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The EU-UK Trade and Cooperation Agreement and workers' rights

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Policy implications

- The EU-UK TCA goes beyond the diluted, and at times tokenistic, protection of multilateral labour standards contained in the other FTAs concluded by the EU, e.g. with countries like Canada or South Korea.
- However, the few additional labour clauses it contains, and the overall weak supervision and dispute resolution procedures applying to them, offer an unsatisfactory regulatory framework, one that is unlikely to deter future UK Government from eroding present-day standards.
- The implementation of the labour provisions in the TCA will require close monitoring in the years to come and should become one of the priorities of the five-year review catered for by Article FINPROV.3.

Introduction

The EU-UK Trade and Cooperation Agreement (hereinafter 'TCA') mentions labour and social standards in a number of its Parts, Titles, Chapters, and Articles,[1] from its provisions on social security coordination (Part 2, Heading 4) to the (limited) provisions on public procurement (Part 1, Heading 1, Title VI). But the main focus of this brief is on the substantive and procedural provisions introduced to guarantee what the TCA's preamble describes as a 'level playing field for open and fair competition and sustainable development, through … a commitment to … high levels of protection in the areas of labour and social standards'.

The TCA ostensibly seeks to achieve this aim by means of three sets of provisions contained in Part 2, Heading 1, Title XI of the Treaty, aptly named 'Level playing field for open and fair competition and sustainable development'. We refer below only to the Chapter numbers of these provisions since all are found in the same Part of the TCA:

- a non-regression clause (in Chapter 6);
- the promotion of a number of 'multilateral labour standards' (in Chapter 8); and
- a dedicated dispute settlement and enforcement process (in Chapter 9), which also includes a 'rebalancing procedure' in case of future 'significant divergences'.

While some of these provisions replicate similar clauses present in other FTAs, the 'rebalancing procedure' of Article 9.4 is quite specific to this TCA.

1 The TCA adopts the convention that each Article is prefixed by the Chapter number. We have added the Paragraph number as the second decimal place. So the third Paragraph of the first Article of Chapter 6 is referred to as Article 6.1.3.

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Before addressing these matters, it should be emphasised that so far as labour standards are concerned, the TCA excludes any requirement for 'dynamic alignment' between future UK law and future EU labour standards whether established by EU treaty or legislation, or by the jurisprudence of the Court of Justice of the EU.

Chapter 6: Non-regression

Chapter 6, the Treaty's 'non-regression' in labour matters chapter, is riddled with limitations and contradictions. First the scope of the chapter's key non-regression clause, Article 6.2, is limited to 'labour and social levels of protection' defined by Article 6.1 as 'the levels of protection provided *overall* in a Party's law and standards' (emphasis added, also for the following quotations), in a number of specific but restricted areas: fundamental rights at work; OHS; fair working and employment standards; information and consultation; and business restructuring.

Secondly, the commitment to non-regression on these limited matters is prefaced in Article 6.2.1 by a clause which seems designed deliberately to increase each party's discretion. It thus categorically affirms 'the right of each Party to set its policies and priorities in the areas covered by this Chapter, to determine the labour and social levels of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including those under this Chapter'.[2]

As a result, it is only when these limitations and qualifications are fully foregrounded that we get to the non-regression obligation in Article 6.2.2. This provides that 'A Party shall not weaken or reduce, *in a manner affecting trade or investment between the Parties*, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards'. That said, further concerns are raised by Article 6.2.3, which provides that

> The Parties recognise that each Party retains the right to exercise reasonable discretion and to make bona fide decisions regarding the allocation of labour enforcement resources with respect to other labour law determined to have higher priority, provided that the exercise of that discretion, and those decisions, are not inconsistent with its obligations under this Chapter.

These limitations and qualifications are such that the non-regression commitment appears difficult to enforce, though perhaps not quite to the extent as the commitment in Article 6.2.4 by which 'the Parties shall continue to strive to increase their respective labour and social levels of protection' referred to in Article 6.1. But so far as the core obligation in Article 6.2.2 is concerned, it is reasonable to expect Articles 6.2.1 and 6.2.3 to play a major role in the event of a dispute arising in the future between the UK and the EU over divergent labour standards.

The limitations of this flimsy non-regression clause become all the more apparent when the detail of the wording of Chapter 6 is compared with the original intentions of the EU in the February 2020 negotiating mandate. In the latter document, the EU envisaged that the final 'agreement should uphold common high standards, and corresponding high standards over time *with Union standards as a reference point*'. In the final version of Chapter 6, EU standards do not appear in any way as the benchmark for any future legislative developments (Council of the European Union 2020: para 94).

