Will Create 400,000 Jobs? This is a Fiction, As Any Economist Will Tell You', *The Guardian*, 3 January 2017.

studies have considered the duty of UK policy-makers to take into account the effects of possible trade-related redundancy in poorer countries.<sup>7</sup> But there has been no detailed consideration as yet of how the UK's future trade relationship with third countries will affect workers in terms of their rights as protected in law and how these are implemented in their working lives, referred to in the rest of this article as 'labour rights'.<sup>8</sup> Nor has there been an exposition of how future trade deals might safeguard or even enhance existing labour rights. This paper investigates these sets of questions.

It starts by examining the rhetoric of politicians within the UK, the EU and the US around the issue of labour rights and international trade. The paper then explores the two dominant approaches for tackling labour issues in existing trade policy – those of the EU and the US – and argues that neither is capable of realising fundamental labour rights and nor do they articulate a sufficiently expansive rights agenda. The paper concludes by setting out some ideas for how that agenda might be better addressed by the UK government.<sup>9</sup>

### **Labour Rights in UK Trade Agreements: From Rhetoric to Reality?**

In the wake of Brexit and the rise of anti-establishment politics across the Western world, there has been a renewal of rhetoric about making sure that globalisation 'works for all' and that international trade does not lead to a 'race to the bottom' in labour standards. In the UK, as well as in the EU and US – the UK's major trading partners – politicians of various ideological stripes have made reference to these arguments, suggesting that there might be parliamentary support for a trade-labour linkage in UK trade policy. However, that needs to be balanced against the calls within the UK for the country to cut 'red tape' related to EU

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<sup>7</sup> See Max Mendez-Parra, Dirk Willem te Velde and L Alan Winters (2016) *The Impact of the UK's Post-Brexit Trade Policy on Development: An Essay Series*, London: Overseas Development Institute; Mohammad Razzaque and Brendan Vickers (2016) 'Post-Brexit UK-ACP Trading Arrangements: Some Reflections', *Commonwealth Trade Hot Topics*, 137, London: Commonwealth Secretariat.

<sup>8</sup> We define these here as entitlements accorded to individuals and collectives under the law and in respect to work. They can include, among many others, a right to work in a job freely chosen, a right to fair working conditions, a right to be protected from arbitrary and unjustified dismissal, and a right to bargain collectively as a trade union. Labour law is present at the national level in domestic statute, as well as at the international level, most directly in the conventions of the International Labour Organisation. Collective agreements at the workplace, company or in a particular sector can also create important rights for employees.

<sup>9</sup> We are not arguing that labour standards in trade agreements are a panacea for workers' rights, but instead that their incorporation could be an important resource alongside the range of other legal-institutional, political and socio-economic resources available to workers to advance their rights and working conditions.

directives on labour legislation and embark on a 'Global Britain' trade strategy that prioritises commercial interests above all others. As highlighted most clearly by President Trump, it is also evident that appeals to 'working people' in trade debates can be used disingenuously to mask a dangerous agenda of economic and political nationalism.

Firstly then, there are reasons for taking labour rights seriously that flow from the agenda set by the UK government. Upon her election as UK Prime Minister in 2016, Theresa May diagnosed the Brexit referendum as driven by the economic concerns of those "just managing", and thus declared that, upon leaving the EU, her government "will make Britain a country that works not for a privileged few, but for every one of us".<sup>10</sup> Since then she has gone on to pledge in her 'Plan for Britain' speech that "not only will the Government protect the rights of workers' set out in European legislation, we will build on them".<sup>11</sup> Realising such a vision suggests the need to foreground the perspectives and interests of workers in trade negotiations – for to make commitments that would erode labour rights and working conditions, rather than enhance them, would appear to further entrench the systemic problems which Brexit has been perceived as a revolt against. Emboldened by the surprise electoral performance of Jeremy Corbyn's Labour Party, opposition politicians, trade unions and left-leaning pressure groups now seem in a stronger position to insist on such a strategy. The Labour Party election manifesto stated that it would "ensure that trade agreements cannot undermine human rights and labour standards", while the General Secretary of the Trades Union Congress has stated that *if* the UK were to negotiate a trade agreement with the EU, then "the highest standards of worker, consumer and environmental protection must lie at its heart".<sup>12</sup>

Theresa May has also increased the ambitions of the UK government when it comes to tackling abuses of the rights of workers *outside* the UK. She has pledged that her government

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<sup>10</sup> Theresa May (2016) 'Statement from the New Prime Minister Theresa May', 13 May 2016. Available at <https://www.gov.uk/government/speeches/statement-from-the-new-prime-minister-theresa-may>

<sup>11</sup> Theresa May (2017) 'The Government's Negotiating Objectives for Exiting the EU: PM Speech', 17 January 2017. Available at: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

<sup>12</sup> Labour Party (2017) *For the Many Not the Few: The Labour Party Manifesto 2017*, Cramlington, Northumberland: Potts Print; Frances O'Grady (2017) 'Free Trade: What Would it Take to Get Union Backing?', Touchstone blog, 27 February 2017. Available at: <http://touchstoneblog.org.uk/2017/02/free-trade-take-get-union-backing/>

will “lead the way” in tackling one of the worst labour abuses in global supply chains, that of modern slavery, and has argued, in criticising the Davos business elite, that trade partnerships can play a crucial role in tackling such issues.<sup>13</sup> In this context, and building on the 2015 enactment of the Modern Slavery Act, the UK government could well seek to include provisions in its trade deals which signal its commitment to tackling, at the very least, slavery, servitude and forced labour.<sup>14</sup>

Second, there are rationales that arise from the UK’s changing legal relationship with the EU, specifically the repeal of EU legislation and departure from the European Court of Justice. There are concerns from various quarters that, in leaving the Single Market and the Customs Union, the UK might seek to compete with businesses in mainland Europe on the basis of eroding labour rights.<sup>15</sup> The UK is currently constrained from going below a ‘floor’ of supra-national labour rights protection created by EU law.<sup>16</sup> This is especially so in the two areas of labour law where the EU has most competence, namely working conditions (including provisions on working time, part-time and fixed-term work, and the posting of workers) and worker consultation (including provisions on collective redundancies and transfers to new employers, known as TUPE).<sup>17</sup> While some protection will remain in place post-Brexit, most notably as a result of obligations contained within the European Convention on Human Rights,

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<sup>13</sup> Theresa May (2016) ‘Defeating Modern Slavery’, *Sunday Telegraph*, 31 July 2016. See also Theresa May (2017) ‘May’s Speech to the 2017 World Economic Forum’, *Business Insider*, 19 January 2017. Available at: <http://uk.businessinsider.com/theresa-may-davos-speech-full-text-2017-1>

<sup>14</sup> However, the impact of the Modern Slavery Act on global supply chains has been questioned. See Genevieve LeBaron and Andreas Rühmkorf (2017) ‘Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance’, *Global Policy*, 8: 3, pp. 15–28.

<sup>15</sup> See Ann Pettifor (2017) ‘May’s Promise on Workers’ Rights is Hollow if She Doesn’t Get a Good Deal’, *The Guardian*, Opinion, 17 January 2017; Fawcett Society (2017) ‘Fawcett Launches Sex Discrimination Law Review Amid Fears that Brexit will “Turn Back the Clock” on Women’s Rights’, Press Release, 30 January 2017. Available at: <https://www.fawcettsociety.org.uk/2017/01/sex-discrimination-law-review/>

<sup>16</sup> We leave aside here the more complex question of whether membership of the EU has been beneficial for labour rights. Within the organised labour movement, the TUC have provided qualified support for the positive effects of the EU, while Trade Unionists Against the European Union have taken the opposite stance. See TUC (no date) *UK Employment Rights and the EU: Assessment of the Impact of Membership of the European Union on Employment Rights in the UK*, London: Congress House; Trade Unionists Against the European Union (no date) Homepage. Available at: <http://www.tuaeu.co.uk/>.

<sup>17</sup> See Directorate-General for Employment, Social Affairs and Inclusion (no date) ‘Labour Law’, DG EMPL webpage. Available at: <http://ec.europa.eu/social/main.jsp?catId=157>

the EU floor, which covers a more extensive range of labour rights, will disappear with Brexit and the accompanying Repeal Bill.<sup>18</sup>

The UK government has frequently asserted that it will not lower labour rights protection after leaving the EU, and there appears to be no immediate prospect of labour rights which are protected by EU law being removed, especially those that have advanced further in the UK than the EU (e.g. on statutory maternity leave).<sup>19</sup> The Shadow Secretary of State for Leaving the European Union, Kier Starmer, has also made clear that one of Labour's 'guiding principles' for Brexit is that "[a]ll rights enjoyed because of our EU membership over the past 43 years should be preserved in full and without qualification. Those include all workplace rights".<sup>20</sup> But a large number of UK employment rights are not just guaranteed by EU law but also "supported by strong EU rules on how they must be protected and enforced".<sup>21</sup> There are no certainties that they would not be gradually eroded over time, not least because particular EU laws, such as the 2008 Directive on Temporary Agency Work, have been strongly criticised by British business representatives.<sup>22</sup> Giving up on EU membership also prevents the automatic application to the UK of any future extension of EU labour rights, including those which might be covered in the European Commission's plan for a European Pillar of Social Rights.<sup>23</sup> Trade unions, including the TUC and GMB, have therefore argued that the UK government should make a commitment that "workers' rights will *always* be as good as, or better, than workers' rights in the rest of the EU".<sup>24</sup>

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<sup>18</sup> For the range of labour rights protected by this Convention, and the recent more expansive interpretation of these rights by the European Court of Human Rights, see Virginia Mantouvalou (2013) 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation', *Human Rights Law Review*, 13: 3, pp. 529-555.

