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Conditionality 2.0: An improved legal framework to protect sustainable development through EU Free Trade Agreements

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The European Union makes no secret of its aim to export its norms through trade, including the respect for human rights, international law and sustainable development. The inclusion of normative values “through trade” (Meunier, Nikolaïdis, 2006) may appear self-contradictory since the constant quest for liberalisation often leads to the lowering of environmental and labour standards. Nevertheless, Human rights and sustainable development are included in the new generation of far-reaching free trade agreements (FTAs) that the EU is currently negotiating.

Introduction

The European Union makes no secret of its aim to export its norms through trade, including the respect for human rights, international law and sustainable development¹. The inclusion of normative values “through trade” (Meunier,

Nikolaïdis, 2006) may appear self-contradictory since the constant quest for liberalisation often leads to the lowering of environmental and labour standards. Nevertheless, Human rights and sustainable development are included in the new generation of far-reaching free trade agreements (FTAs) that the EU is currently negotiating.

The official inclusion of human rights conditionality in the EU’s trade policy towards third countries can be traced back to a Council resolution of 1991², and the literature has been very critical as to whether they have had a positive effect or not. The Trade and Sustainable Development (TSD) chapters are much more recent, with a first occurrence in the EU-Korea FTA signed in 2009. Although their effectiveness has not yet been assessed thoroughly, this Brief argues that the legal architecture of TSD chapters (enforceability; monitoring and civil

¹ Article 21 TEU.

² Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development, 28 November 1991, Bull. EC 11/1991, p. 122-3.

society consultation; and dispute settlement) constitutes an improved model of conditionality. Compared to human rights conditionality, the TSD chapters model could thus be called “Conditionality 2.0”. The implication of this finding may very well be the evolution of human rights conditionality towards this improved model in the future.

Bindingness and Enforceability

In legal terms, human rights clauses enjoy a very strong protection. The EU’s usual practice is to qualify their respect as “an essential element” of Partnership and Cooperation Agreements (PCAs) which precede the negotiation of FTAs and which are legally linked to them. This qualification allows the EU to unilaterally suspend the agreement under international law in case of gross human rights violations³.

But when it comes to enforcing these clauses, practice shows that the EU has only suspended its preferential trade treatment in its relations with African, Caribbean and Pacific (ACP) countries within the framework of the multilateral Lomé and then Cotonou Conventions. In no other agreement has the EU activated the conditional clause, despite gross human rights violation. This has led to criticisms that the EU was politically selective and that such clauses were only effective when the EU has a strong aid leverage (Donno, Neureiter, 2017).

TSD chapters rely on a completely different model of conditionality. Their main legal commitment is one to not decrease the levels of protection of environmental and labour standards, and to make “best efforts” to increase them. Although the legal force of this second obligation is rather weak, it matches the pragmatic statement that the process of

deepening environmental and labour legislation beyond a minimal threshold must be started freely, progressively and in a local context. The use of the carrot, through assistance and dialogue, is thought more impactful than the stick for ensuring sustainable development in trade. More than that, the absence of a specific enforceability mechanism is integral to the goal of ensuring compliance through socialisation, under the surveillance of monitoring and civil society mechanisms.

Monitoring and civil society consultation

Although considered as an ‘essential element’ in FTAs, human rights do not enjoy a dedicated monitoring mechanism designed to identify potential violations or potential improvements. The issue can still be raised – and sometimes must – by the primary bilateral organ that oversees the entire agreement or by an ad hoc subcommittee. But overall, the institutional architecture of the agreement encourages neither human rights dialogue nor bilateral cooperation to ensure compliance.

By contrast, Trade and Sustainable Development obligations are monitored by a dedicated organ that works exclusively on trade and sustainable development-related issues, and which is seconded by an institutionalised form of civil society dialogue. The latter consists in regular meetings of a trading partner with representants of its own civil society to work nationally on the implementation of the agreement. Instead of flexing its muscles, the EU hence helps building internal democratic pressure.

³ See articles 60 and 62 of the Vienna Convention on the Law of Treaties, 1969. Most of its provisions have become customary international law.

Dispute Settlement

Finally, the model of human rights conditionality does not always provide for dispute settlement mechanisms. In some cases, a party is only required to demand an urgent meeting before he is entitled to unilaterally removing preferences until compliance. The emphasis is thus put on retaliation, which involves a party sacrificing its own trade benefits in response to an action it did not directly suffer from. One can easily see the weakness of such mechanism, and the temptation is strong never to trigger the suspension of the agreement.

TSD chapters cannot be enforced through unilateral suspension of preferences. Instead, a dedicated mechanism of dispute settlement plans for consultations followed by investigations conducted by a Panel of Experts. Although their findings and recommendations are not binding, it is expected that the specific monitoring and civil society bodies will prove more efficient in enticing compliance than threats of sanctions.

Conclusion

TSD chapters negotiated in EU FTAs rely on a legal framework which prompts cooperation and inclusiveness. They are built on lessons learnt from the dubious effectiveness of human rights clauses. Stepping away from the rigid and negative model of human rights clause, these chapters put forward a new model of positive conditionality more likely to foster trust, and hence success.

While today the European Commission is reflecting on possible evolutions of the TSD chapters, this Brief has proposed to reverse the debate and to research how this new legal framework of 'Conditionality 2.0' may influence the previous conditionality model of human rights clauses. But for such evolution to take place, the positive conditionality model still needs to match expectations. Further academic research is therefore necessary in order to assess the effectiveness of TSD chapters.

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