Chapter 8: Multilateral labour standards

In addition to the weak non-regression clause in Chapter 6, there is separate provision for labour rights in Chapter 8, dealing with trade and sustainable development. In the opening Article 8.1.1 the parties affirm their commitment to the development of international trade in 'a way that is conducive to decent work for all, as expressed in the 2008 ILO Declaration on Social Justice for a Fair Globalization'. Article 8.3.2 also commits the parties to respect, promote and *effectively implement* the internationally recognised core labour standards, as defined in the fundamental ILO Conventions, namely:

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.

Article 8.3.5. additionally 'commits' the parties 'to implementing all the ILO Conventions that the United Kingdom and the Member States of the Union have respectively ratified and the different provisions of the European Social Charter that, as members of the Council of Europe, the Member States of the Union and the United Kingdom have respectively accepted'.

Until recently there was a generalized consensus among trade and labour law experts, that these – and similarly worded provisions present in other FTAs – were essentially 'paper tigers': aspirational and unenforceable clauses, binding no one as a result. However, a recent decision by the panel of experts convened under the EU-South Korea FTA to adjudicate on a series of alleged violations by the South Korean authorities of the core ILO instruments referred to in Article 13.4.3 of that agreement (a provision that essentially mirrors Article 8.3.2. of the TCA), may lead some to have second thoughts.

The decision in question has clarified that these clauses can produce 'a legally binding commitment on both Parties in relation to respecting, promoting and realizing the principles … as they are understood in the context of the ILO Constitution' (EU-South Korea 2020: 107). While it is clear that part of the reasoning underpinning the panel decision in the EU-South Korea dispute could apply, hypothetically, in an analogous EU-UK dispute under the TCA, we would caution against assuming that that would necessarily be the case, let alone lead to a binding result for the parties. Indeed, as we note below, these panel decisions are not enforceable even on the parties themselves.

2 The point is reinforced by Article 6.2.3 which refers to the right of each party 'to exercise reasonable discretion and to make bona fide decisions regarding the allocation of labour enforcement resources'.

So while prior panel decisions about comparable provisions of other treaties can offer some useful guidance, they do not typically carry the weight of a binding precedent or authority, most certainly not between different FTAs. In any event, the broader 'commitment' vis-à-vis other ratified instruments under Article 8.3.5. is heavily qualified: it is to be read in conjunction with a footnote to that provision declaring that '[e]ach Party maintains its right to determine its priorities, policies and the allocation of resources in the effective implementation of the ILO Conventions and the relevant provisions of the European Social Charter'.

It is worth emphasizing finally in relation to the EU-UK TCA that the issues likely to be contested are more controversial than those that featured in the EU-Korea dispute. Here we are concerned principally with far-reaching restrictions on the right to strike, with a comprehensive list of British violations of ILO Convention 87 stretching back to 1989, including most recently as a result of the Trade Union Act 2016 (Ewing and Hendy 2015). But the EU is itself in breach of Convention 87, as in the *Viking* case which imposed restrictions on the right to strike which in some circumstances make the exercise of that right virtually impossible. The incompatibility of *Viking* with ILO Convention 87 was confirmed by the ILO Committee of Experts – in a case involving British trade union BALPA (ILO 2011).

The EU is thus in no position to complain about the UK's continuing breach of ILO standards, while it is unlikely that the UK will have any interest in provoking the EU by challenging *Viking*. Indeed, the EU is unable to comply with ILO Conventions as a matter of EU law, unless it were to amend the EU treaties or the CJEU reversed *Viking*. We may well be in a world of mutually assured transgression (MAT) or mutually assured non-compliance (MANC), in which it is in the interests of neither party to raise a complaint against the other. Significantly, the EU did not challenge Korea's swingeing restrictions on the right to strike in the original complaint leading to the recent decision.

Chapter 9: Weak supervisory and dispute resolution framework

Though it is not unusual in an international free trade agreement, it is a matter of acute concern, that workers and their trade unions have no possibility of challenging directly any dilution of existing labour law standards in breach of the Agreement.[3] This is because the TCA makes it explicit that private parties, affected by breaches of the substantive provisions discussed above, will not be able to bring claims before domestic courts. According to Part 1, Title II, Article COMPROV.16.1[4]

> nothing in this Agreement ... shall be construed as conferring rights .... on persons ... nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.[5]

In essence, the Treaty offers three narrow pathways for the enforcement of its provisions on labour standards.

First, and limited to the substantive standards covered by the non-regression clause of Chapter 6 (that is to say fundamental rights at work; OHS; fair working and employment standards; information and consultation; and business restructuring), Article 6.3 provides that its enforcement is entrusted to domestic mechanisms such as labour inspectorates and administrative and judicial proceedings. While the UK has ratified ILO C-81, the Labour Inspectorate Convention, Article 6.2.3 and the footnote in Article 8.3.5 (both referred to above), will surely be relied upon to justify the chronic underfunding of UK administrative enforcement bodies in the domain of labour standards.