<sup>19</sup> See Greg Clark (2016) 'Exiting the EU and Workers' Rights', House of Commons, *Hansard*, 616: 1302, 7 November 2016. Note: generous maternity *leave* provision has been criticised because of low maternity *pay*.

<sup>20</sup> Kier Starmer (2017) 'Labour Won't Give Theresa May a Free Pass on Brexit', *The Guardian*, 25 January 2017.

<sup>21</sup> Michael Ford (2016) 'The Impact of Brexit on UK Labour Law', *International Journal of Comparative Labour Law and Industrial Relations*, 32: 4, pp. 473-495. Ford also notes that there are procedural mechanisms for reducing the effectiveness of labour rights protections (e.g. increased costs of bringing cases) which need to be recognised.

<sup>22</sup> See Louise Peacock (2011) 'CBI: Government Must Overhaul 'Damaging' Agency Workers Rules', *The Daily Telegraph*, 14 November 2011.

<sup>23</sup> European Commission (2016) 'Commission Launches a Public Consultation on the European Pillar of Social Rights', Press Release, Strasbourg, 8 March 2016. Available at: [http://europa.eu/rapid/press-release\\_IP-16-544\\_en.htm](http://europa.eu/rapid/press-release_IP-16-544_en.htm)

<sup>24</sup> Italics added. Emma Bean (2017) 'What about Workers' Rights?', Labour List, 17 January 2017. Available at: <http://labourlist.org/2017/01/what-about-workers-rights-burnham-and-figures-from-labour-movement-give->

Third, there is potential pressure from trade partners to take labour rights seriously. This was outlined from the very beginning by Michel Barnier, Chief Negotiator for the EU in Brexit negotiations, who wrote in March 2017 that an EU-UK partnership “could be based on an ambitious free trade agreement, provided that it ensures fair competition and guarantees high environmental, social and consumer protection standards”.<sup>25</sup> Other leading EU officials, including the European Commissioner for Competition, Margrethe Vestager, have publicly reiterated this stance, casting low standards and low taxation as ‘unfair’ competitive advantages.<sup>26</sup> Early signals are that one of the first trade deals the UK will look to sign will be with the US. Central to Donald Trump’s successful election campaign was the idea that future trade deals would ensure benefits to US workers. Since taking office, Trump has withdrawn from the hemispheric Trans-Pacific Partnership, arguing that the agreement would be bad for US workers,<sup>27</sup> and has instead committed to a programme of “bilateral trade negotiations to promote American industry, protect American workers, and raise American wages”.<sup>28</sup>

What is crucial, of course, is whether such rhetoric is translated into meaningful commitments on paper. In this regard, there are reasons to be cautious. There are significant tensions between a trade policy which focuses on commercial interests in opening up markets and one that prioritises the conditions of workers both in the UK and in its trading partners. It is well established that key business actors can get the ear of government, over and above the (potentially divergent) interests of labour.<sup>29</sup>

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[their-verdict-on-mays-speech/ http://www.gmb.org.uk/newsroom/brexit-white-paper](http://www.gmb.org.uk/newsroom/brexit-white-paper). See also Tim Roache (2017) ‘Response to Brexit White Paper’, GMB Press Release, 2 February 2017. Available at: <http://www.gmb.org.uk/newsroom/brexit-white-paper>

<sup>25</sup> Michel Barnier (2017) ‘Europe Will Be Transparent and Fair in Brexit Talks’, *Financial Times*, 26 March 2017.

<sup>26</sup> See Jennifer Rankin (2017) ‘EU Insists Trade Deals Must Meet its Labour and Competition Standards’, *The Guardian*, 18 May 2017.

<sup>27</sup> Eric Bradner (2017) ‘Trump’s TPP Withdrawal: 5 Things to Know’, *CNN*, 23 January 2017 <http://edition.cnn.com/2017/01/23/politics/trump-tpp-things-to-know/index.html>

<sup>28</sup> The White House Office of the Press Secretary (2017) ‘Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement’, Press Release, 23 January 2017. Available at: <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>

<sup>29</sup> On EU trade policy, see Cornelia Woll (2007) ‘Leading the Dance? Power and Political Resources of Business Lobbyists’, *Journal of Public Policy*, 27: 1, pp. 57-78. On WTO policy see Liam Campling and Elizabeth Havice (2013) ‘Mainstreaming Environment and Development at the WTO? Fisheries Subsidies, the Politics of Rule-Making and the Elusive “Triple Win”’, *Environment and Planning A*, 45: 4, pp. 835-852.

Such a prioritisation seems more than possible in the UK, where Liam Fox, the Secretary of State for International Trade and recognised Eurosceptic, has sought to appease British businesses angered by Brexit by outlining a liberal free trade agenda. This has been narrowly focused on achieving market access and competitiveness for British multinational corporations overseas, and on persuading foreign multinationals to invest in the UK.<sup>30</sup> Fox has stated that the UK will “happily lead the charge for global free trade” in the belief that it creates more and better paid jobs, as long as governments provide “infrastructure and training and skills”, so as to “not leave people behind”.<sup>31</sup> Within this vision, trade policy-making is unencumbered by the need to directly consider workers’ interests because those interests are inevitably served by signing up to trade agreements. But there is an extensive academic literature, associated with a variety of theoretical perspectives, which challenges the idea that trade agreements uniformly and automatically drive up labour standards, even with accompanying supply-side labour reforms.<sup>32</sup> The tensions between labour rights and an ‘export first’ policy are also evident in Fox’s belief that deregulating the labour market is key to increased competitiveness in a global economy,<sup>33</sup> a call made by other senior Conservative politicians like Iain Duncan Smith and think-tanks like Open Europe.<sup>34</sup>

Neither is it clear how concerns about workers’ rights in the UK’s trade partners will play out in practice. For instance, it is unclear how the Trump administration will seek to ‘protect’ workers within trade agreements. Early indications of the ‘America First’ trade policy suggest

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<sup>30</sup> Liam Fox (2016) ‘Liam Fox’s Conference Speech’, Speech delivered at the Conservative Party Conference, Birmingham, 3 October 2016. Available at <http://blogs.spectator.co.uk/2016/10/full-text-liam-foxs-conference-speech/>

<sup>31</sup> Liam Fox (2016) ‘Liam Fox’s Free Trade Speech’, Speech delivered at the Manchester Town Hall, 29 September 2016. Available at: <https://www.gov.uk/government/speeches/liam-foxs-free-trade-speech>

<sup>32</sup> Layna Moseley and Saika Uno (2007) ‘Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labor Rights’, *Comparative Political Studies*, 40: 8, pp. 923-948; Nita Rudra (2005) ‘Are Workers in the Developing World Winners or Losers in the Current Era of Globalization?’, *Studies in Comparative International Development*, 40(3): 29-64; Giovanni Arrighi, Beverly J. Silver and Benjamin D. Brewer (2003) ‘Industrial Convergence and the Persistence of the North-South Divide’, *Studies in Comparative International Development*, 38: 1, pp. 3–31; Branko Milanovic (2003) ‘The Two Faces of Globalization: Against Globalization as We Know It’, *World Development*, 31(4): 667-683; Dani Rodrik (2007) *One Economics, Many Recipes: Globalization, Institutions and Economic Growth*, Oxford: Princeton University Press.

<sup>33</sup> BBC News (2012) ‘Budget 2012: Liam Fox Calls for Business Tax Cuts’, *BBC News*, 22 February 2012 <http://www.bbc.co.uk/news/uk-politics-17123137>

<sup>34</sup> See Gordon Rayner and Christopher Hope (2017) ‘Cut the Red Tape Chocking Britain after Brexit to Set the Country Free From the Shackles of Brussels’, *The Daily Telegraph*, 28 March 2017.

an emphasis on nationalist schemes intended to boost employment in manufacturing and construction – to be pursued via punitive measures against countries using ‘unfair’ export promotion policies – rather than an internationalist approach resting on the implementation of core labour standards or a class-based approach of empowering labour movements.<sup>35</sup> For the European Commission, as will be explored below, labour rights have not always been a priority issue when seeking to ensure trade partners comply with the commitments they have made in trade agreements, particularly where this might undermine other, offensive, commercial interests.<sup>36</sup>

The rest of this paper will therefore discuss the UK’s post-Brexit trade policy with a particular focus on its implications for labour rights in the UK and its trading partners. It will explore what kinds of commitments in UK trade agreements would indicate that labour rights are being taken seriously by the respective signatories. Our starting point for such an inquiry is to examine approaches that have been adopted in existing trade agreements, to understand the issues they seek to address, and to examine their effectiveness.

### **The EU and US Approaches to Labour Standards Provisions**

There is a long history of linkage between trade agreements and labour rights. Since the inception of the multilateral trading system in the mid-twentieth century there have been periodic attempts to have labour conditionality – often as part of a wider social clause – included within the General Agreement on Trade and Tariffs (GATT) and subsequently the World Trade Organization (WTO). This was the result of proposals put forward by the US and supported by various other developed countries, including some Member States within the EU. Both the US and the EU had also begun to link their *unilateral* trade preferences (known as Generalised System of Preferences, or GSP) to minimum labour standards from the 1980s onwards.<sup>37</sup>

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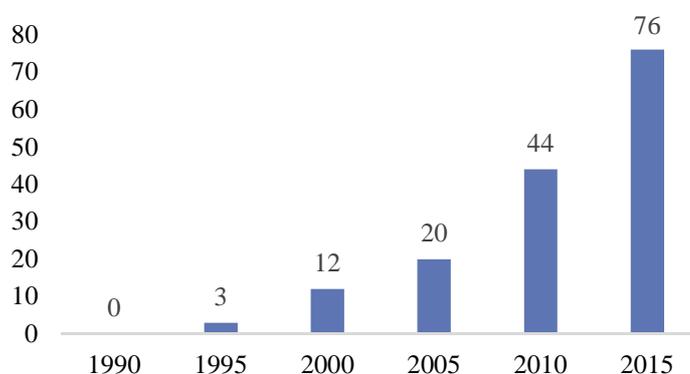
<sup>35</sup> United States Trade Representative (2017) ‘The President’s 2017 Trade Policy Agenda’. Available at: <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20I%20-%20The%20President%27s%20Trade%20Policy%20Agenda.pdf>

<sup>36</sup> See James Harrison *et al.* (2016) ‘Governing Labour Standards through Free Trade Agreements: Limits of the European Union’s Trade and Sustainable Development Chapters’, working paper available from authors.

<sup>37</sup> Brian Burgoon (2004) ‘The Rise and Stall of Labor Linkage in Globalization Politics’, *International Politics*, 41: 2, pp. 196-220.

This linkage became particularly prominent in the run up to the 1996 WTO Ministerial Conference in Singapore, where it became a major stumbling block for the trade negotiations as a whole. The so-called ‘Singapore Declaration’, produced as a result of that meeting, reflected reluctance by many countries towards allowing labour rights to be governed under the WTO and hostility towards the idea that failure to comply with labour rights specified in trade agreements could permit retaliation from other members.<sup>38</sup> However, the Singapore Declaration has not spelt the end of attempts to create linkage on this issue. Indeed, as has happened in relation to many other areas, as progress has been blocked in the WTO, there has been an upsurge in the negotiation of labour standards within *bilateral* trade agreements reaching 76 in total by the end of 2015 (see Figure 1). Collectively these agreements cover 107 national economies and represent 28% of all trade agreements notified to the WTO.<sup>39</sup>

FIGURE 1. Bilateral Trade Agreements with Labour Standards Provisions



Source: Authors based on International Labour Organisation (2016) *Handbook on Assessment of Labour Provisions in Trade and Investment Agreements*, Geneva: ILO, pp. 9-10.

Linking trade to labour rights has been criticised, considered by some as a form of disguised protectionism, especially towards ‘developing countries’, meaning those with lower

<sup>38</sup> Steve Hughes and Rorden Wilkinson 1999, ‘International Labour Standards and World Trade: No Role for the World Trade Organization?’, *New Political Economy*, 3: 3, pp. 375-389

<sup>39</sup> International Labour Organisation (2016) *Handbook on Assessment of Labour Provisions in Trade and Investment Agreements*, Geneva: ILO, p. 22.

levels of per capita income.<sup>40</sup> This stems from concerns that a ‘social clause’ would be used unfairly to sanction an entire country and thereby inhibit trade. However, there are many ways of using trade policy to support workers, some of which might obviate these concerns. For instance, Naila Kabeer’s feminist critique of the social clause is that it has focused only on formal ‘blue collar’ employment and dismisses – and risks diminishing – the relative economic benefits offered to women by export-oriented factory work in South Asia. In so doing, it also overlooks the inferior conditions that pertain in other occupations and employment statuses.<sup>41</sup> Yet she does not reject the idea of solidarity. Rather, her preference is for the international labour movement to (a) recognise the agency of workers to define their own goals, and (b) mobilise around those issues which prevent better forms of alternative employment emerging in poorer countries, e.g. by improving informal work and providing a statutory social floor, funded in part through North-South redistribution. As we go on to show, these are not necessarily incompatible with trade agreements, though must be seen in the context of the wider effects of the agreement on employment and development.<sup>42</sup>

The assumption that developing countries are necessarily opposed to a trade-labour linkage can also be misleading, as support among unions in the Global South has been found, though is often discounted because of the opposition expressed by their respective governments.<sup>43</sup> Finally, it is worth noting that references to ‘rights’ are not alien to trade agreements. The thirty chapters of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, for instance, contains over 100 mentions of the term ‘rights’, but used chiefly in relation to the rights of investors and patent holders, rather than labour.

In considering the options which are available to the UK in seeking to address labour rights through its trade agreements, it is useful to start by considering other recent experiences.

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<sup>40</sup> The economist Jagdish Bhagwati has been a persuasive proponent of this position.

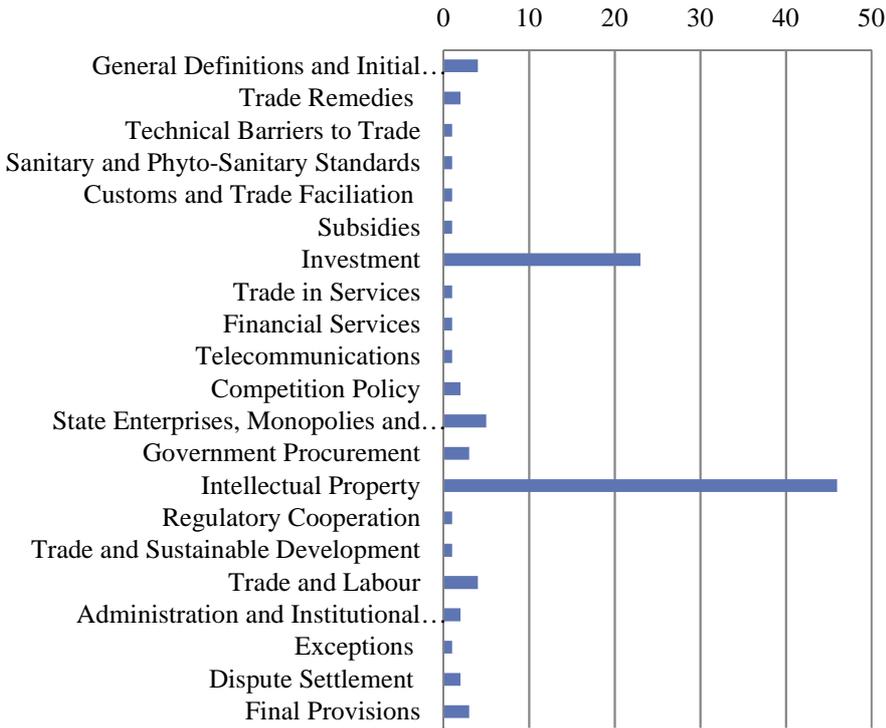
<sup>41</sup> Naila Kabeer (2004) ‘Globalization, Labor Standards, and Women’s Rights: Dilemmas of Collective (In)Action in an Interdependent World’, *Feminist Economics*, 10: 1, pp. 3-35.

<sup>42</sup> See John Hilary (2014) ‘European Trade Unions and Free Trade: Between International Solidarity and Perceived Self-Interest’, *Globalizations*, 11: 1, pp. 47-57.

<sup>43</sup> Gerard Griffin, Chris Nyland and Anne O’Rourke (2003) ‘Trade Unions and the Trade-Labour Rights Link: A North-South Union Divide?’, *International Journal of Comparative Labour Law and Industrial Relations*, 19: 4, pp. 469-494.