Second, Articles 6.4 and 8.11 clarify that any disagreement arising in the context of labour and social provisions is not to be settled in accordance with the more robust (standard form) arbitration procedure contained in Part 6, Title 1 of the TCA (which applies, for instance, when a dispute revolves around the misuse of state aid and other subsidies). Instead, any disagreement is to be addressed exclusively by reference to a second-best procedure set out in Part 2, Title XI, Article 6.4 and developed at Article 9. This latter procedure provides that disputes are to be resolved as follows:

– *Articles 6.4.1 and 9.1* begin with 'Consultations' between the parties. If these prove fruitless, then the parties may request a 'panel of experts' to be convened to examine the dispute.
– *Article 9.2* sets out the procedure for the operation of the panel of experts examining disputes arising under both Article 6 (non-regression) and Article 8.3 (multilateral labour standards). In both cases, the panel's findings and recommendations are non-binding, a point expressly reiterated by Article 9.2.9.

A notable feature of Article 9.3 is that, in cases of non compliance with recommendations on non-regression disputes (i.e. those under Article 6), it allows the aggrieved State to adopt unilateral, retaliatory, temporary measures, including compensation and the suspension of certain TCA provisions, which may involve the introduction of tariffs. Such measures are, as stated, temporary, only lasting until the parties negotiate a solution to the dispute or the losing party notifies its own compliance measures. Article 9.3 allows for a proper arbitration panel to be constituted if, for instance, the losing party believes that, perhaps following its own compliance measures, the winning party should desist from its retaliatory action.

An important point to flag at this stage (albeit that the procedure is likely to be seldom used) is that 'In respect of matters related to multilateral standards ..., the panel of experts should seek information from the ILO or relevant bodies established under those agreements, including any pertinent available interpretative

3 Given the terms of the TCA coupled with government proposals to restrict the operation of judicial review in the UK, this legal avenue appears next to useless for this purpose.

4 Part 1 (and other Parts) give each Article a prefix indicating their subject matter. Thus Titles II and III of this part prefix each Article 'COMPROV' presumably indicating that it is a common provision. So the reference is to Part 1, Title II, Article 61.1.

5 The few exceptions to this rule apply to provisions on unlawful subsidies (Title XI, Chapter 3, Article 3.10.1d), but not to labour standards.

guidance, findings or decisions adopted by the ILO and those bodies' (Article 9.2.6). This could ensure that an 'authentic interpretation' of these instruments could eventually permeate the TCA dispute resolution procedure. Especially in the light of the recent EU-South Korea dispute panel decision, this is a point worth emphasising and developing, perhaps by means of clear interpretative guidance that could expand the same principle to the Council of Europe's Social Charter should a complaint arise.

Third, it is to be noted too, that under Article 9.4 a State party claiming that the other has diverged significantly (i.e. in a manner having a '*material impact* on trade or investment between the Parties', in relation to 'labour … protection' (or certain other matters) can adopt unilateral 'rebalancing measures', including tariffs. Rebalancing measures are specific to the TCA, and not to be found in other FTAs concluded by the EU. Such measures could conceivably be an adequate deterrent to prevent social dumping, but as always the devil is in the detail:

– The article provides that rebalancing measures can be challenged before an arbitration tribunal. They must be '*strictly* necessary and proportionate,' and 'be based on reliable evidence and not merely on conjecture or remote possibility.'
– As noted in the next section by reference to the US-Guatemala dispute, experience suggests that the burden of proof necessary to demonstrate that a breach of labour clauses is such as to 'affect trade or investment', let alone that it has a '*material*' impact on them, is particularly arduous for a complaining party to satisfy.

Overall, the concerns identified above are magnified by the absence of *any* independent judicial body to assess whether or not the non-regression provisions have been violated at the suit of any potential claimant. As expected, given the UK Government's red lines on the matter, the role of the CJEU has been completely excluded from the TCA (though it will continue to play a role in Northern Ireland by virtue of the Protocol, and will remain competent on matters of interpretation of some of the Equality Directives).

The 'impact on trade' concept

Many of the provisions above are replete with references to terms such as 'manner affecting trade or investment' (Article 6.2.2), 'capable of impacting trade' (Article 9.4.1), 'material impacts on trade … arising as a result of significant divergences', or 'these impacts shall be based on reliable evidence' (Article 9.4.2). The aforementioned US-Guatemala dispute offers us a glimpse of how some of these provisions could be interpreted in the context of the TCA (bearing in mind the point that panel decisions do not constitute 'precedents', in the legal sense). The US-Guatemala dispute substantially revolved around the phrase 'in a manner affecting trade', present in Article 16.2 (Enforcement of Labor Laws – this is the same wording we find in Article 6.2.2 of the TCA) of the CAFTA-DR agreement, the key labour linkage provision in the treaty. The US had argued that the failure on the part of the Guatemalan authorities to enforce a number of fundamental employment and trade union victimisation protections amounted to a breach of that article.