There are two approaches that dominate; those pursued by the EU and the US. We consider the EU approach first. There are two reasons why such a model would be an obvious default option for the UK government in its future trade agreements. First, the UK is currently subject to all of the obligations contained within EU trade agreements, including those on labour rights. So the EU’s model is one which the UK is accustomed to. Second, the first trade negotiation which the UK will have to embark upon will be its post-Brexit trade relationship with the EU, and the starting-point for EU negotiators is likely to be the chapter on Trade and Sustainable Development which it has utilised in all of its recent negotiations, including with countries with similar levels of development, such as Canada.

FIGURE 2. References to ‘Rights’ in Chapters of the CETA



Source: Authors.

We then move on to consider the US approach which in some respects is different to that of the EU, namely, in terms of the direct involvement of its labour ministry in the

implementation of the agreement,<sup>44</sup> in emphasising juridical mechanisms of enforcement, and in being more insistent on making trade preferences conditional on certain state reforms to labour law. As noted above, the new Trump Administration has indicated that it will pursue a very different approach to trade policy, adopting a more aggressive stance toward countries which appear to be encouraging the relocation of industrial production outside the US. However, it is worth bearing in mind that the inclusion of labour provisions in trade policy has been pursued by both Democrat *and* Republican administrations since the mid-1990s, gaining an increasing acceptance within the Office of the United States Trade Representative (USTR) and its Department of Labor giving a 20 year legacy for the incoming administration to inherit. Moreover, regardless of the US' future direction, its past approach remains useful in highlighting alternative ways of protecting and promoting labour rights.

### *The EU Approach*

Since the signature of the EU-Korea free trade agreement (FTA) in 2010, the EU's labour rights provisions have been packaged with rules around environmental protection in a 'Trade and Sustainable Development' (TSD) chapter. This has become a standard part of the EU 'template' it negotiates with third parties. Such chapters feature in finalised agreements with Canada, Colombia/Peru, Central America, Georgia, Moldova, Singapore, the Southern African Development Community, Ukraine and Vietnam. As of January 2017, they were also present in the negotiated texts with Ecuador, Tunisia and the USA.<sup>45</sup>

While there is some variation between the provisions in the different agreements, TSD chapters typically share three key elements. First, there are a common set of *substantive rights*, with most emphasis placed on the International Labour Organisation's (ILO) core labour standards. There is also reference in all agreements to the ILO's decent work agenda. Second, there are common *procedural commitments* including on dialogue and co-operation

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<sup>44</sup> The Directorate-General for Employment, Social Affairs and Inclusion is notable by its absence in the governance of trade-related labour provisions in the EU. Partly this is because in employment and social policy, the EU only has competence to provide arrangements within which EU member states must coordinate policy (unlike trade policy, where it has exclusive competence).

<sup>45</sup> Exceptions include the Economic Partnership Agreements with East African Community, with Economic Community of West African States, and with Central Africa, which are notable because they were negotiated over the same years as some of other agreements that do contain labour provisions.

(via the institutional structures mentioned below); transparency in introducing new labour standards measures domestically; monitoring and review of the sustainability impacts of the agreement; and a commitment to uphold levels of domestic protection in relation to labour rights. Third, there are the *institutional structures* which comprise committees of state/EU officials from the two parties that oversee the implementation of the chapter; a civil society mechanism that brings representatives of business, trade unions, NGOs and academia together in Domestic Advisory Groups, and facilitates international dialogue between these through a civil society forum; and, finally, a Panel of Experts that investigates complaints by the parties and passes non-binding recommendations on them.

TSD chapters were included primarily as a result of pressure from the European Parliament, supported by European NGOs and trade unions. But they are now presented as increasingly vital components of trade policy-making by the European Commission Directorate-General for Trade (the EU body with primary responsibility for trade policy), as EU strategy documents and the speeches of key Commission officials make clear.<sup>46</sup> Just as Theresa May has reflected upon widespread public concerns in the UK over the current global trading system, DG Trade, in its strategic plan for 2016-2020 recognises that trade policy has come under increased public and civil society scrutiny and that a key element of the response to this is ‘strong provisions [in FTAs] to promote the respect of labour rights’.<sup>47</sup>

For EU negotiators, obtaining agreement to TSD chapters from trade partners has at times been challenging, due to, *inter alia*, wariness about the nature of commitments on labour issues and hostility about the incorporation of civil society actors within the institutional structures of relevant trade agreements.<sup>48</sup> Also challenging, has been the *operationalisation* of institutional structures, and in particular the civil society mechanisms. The fact that TSD chapters exist, that they contain labour provisions, and that institutional mechanisms have at

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<sup>46</sup> European Commission (2016) *Strategic Plan 2016-2020*. Available at [http://ec.europa.eu/atwork/synthesis/amp/doc/trade\\_sp\\_2016-2020\\_en.pdf](http://ec.europa.eu/atwork/synthesis/amp/doc/trade_sp_2016-2020_en.pdf); Cecilia Malmström (2015) ‘Responsible Supply Chains: What’s the EU Doing?’, Speech at EU and Global Value Chains Conference, Amsterdam, Netherlands, 7 December 2015. Available at [http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc\\_154020.pdf](http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154020.pdf)

<sup>47</sup> European Commission, *ibid.*

<sup>48</sup> Harrison *et al*, *ibid.*

least been set up to support work in implementing them is therefore itself seen as something of a triumph.<sup>49</sup>

What is more debatable is the extent to which TSD chapters have had any positive impact on workers' rights in practice. A critical mass of studies (including our own) which have examined the effectiveness of the EU's approach by conducting interviews with key stakeholders and visiting the countries affected have presented a pessimistic picture.<sup>50</sup> Among the key findings are:

- government officials from trading partners do not appear to see the externally imposed TSD chapters as their responsibility;
- civil society mechanisms are seriously hampered by operational failings including inadequate resourcing, infrequency of meetings, and insufficient substantive discussions;
- there is reluctance by European Commission officials to commence formal 'complaint' procedures which appears symptomatic of the fact that such processes are of marginal importance within the institutional structures of the TSD chapter;
- efforts to monitor the 'sustainability' impacts of the agreement, including on workers have not been properly operationalised;
- governments have sought to weaken labour standards protection in two countries studied (Peru successfully and South Korea unsuccessfully) since the trade agreements came into force;
- despite the focus on co-operative activities, progress on labour issues in trade partners is not being stimulated in any systematic fashion by EU-funded projects.

More fundamentally, the EU's common formulation to TSD chapters appears ill-suited to dealing with the complexity of labour issues encountered within diverse trading partner

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<sup>49</sup> Harrison *et al*, *ibid*.

<sup>50</sup> See Harrison *et al*, *ibid*; Axel Marx, Brecht Lein and Nicolas Brando (2016) 'The Protection of Labour Rights in Trade Agreements: The Case of the EU-Colombia Agreement', *Journal of World Trade*, 50: 4, pp. 587-610; Franz Ebert (2016) 'Labour Provisions in EU Trade Agreements', *International Labour Review*, 155: 3, pp. 407-433; Jan Orbie and Lore Van den Putte (2016) Labour Rights in Peru and the EU Trade Agreement: Compliance with the Commitments under the Sustainable Development Chapter, OFSE Working Paper 58. Available at: <https://www.econstor.eu/handle/10419/145974> Lore Van den Putte (2015) 'Involving Civil Society in Social Clauses and the Decent Work Agenda', *Global Labour Journal*, 6: 2, pp. 221-235.

scenarios. The core ILO labour standards which are at the heart of the EU model are not the most pressing worker-related concern in all trading partners. For instance, trade-related unemployment in the Caribbean and poverty wages in Moldova have been bigger issues for workers in those locations. Conversely, in South Korea, where core labour standards are a concern, the government crackdown on trade unions in 2015-2016 calls into question the utility of an approach based on dialogue and cooperation.<sup>51</sup>

All of these issues suggest that deep reflection is needed about the intrinsic value of these provisions to tackling labour abuses in trading partners. The EU's primary reliance on dialogue and co-operation is perhaps understandable, given the concerns of developing countries going back to debates in the WTO. But there is little evidence that its approach has had any significant impacts on labour rights in trade partners. In addition, despite the formally reciprocal nature of the provisions, there is also no evidence that they have been operationalised in a way that considers labour issues *within* the EU at all.

Some of the EU's more recently negotiated agreements do contain some additional content beyond what is outlined above. Most relevant to the EU's future negotiations with the UK, the CETA contains additional substantive provisions (for instance on the health and safety of workers) and more detailed provisions on enforcement (referencing labour inspection and domestic legal remedy). But, as recognised by academics and trade unionists, overall, it is not a significant departure from the standard approach detailed above, and so is likely to be largely subject to the same limitations.<sup>52</sup>

For a select group of developing countries which have not signed a trade agreement with the EU, the GSP offers an alternative mechanism for addressing labour issues through the EU's trade policy making.<sup>53</sup> The EU's GSP+ scheme contains incentives in the form of trade

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<sup>51</sup> Harrison *et al.*, *ibid.*

<sup>52</sup> See Frances O'Grady (2017) 'A Canada-Style Trade Deal with the EU Will be Bad for Britain', *Huffington Post*, 10 February 2017; Franz Ebert (2017) 'The Comprehensive Economic and Trade Agreement (CETA): Are Existing Arrangements Sufficient to Prevent Adverse Effects on Labour Standards?', *International Journal of Comparative Labour Law and Industrial Relations*, 33: 2, pp. 295-329.

<sup>53</sup> GSP arrangements are permissible under the Enabling Clause of the WTO which allows for an exception to the Most Favoured Nation principle on the condition that they facilitate exports from developing countries without raising barriers to trade with others.

preferences for beneficiaries to address labour standards in both law and practice.<sup>54</sup> Introduced in 2005 and reformed in 2012 the GSP+ requires that countries have ratified and effectively implemented twenty-seven core international conventions, including the eight ILO Conventions pertaining to the core labour standards.

As of July 2017 there were 16 countries that had qualified for the reformed GSP+, the biggest beneficiaries in economic terms being Pakistan and Sri Lanka via their apparel and textile exports. In our research on the scheme we concluded that it has had a small but meaningful impact on the institutional and legislative frameworks governing labour rights.<sup>55</sup> The GSP+ process comprises legal reform ahead of entry, reporting and monitoring mechanisms, inter-state dialogue, civil society inclusion, and technical assistance projects. There is evidence to suggest that, collectively, these have encouraged revisions of labour law and improved ILO reporting in Mongolia, new provincial level labour law and enhanced governance arrangements in Pakistan, and revisions to labour law in the Philippines, among other countries. The GSP+ has also given leverage to domestic coalitions pushing for better labour rights and raised the profile of the core labour standards as human rights. This has played a part in the formation of a national strategy to eliminate child and bonded labour in Pakistan, and the ongoing struggles over freedom of association in the Philippine processed fish sector and Sri Lankan apparel sector. However, notes of caution are necessary. Reforms that have been introduced are not solely down to the influence of the GSP+. Domestic factors including changes in government, party political dynamics and pressure from workers' organisations have all played a more influential role, and to which the GSP+ processes have had to adjust accordingly. More importantly, the *implementation* of reformed and existing laws still leaves much to be desired. There are clearly limits to what monitoring and dialogue can

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<sup>54</sup> The EU operates three GSP schemes: (1) the standard or general GSP which offers reduced duties for circa 66% of all EU tariff lines for eligible developing countries; (2) the GSP+ which offers zero duties for essentially the same 66% tariff lines for those eligible developing countries which meet additional criteria related to sustainable development and good governance; and (3) the Everything But Arms scheme which offers zero duties and no quotas on all goods except arms and ammunition for all Least Developed Countries.

<sup>55</sup> Ben Richardson, James Harrison and Liam Campling (2017) 'Labour Rights in Export Processing Zones with a Focus on GSP+ Beneficiary Countries', Study for the Directorate-General for External Policies, forthcoming. On file with authors.

achieve, leaving some to critique the GSP+ in ways analogous to the EU's labour agenda in the TSD chapters.<sup>56</sup>

### *The US Approach*

Alongside the EU, the US has been the leading advocate of the inclusion of labour standards issues within its trade agreements. Indeed, the first bilateral trade agreement to include labour provisions – albeit in a side-agreement – was the 1994 North American Free Trade Agreement between the US, Canada and Mexico.<sup>57</sup> Since then every bilateral trade agreement signed by the US has included labour provisions, which now cover 19 countries, chiefly within the Americas.<sup>58</sup> Labour provisions have also become more central to its trade agreements, such that, from the 2004 FTAs with Chile and Singapore, they have been detailed in a dedicated 'Labor Chapter'.

Like the EU's TSD chapters, the US' labour chapters share similar features across agreements. In terms of *substantive standards* they include commitments to respect 'internationally recognised labor rights'. Unlike the EU, then, which has placed more emphasis on the rules of the ILO and the legal detail and supervisory mechanisms this implies, the US has put more weight on national governance and attended to a wider set of issues including minimum wages, hours of work and occupational health and safety, as well requiring parties to effectively enforce their own labour law.<sup>59</sup> This can undoubtedly be traced to the US'

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<sup>56</sup> Jeffrey Vogt (2015) 'A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized System of Preferences (GSP)', *International Journal of Comparative Labour Law and Industrial Relations*, 31 (3), pp. 285–304. Note: the EU has twice suspended beneficiaries of the GSP+ scheme for egregious labour rights violations (Burma/Myanmar and Belarus).

<sup>57</sup> The side-agreement was the North American Agreement on Labor Cooperation (NAALC). Parties undertook commitments with regard to 11 labour principles, though only some of these could be the subject of dispute settlement, namely, the obligation to effectively enforce national occupational safety and health, child labour and minimum wage standards.

<sup>58</sup> In alphabetical order these are with Australia, Bahrain, CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua), Chile, Colombia, Jordan, Republic of Korea, NAFTA (Canada, Mexico), Morocco, Oman, Panama, Peru and Singapore.

<sup>59</sup> However, in the US, a more narrowly defined group of workers is covered by the right to organise than in the ILO Convention No. 87 definition. Also the rights for selecting a bargaining representative and for establishing and joining unions are broader in the ILO convention than in US law. Only 36 states and Washington DC clearly permit some public employee collective representation, with some others explicitly prohibiting it. Ferdi De Ville, Jan Orbie and Lore Van den Putte (2016) 'TTIP and Labour Standards', Study for the European Parliament's Committee on Employment and Social Affairs, IP/A/EMPL/2015-07, June 2016.

reluctant engagement with the ILO and its international system of labour law; domestically, the US has still only ratified two of the eight fundamental Conventions. In terms of *procedural commitments* the labour chapters seek to ensure that signatory states provide access to domestic legal remedy for possible violations of labour law. And in terms of *institutional structures* they mandate a Labor Affairs Council comprised of high-level representatives of the parties,<sup>60</sup> a Labor Cooperation Mechanism to promote joint activities by state officials, and encourage each party to establish a National Labor Advisory Committee comprised of civil society actors to give advice on implementation.

As noted above, arguably the most significant difference between the EU and the US has been their methods of enforcement, and it is in this respect that commentators have identified some impacts of the US approach that go beyond what has been achieved by the EU. Compared to the EU, the US has been more insistent that certain changes are made to labour law in its prospective FTA partner prior to the agreement being signed; a practice known as *pre-ratification conditionality*. In FTAs with Bahrain (entered into force 2006), Morocco (2006) and Oman (2009) for instance, the US demanded that statutory restrictions on freedom of association be reformed, while in FTAs with Peru (2009) and Colombia (2012) more specific labour law reforms were undertaken, focusing on the enforcement framework.<sup>61</sup> In the US-Cambodia Textile Agreement (1999), a bespoke bilateral agreement focused on the garment sector, the US also used an incentive-based rather than sanctions-based approach, gradually increasing its quota allowance to Cambodia on the condition that factories being monitored by the ILO complied with internationally recognised labour standards. It must be acknowledged that such conditions are no guarantee of improvements to labour rights. For instance, evaluations of labour reforms actually carried out in Peru and Colombia found that progress was very limited.<sup>62</sup> Furthermore, advances in some areas of law may be outweighed

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<sup>60</sup> The Labour Affairs Council meets in an open session with the public within the first year after the entry into force of the agreement and sporadically thereafter. De Ville *et al.*, *ibid*.

<sup>61</sup> The USTR sought a similar form of pre-ratification conditionality as part of the TPP negotiations, highlighting the need for countries like Vietnam to recognise trade unions and respect their collective bargaining rights. See United States Trade Representative (2015) *The President's Trade Agenda*. Washington D.C.: USTR. Available at: <https://ustr.gov/sites/default/files/President%27s%20Trade%20Agenda%20for%20Print%20FINAL.pdf>

<sup>62</sup> Jeffrey Vogt (2015) 'The Evolution of Labor Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership', *Journal of International Economic Law*, 18, pp. 827–860.

by regression in others, or legal minimums (e.g. on wages) may remain materially insufficient.<sup>63</sup> Nevertheless, there is evidence to suggest that these measures have supported domestic pressure for change in certain countries, and are considered one of the strongest forms of leverage that trading partners have exerted over labour rights.<sup>64</sup>

Once an agreement has come into force, *post-ratification conditionality* comes into play. This refers to the use of trade-related economic sanctions in the event that certain provisions, in this case on labour rights, are systematically violated. As discussed above, the EU has dispute settlement procedure for labour provisions but this is of marginal importance not least because relevant officials remain reluctant to utilise it. In principle, the US has a much stronger dispute settlement process,<sup>65</sup> and in practice, to a degree, has been more willing to use it. For instance, it has a more open system for receiving and responding to complaints about the violation of labour provisions.<sup>66</sup> Such complaints have been raised by transnational alliances of trade unions and labour NGOs in the US and its trading partners, and have led the US Department of Labor to formally investigate disputes in seven countries to date, resulting in government-level action plans.<sup>67</sup> One of these, concerning the failure of Guatemala to effectively enforce its own labour law, has since been taken to arbitration under

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<sup>63</sup> On the limits of the US-Cambodia Textile Agreement, see International Human Rights and Conflict Resolution Clinic & Worker Rights Consortium (2013) *Monitoring in the Dark: An Evaluation of the International Labour Organization's Better Factories Cambodia Monitoring and Reporting Programme*. Available at: <https://humanrightsclinic.law.stanford.edu/wp-content/uploads/2013/03/Monitoring-in-the-Dark-Stanford-WRC.pdf>

<sup>64</sup> ILO and International Institute for Labour Studies (2015) *Social Dimensions of Free Trade Agreements*. Geneva: ILO.