The panel disagreed with the US argument 'that all failures to effectively enforce such laws would be in a manner affecting trade to the extent that they affected employers engaged in trade'. Instead the panel held that 'in order for a failure to enforce to affect trade it must change conditions of competition by conferring a competitive advantage upon an employer engaged in trade' and, further, that 'A complainant must demonstrate that labor cost effects reasonably expected in light of the record evidence are sufficient to confer some competitive advantage' (USA-Guatemala 2017: 478-480), noting that 'A failure to effectively enforce labor laws will not necessarily result in lower prices or altered trade flow', and that 'attempting to establish that an effect on prices is due to a failure to enforce and not to such other factors would often be so fraught with difficulty as to make proof of trade effects impossible' (USA-Guatemala 2017: 177-178).

On the basis of these elaborations, the panel established a three-prong test to identify 'impact' based on (1) proving that the enterprise or enterprises in question export(s) to CAFTA-DR Parties in competitive markets or compete with imports from [the FTA's] Parties; (2) identifying the effects of a failure to enforce; and (3) demonstrating that these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises (USA-Guatemala 2017: 196). This is an arduous test to satisfy and one that is likely to bear some relevance in any non-regression TCA dispute. At this stage it unknown what test would be used to ascertain '*material* impact' for the purpose of rebalancing measures, but it is at least possible that it will be just as stringent.

The TCA provisions discussed above do not replicate verbatim the wording and structure of Article 16.2 of CAFTA-DR, and – in the light of the recent EU-South Korea panel decision – it can now be argued that the latter 'does not have the same contextual setting of sustainable development as the EU [UK TCA], nor does it refer to the range of multilateral and international agreements and declarations' that the EU and UK have included in the TCA (EU-South Korea 2020: 93). However, it is fairly clear that they share the same economic and policy rationale, i.e. that national labour standards are to be respected and upheld as rights protecting workers, but only to the extent that a failure to observe such standards distorts trade and fair competition (Namgoong 2019).

Conclusion

It is becoming increasingly clear that Brexit is not to be seen as an *event*, but as a *process*, requiring further attention and careful monitoring in the years to come. This is particularly so as far as questions pertaining to labour rights and the level playing field are concerned. It is quite clear that the UK government insisted on wording that will facilitate the dilution of workers' rights deriving from the EU. Despite its rhetoric to the contrary, this can only be in order to achieve such a regression in the future; divergence by improving those rights was always possible and did not require the wording inserted.

One question is what rights are to be diluted and to what extent. That is likely to be a moving target depending on events in the UK but it is possible to see that certain elements of EU derived

rights which successive Conservative Governments have long resented will be under contemplation. These include rights emanating from the Working Time Directive (the very basis of which a former Conservative government unsuccessfully challenged) (Case C84/94), the equality rights of temporary agency workers, unlimited compensation in discrimination cases (Countouris and Ewing 2019: Section 5), and health and safety legislation (e.g. limits on exposure, and actions for damages).[6]

A second question is what type of flanking measures unions and others, on either or both sides of the Channel, may still be able to put in place in order to monitor the post-Brexit *process*. Much work will have to be done by trade unions to identify breaches of Chapters 6 and 8 to expose violations and to pressure the parties to initiate the Article 9 procedures. It would seem to us that Chapter 8 may present a more promising route than Chapter 6, at least to the extent that infringements of the 'non-regression' clause (unlike those of multilateral labour standards and of ILO fundamental Conventions in particular) would require a demonstrable 'impact on trade'.

A key role will also be played by parliamentary scrutiny by both the European and British Parliaments (the devolved legislatures in the UK may also have a role). British parliamentary procedures in particular will now have to adapt to Brexit, and it is to be expected that there will be a parliamentary role in scrutinising compliance with FTAs, including the TCA. The EU Parliament should no doubt consider similar arrangements and encourage the possibility for social partners to make formal complaints beyond submitting an amicus brief to panels. But in concluding this Brief we suggest that it is perhaps already the time to think about this Chapter as one of the priorities for the five-year review provided under Part 7, Article FINPROV.3. Some cracks are just impossible to paper over.

6 Recall that the Coalition government removed the longstanding right of workers to sue for damages for breach of UK health and safety legislation: s.69(3) Enterprise and Regulatory Reform Act 2013 amending s.47(2) Health and Safety at Work Act 1974.

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