<sup>65</sup> In US FTAs complaints around labour provisions are covered by the same chapter on dispute settlement as those concerning other provisions of the trade agreement, though the exact procedures and penalties for non-compliance can differ. For instance, in the US-DR-CAFTA FTA, there is a cap of \$15m compensation that can be imposed for non-implementation of labour laws and environmental laws, whereas for non-implementation of other rules the penalty that can be imposed is unrestricted.

<sup>66</sup> To be considered, the allegations must raise issues relevant to the labour provisions in the NAALC or FTA and illustrate a country's failure to comply with its obligations. If the submission meets these criteria, the US Office of Trade and Labor Affairs (OTLA) will accept the submission for review. OTLA then conducts the review and issues a public report on its findings generally within six months of accepting the submission. Depending on the outcome of the review, OTLA may recommend further actions, including that the US request Consultations with the other country. If Consultations fail to resolve the issue(s), FTA dispute settlement procedures may be invoked under certain circumstances. The procedures and remedies vary depending on the particular FTA, and the NAALC limits which labour issues can be taken to dispute settlement.

<sup>67</sup> These are Bahrain, Colombia, Dominican Republic, Guatemala, Honduras, Mexico and Peru. See US Bureau of International Labor Affairs (no date) Submissions under Labor Provisions of Free Trade Agreements webpage. Available at: <https://www.dol.gov/agencies/ilab/our-work/trade/fta-submissions>

the DR-CAFTA agreement; the first labour case ever submitted to an FTA dispute settlement panel. In its GSP schemes meanwhile, the US has organised public hearings around labour provisions as part of its eligibility review procedures, and has in recent years suspended preferences to Bangladesh in 2013 and Swaziland in 2014 for failing to respect workers' rights.<sup>68</sup>

However, as with pre-ratification conditionality, the effects of these interventions should not be overstated. Agreed action plans are not always followed, the Guatemala case under the DR-CAFTA remains unresolved at the panel level, and the suspension of Bangladesh is largely symbolic given that the country's main export, apparel, is not included in the list of duty-free products under the US' GSP scheme. As suggested by practitioners who have engaged with the labour provisions of US trade policy, the effectiveness of its post-ratification conditions lies in the extent to which they have "created space for sustained legal work", allowing transnational labour coalitions to pressure government officials to improve and implement national systems of labour law both outside *and inside* the US.<sup>69</sup>

#### *Labour Standards in the EU-US Transatlantic Trade and Investment Partnership (TTIP)*

Despite the differences highlighted above, there is arguably more that unites than divides the EU and US on their approaches to labour provisions in trade agreements. Both refer centrally to the 1998 ILO Declaration on Fundamental Principles and Rights at Work and elaborate commitments around core labour standards,<sup>70</sup> both seek to prevent a weakening of labour law to attract investment and increase exports (the 'race to the bottom'), both seek to involve civil society in the negotiation and monitoring of provisions, and both establish dispute

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<sup>68</sup> United States Trade Representative (2015) 'USTR Uses Trade Preference Programs to Advance Worker Rights', Press Release, November 2015. Available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/november/ustr-uses-trade-preference>

<sup>69</sup> One public hearing brought under the NAFTA concerned Mexican workers on apple farms in Washington state, US. This was one of more than forty complaints and cases that have arisen under the NAFTA labour accord. See Lance Compa (2014) 'Re-Planting a Field: International Labour Law for the Twenty-First Century', Inaugural Lecture, Leiden Law School, the Netherlands, 13 October 2014. Available at: <http://media.leidenuniv.nl/legacy/inaugural-talk-leiden-october-13.pdf>

<sup>70</sup> Although there is an important debate about the legal effects of referencing only the ILO Declaration, as opposed to directly referencing the ILO Conventions in the text of trade agreements. On this see J. Agustí-Panareda, Franz Ebert and Desiree LeClercq (2014) *Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System*, ILO Background Paper, March 2014.

settlement procedures involving inter-governmental dialogue and expert panels (although methods of enforcement do differ). This overlap is reflected in the negotiations over the proposed EU-US TTIP, in which labour provisions appear to have been one of the least contentious aspects, at least as far as relations between DG Trade and the USTR are concerned.<sup>71</sup>

The most recent textual proposal from DG Trade for the TSD chapter, tabled for discussion with the US in the October 2015 negotiating round, built on these shared principles. However, it developed the EU 'template' in two key respects. First, it sought to advance workers' rights beyond the territories of the respective parties, framing the chapter as part of a "global approach to trade and sustainable development" and requiring the parties to "promote worldwide" the implementation of core labour standards.<sup>72</sup> Second, and related to this, the proposed text made greater reference to soft law instruments like corporate social responsibility and voluntary sustainability assurance schemes, consonant with its aim for "cooperation on the promotion of decent work in *global* supply chains".<sup>73</sup> For its part, the USTR appeared to have endorsed this attempt to cement a common set of global rules through a mix of inter-state and inter-firm policy diffusion, stating that the levels of protection currently afforded to workers in the EU and US should be reflected in TTIP, "which may become a model for others to follow, and encourage even greater transatlantic cooperation".<sup>74</sup>

This shift in focus towards seeing *bilateral* trade agreements as mechanisms for tackling labour issues in *global* supply chains is reflected in other aspects of EU trade policy-making. EU Trade Commissioner Malmström has suggested that TSD chapters are ways of making global supply chains 'more responsible'.<sup>75</sup> Indeed, one important focus of recent discussions

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<sup>71</sup> A leaked March 2016 update by the EU on the 'tactical state of play' noted that "the discussions [on TSD] took place in a constructive atmosphere" and did not highlight any major disagreements around labour provisions. That said, one point of contention, could be the EU provision asking the US to "continue to make sustained efforts towards ratifying the fundamental ILO Conventions and their Protocols". See <https://ttip-leaks.org/ttip/tactical-state-of-play/>

<sup>72</sup> DG Trade (2015) 'EU Textual Proposal: Trade and Sustainable Development', EU-US TTIP Negotiations, 6 November 2015. Available at: [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153923.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf)

<sup>73</sup> *Ibid.*

<sup>74</sup> USTR (no date) 'T-TIP Issue-by-Issue Information Center: Labor', USTR webpage. Available at: <https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-ttip/t-tip-8>

<sup>75</sup> Malmström, *ibid.*

within the institutional mechanisms of the Korea-EU TSD chapter has been on corporate social responsibility efforts by multinational companies and governance initiatives to support such efforts.<sup>76</sup> These developments propose a recasting of trade agreements as mechanisms for tackling global labour problems, including modern slavery. But there is much evidence pointing to the gaps and limits that come from relying on corporations to voluntarily regulate labour conditions in suppliers that they may not even have direct contractual relations with.<sup>77</sup> The danger for labour governance in FTAs generally, and UK trade agreements in particular, is that labour standards provisions become purely promotional mechanisms for doing good elsewhere at the discretion of the signatories, and not mechanisms for holding governments to account for the laws they enact and the way they enforce them.

### **Rethinking Labour Rights for UK Trade Policy**

Lessons from recent EU and US efforts, culminating in their joint negotiations over TTIP, suggest that careful scrutiny is needed of labour standards provisions in international trade agreements. Both the existing EU and US models have limitations which mean that, if adopted within UK trade agreements, they will not have the transformational effect on trade policy-making which the post-Brexit policy agenda advanced by the May government would demand. If the rhetoric of UK politicians is to be translated into the reality of meaningful efforts to address labour issues in the UK, in its trading partners and in the wider global economy, then we must consider very carefully what it is possible (as well as *not* possible) to achieve through trade policy, and what approaches are best suited to addressing those goals.

Below we explore three separate but related aims that UK trade agreements might reasonably seek to pursue, in light of the political issues discussed in section 2 and experience of existing approaches to labour standards protection set out in section 3. These are to protect, promote and empower a labour rights agenda.

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<sup>76</sup> A half day workshop on corporate social responsibility was organised within the framework of the South Korea – EU February 2017 Civil Society Forum. See <http://www.eesc.europa.eu/?i=portal.en.events-and-activities-eu-korea-fta-05-workshop>

<sup>77</sup> *Development and Change* (2008) 'Debate: Governing Capital? Corporate Social Responsibility and the Limits of Regulation', *Development and Change*, 39: 6, pp. 945-1078; Don Wells (2007) 'Too Weak for the Job: Corporate Codes of Conduct, Non-Governmental Organizations and the Regulation of International Labour Standards', *Global Social Policy*, 7: 1, pp. 51-74.

## *Protect*

Trade agreements should, at a minimum, be seeking to *protect* labour rights so that there is no erosion of rights below existing levels. There are two key aspects to the protect agenda. First, to what extent can trade agreements be a mechanism for ‘locking in’ existing levels of protection of labour standards within trade partners? Most relevant to current policy debates is whether UK trade agreements can provide meaningful assurances that the UK government upholds key labour rights and does not attempt to use lower protections for workers as a basis for competition with its EU counterparts? Similar assurances could also be given by the UK and its other trade partners in subsequent trade deals.

As discussed above, all EU and US trade agreements contain provisions which seek to prevent a weakening of labour law to attract investment and increase exports. But neither EU nor US provisions provide *robust* safeguards against the lowering of labour protections. Strengthening such provisions requires a consideration of the formulation of the provisions themselves and the way in which potential violations are investigated and enforced.

In terms of the formulation of provisions, it is crucial that, at a minimum, provisions are clearly constructed so that an ‘effects’ test rather than an ‘intention’ test is the way of determining when a violation has occurred. Proving that labour laws have been weakened *in order to* encourage trade and investment is fraught with difficulty. Simply looking at the *effects* of erosions of labour rights makes violations considerably easier to prove (although even then the nature of the effects test utilised can be more or less stringent).<sup>78</sup> A maximalist approach might not make reference to trade effects at all, and simply prohibit trade partners from reducing labour protections even if there is no (potential) impact on trade between them.

As with any of the other labour-related provisions, the effectiveness of these safeguard provisions depends on the creation of rigorous systems for effective investigation of potential violations. Depending on the legal test adopted (intention, effects, no linkage) then causality issues will be more or less complex in proving a violation, and so, as a result, will be the

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<sup>78</sup> More or less stringent requirements to prove effects are possible. For instance, see the arguments of Guatemala and the US in *Comments of Guatemala to the United States’ Supplementary Written Submission and Responses to the Panel’s Questions*, 1 July 2015, para 40f. Available at: [https://ustr.gov/sites/default/files/files/Issue\\_Areas/Labor/Comments%20of%20Guatemala%20July%201.pdf](https://ustr.gov/sites/default/files/files/Issue_Areas/Labor/Comments%20of%20Guatemala%20July%201.pdf)

complexity of the investigatory process required to identify potential violations. Resources should be tailored accordingly, but the independence of the investigatory process is always vital. For example, the UK Department for International Trade would not be in a position to act as the independent authority for the investigation of any alleged violation because it has a parallel institutional remit to implement other (potentially conflicting) areas of trade agreements.

In terms of enforcement of the obligations where a potential violation has been found, a mechanism of resolving disputes is needed that acts as a clear deterrent against violations. Neither the EU's weak form of dispute settlement which it is unwilling to utilise, nor the US's stronger system which has had limited effects on the behaviour of recalcitrant trading partners, appears sufficient to act as such a deterrent. Careful thought is required as to the construction of a model which makes commitments meaningful. Important factors that determine the strength of the dispute settlement process include who can invoke it, who participates in the process, and what the corrective actions and/or penalties are when a violation is proved. In the absence of provisions that appear actionable through a credible enforcement mechanism, the unilateral (and breakable) promise of the UK government not to weaken labour law will not be translated into a meaningful bilateral commitment.<sup>79</sup>

A second aspect of the 'protect' principle is the degree to which there is assurance that the trade agreements which the UK signs do not *themselves* lead to an erosion of labour rights and working conditions in the UK as well as in its trading partners. Here the standard approach is to rely on monitoring of the impacts of trade agreements. But as identified above, the EU model for monitoring the sustainability (including labour) impacts of its trade agreements has lacked robustness, with a failure to clearly identify methodologies for how monitoring should take place, insufficient funding provided for monitoring activity and an over-reliance on civil society mechanisms that look ill-equipped to play such a role. If monitoring is to play a significant *protection* role, it must be taken more seriously, and mechanisms must also be identified for effectively addressing issues that are identified through the monitoring process.

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<sup>79</sup> This is why an agency that is independent of the UK government would be necessary to monitor implementation of labour standards commitments in order to take wider political dynamics out of the enforcement process.

Even with an optimally functioning monitoring system, causal relationships are often difficult to prove. Workers can be negatively affected as the result of the congruence of a number of international and domestic circumstances (changing trading relationships, technological advancements, changes in governments etc.). Pinning responsibility to the trade agreement can, in many instances, amount to an almost impossible task. Effective protection cannot therefore only be based on monitoring and *responsive* action. Instead there is a need to think about the construction of the trade agreement itself, and to ensure that it contains *advance* protections against the erosion of rights.

Such protections should include provisions that provide governments the defensive policy space to protect the rights of workers without fear of breaching other obligations in the agreements, including, for instance, ‘right to regulate’ provisions and detailed ‘exception clauses’ (it is interesting to note in this context that the national security exemptions in relation to WTO agreements such as the General Agreement on Trade and Services are much stronger than those which protect other public interests). Alongside this, provisions could also be included which temporarily suspend aspects of the trade agreement, pending further investigation, if a case can be made that trade reforms are connected to labour abuses, e.g. that tariff reductions have led to the exploitation of migrant labour in a rapidly growing export industry.

There is also a value in thinking beyond the traditional state-state paradigm of trade agreements, where willingness to take action on labour issues can be undermined by broader economic and political interests. Consideration should therefore be given to mechanisms that apply directly to the companies who are the beneficiaries of the new trading relationships created by trade agreements, not least because approximately 80% of all international trade occurs within global value chains co-ordinated by multinational companies.<sup>80</sup> For instance, there could be an independent monitoring and review body which examines the behaviour of

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<sup>80</sup> United Nations Conference on Trade and Development (2013) *World Investment Report 2013*, Geneva: UN, p. 10.

‘systemically important’ companies and brings actions against those found in breach of rights specified in the trade agreement.<sup>81</sup>

Alongside added protections, consideration should also be given to *the exclusion of provisions* that threaten the rights of workers. For instance, careful scrutiny is required of investment protection provisions which allow international arbitrators, who lack knowledge and understanding of labour issues, to make decisions which can have serious direct and indirect impacts on the rights which workers enjoy. A case brought under a bilateral investment treaty signed by France and Egypt, widely cited by opponents to introducing similar dispute settlement systems into trade agreements, involved the French waste management company Veolia suing the city government of Alexandria for increasing the minimum wage and not paying the company compensation, as purportedly set out in the contract terms.<sup>82</sup>

### *Promote*

Efforts to promote labour rights through UK trade agreements beyond their existing levels, thus embarking on a climb to the top rather than race to the bottom, need to be informed by both reflection on past experience and realism about future prospects. Provisions for enhancing the rights of workers within EU and US trade agreements are currently limited to specific Trade and Sustainable Development and Labor chapters respectively. These chapters have had limited impacts in terms of improving workers’ rights in trading partners. Furthermore, even though such chapters are formally reciprocal in nature, in practice they tend not to focus attention on labour issues *within* the EU or US.

In the context of an EU-UK trade agreement, an obvious mechanism for the UK not just to protect labour rights but promote them too would be to sign an agreement that ‘tracks and translates’ improvements in EU law into UK law. Again, this could potentially transform a unilateral promise into a binding commitment. Beyond this approach, and certainly beyond

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<sup>81</sup> Making this recommendation see Vogt, ‘The Evolution of Labor Rights and Trade’; and Michael Rawling (2015) ‘Legislative Regulation of Global Value Chains to Protect Workers: A Preliminary Assessment’, *The Economic and Labour Relations Review*, 26: 4, pp. 660-677.

<sup>82</sup> Magnus Nilsson (2015) ‘Frihandelsbloggen Demystifies ISDS Case’, Alliance for Responsible Commerce, 6 May 2015. Available at: <http://arc.trade/en/article/frihandelsbloggen-demystifies-isds-case>

this agreement, the UK could adopt two complimentary approaches. First, the UK's trade agreements could include chapters which contain labour provisions, but make them more effective at dealing with labour issues in *both* signatories to the agreement (the UK and the relevant trading partner). Second, opportunities within the rest of the trade agreement could be identified which could be utilised to positively impact on workers' rights.

In terms of specific labour chapters, one of the key limitations of the EU and US approaches is that they operate according to 'templates' which are modified only slightly for individual trade agreements. Labour chapters in UK trade agreements could be individually negotiated (1) to target specifically the labour issues of particular concern in each trading partner, and (2) to create the political, financial and legal mechanisms most likely to be effective in bringing about change, given the nature of the broader political relationships between the trading partners. Here, the US-Cambodia Textile Agreement provides insight in terms of an agreement with a clear 'roadmap' for change, tied to specific economic incentives to take action.<sup>83</sup> Imaginative use of pre-ratification conditionality should also be considered as should a more ambitious set of labour standards which move beyond the internationally-agreed minimum (i.e. the ILO's core labour standards) and focuses on the labour issues that are of greatest concern in any particular trading partner. For instance in the UK, this might lead to a focus, *inter alia*, on the rights of migrant workers and on the problems associated with precarious work.

Vital to the credibility of such a bespoke negotiating model would be the central engagement of civil society and labour actors, as discussed below, otherwise there would be concern that trade negotiators would use the lack of constraint provided by a template model to trade-off labour rights protection for commercial interests – something we have identified in our own research.<sup>84</sup> Moreover, labour issues should not simply be ghettoised within specific chapters, and forgotten within the rest of the agreement. Instead, it should be possible to look at the entire agreement through a 'workers' lens' and attempt to negotiate the agreement with a view to enhancing labour rights in both parties as much as to enhancing business

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<sup>83</sup> See Don Wells (2006) "Best Practice" in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement', *Comparative Labor Law & Policy Journal*, 27: 3, pp. 357, 2006

<sup>84</sup> Harrison *et al.*, *ibid.*

opportunities. Such an approach would seem fitting to the reality of a modern trade agreement, which is as much concerned with reconstituting the regulatory environment through which commercial activity takes place (creating rules on competition, sanitary standards, intellectual property etc.) than it is about reducing tariffs between trading partners. It is certainly possible to consider the rights and interests of workers in this reshaping process – a ‘deep and comprehensive’<sup>85</sup> treatment rather than treating them as a side issue in their own discrete (and largely ineffectual) chapter.

This ‘mainstreaming’ approach could target all kinds of provisions within trade agreements. For instance, the creation of differentiated tariff rates and/or more relaxed rules of origin for companies that demonstrate they have enhanced labour rights protection of particular types; competition rules which specified that abuses of labour rights would amount to actionable subsidies; a negative list of prohibited labour abuses, perhaps using ILO reporting measures as a trigger, which could be assessed as ‘conferring a benefit’ in terms of the Agreement on Subsidies and Countervailing Measures<sup>86</sup>; and provisions which specify that export credit licenses and other forms of support will only be granted to companies if they demonstrate compliance with certain labour rights.<sup>87</sup>

### *Empower*

Finally trade agreements could be mechanism for empowering those who represent workers and/or campaign on behalf of workers’ rights. Both EU and US trade agreements engage civil society (including trade union actors) in the negotiation and implementation of trade agreements. But, as noted above, the EU approach has been criticised for failing to give civil society a meaningful role. The US model, and in particular its complaints process, which allows interested organisations to bring complaints and the US Department of Labor to review

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<sup>85</sup> Such language mimics that of the EU’s ‘Deep and Comprehensive Free Trade Areas’ which are demanding in introducing obligations for regulatory changes to trading partners.

<sup>86</sup> A negative list is one of the mechanisms suggested in the Negotiating Group on Rules debates on fisheries subsidies at the WTO. See Campling and Havice, *ibid*.

<sup>87</sup> This could build upon existing commitments the UK government has made to the Equator Principles for environmental and social risk management. See Equator Principles (2016) ‘UK Export Finance adopts Equator Principles’, Press Release, 31 March 2016. Available at: <http://www.equator-principles.com/index.php/all-adoption/adoption-news-by-year/106-2016/498-ukef>

and receive submissions, allocates a more significant role to trade unions and other labour advocates (albeit with the caveat noted above about the overall effectiveness of the complaints' process). But overall, much more could be done.

The fact that the UK has been without trade-policy making power for so many years means that no detailed consideration has gone into how appropriate participatory mechanisms should be created in relation to trade policy. In terms of parliamentary process, the Constitutional Reform and Governance Act 2010 currently limits even the input of MPs in relation to the negotiation and ratification of international treaties, which needs to be rectified.<sup>88</sup> In terms of the wider policy making process, trade unions and other civil society actors representing and campaigning on behalf of workers' rights could be empowered to meaningfully participate throughout the negotiation and implementation of future trade agreements. As noted above, such organisations should play a significant role if bespoke labour chapters are to be negotiated with individual trade partners, and they could also bring credibility to the negotiation of the remainder of the agreement, making sure it is done with a view to enhancing rather than undermining workers' rights. In terms of implementation, they should be able to raise concerns where (1) the trade agreement itself is negatively affecting workers' rights and (2) labour commitments made within the trade agreement are being violated. This would then need to prompt an independent investigation of the issues raised.

But empowerment should not be limited to the institutional structures of the trade agreement itself, particularly in the context of the UK's limited power to effect change in third countries with regard to labour rights. There should also be a focus on using the trade agreement to empower other international labour rights initiatives which are tackling workers' rights in global supply chains (an approach with more progressive potential than calling upon companies to act, often voluntarily, through CSR processes).<sup>89</sup> Some of the most promising initiatives are tailored specifically to tackle abuses in particular supply chains (for instance

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<sup>88</sup> Arabella Lang (2017) 'Parliament's Role in Ratifying Treaties', House of Commons Library, Briefing Paper Number 5855, 17 February 2017, p.13.

<sup>89</sup> Such initiatives include bottom-up monitoring approaches characterized by complaint systems open to workers and local stakeholders. However, lessons must be learnt from complaint mechanisms in *private* governance systems, which have struggled to ensure effective compliance. See Axel Marx and Jan Wouters (2016) 'Redesigning Enforcement in Private Labour Regulation: Will it Work?', *International Labour Review*, 155: 3, pp. 435-459.

Electronics Watch, the Clean Clothes Campaign etc.) and could be supported through trade regulation mandating transnational forms of corporate accountability. As such, the nature of the goods and services being traded between the parties may well dictate the initiatives that each individual trade agreement is best suited to support.

One of the most promising attempts to overcome labour abuses and enhance working conditions in global supply chains is the Worker-driven Social Responsibility (WSR) approach which has emerged in parts of the USA to deal with labour abuses affecting farmworkers.<sup>90</sup> The WSR approach is based around five key principles:

1. the establishment of industry-specific codes of conduct initiated around the interests of workers;
2. regular and comprehensive auditing by independent monitors (rather than the often light-touch audit approach of CSR);
3. worker-to-worker education and complaint resolution systems which are constantly available to workers (i.e. a form of worker auditing);
4. market consequences for buyer and supplier firm non-compliance, with immediate remediation of issues coming forward; and
5. the requirement that lead firms meet the economic necessities in their contracts with suppliers (e.g. avoiding 'poverty pay') as well as the human resources infrastructure to underpin deep monitoring.

The WSR approach could be integrated into labour provisions in trade agreements as a way of ensuring "deep and comprehensive" protection and enhancement of workers' rights in global supply chains. It would also enable a closer institutional integration of supply-chain monitoring mechanisms with the agenda of ensuring the fairness of global economic integration pursued by international trade agreements.

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<sup>90</sup> The WSR agenda arose out of the Fair Food Campaign spearheaded by the Florida Coalition of Immokalee Workers that sought to establish a new paradigm for labour rights monitoring, one which is "designed, monitored, and enforced *by the very workers whose rights it is intended to protect*". See National Economic and Social Rights Initiative (no date) 'Worker-Driven Social Responsibility', NESRI webpage. Available at: <https://www.nesri.org/initiatives/worker-driven-social-responsibility>

## Conclusion

The post-Brexit trade agreements which the UK signs will, for better or worse, have significant impacts on the lives of workers in the UK and its trading partners. At the moment, the political rhetoric suggests that the concerns of workers *could* be taken seriously in these future trade deals. But this paper has highlighted the serious dangers that rhetoric will not become reality. If UK trade agreements are to include meaningful commitments on labour rights for workers in the UK, its trade partners and in global supply chains, then the bar must be set much higher than the approach in current EU and US agreements. ‘Protect, promote, empower’ provides three principles to guide assessment of the multifaceted ways in which trade agreements might engage with labour rights, and the various policy mechanisms for realising them. As the UK’s trade policy-making process takes shape over the next few years, we believe that an internationalist labour rights agenda should be deeply embedded within it, that the possibilities for progressive action we have set out above are fully explored, and that an overarching trade policy is created which enhances rather than erodes the quality of employment in the UK and beyond.

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