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Transatlantic Trade and Investment
Partnership

TTIP and Labour Rights

By

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Introduction

1 Much concern has been expressed about the TTIP, much of it in the UK related to its impact on the privatisation of the NHS. Across Europe concern has been expressed about its impact on the democratic process and the rule of law by the inclusion of the ISDS mechanism. In fact over 145,000 of the 150,000 responses (97%) to consultation conducted by the European Commission were opposed to ISDS.

2 But there is also concern about many other aspects of TTIP, including food and environmental standards and the influence of multi-national corporations in lowering standards in new regulations. Our concern is that insufficient attention has been paid to the potential impact of TTIP on labour standards, which we fear will be negative. For European workers in particular it will lead at worst to a race to the bottom, and at best to a regression to the mean, which is more likely to be closer to US standards than to European standards.

3 The working text of TTIP is, of course, secret – even from the members of the Parliaments of the European nations on behalf of which the agreement is being negotiated. However, the text is likely to be consistent with the texts of the EU/Canada trade agreement (CETA) and the EU/Korea trade agreement (EUKFTA), both of which have been published. CETA comes in at 1634 pages whereas EUKFTA is a mere 1426 pages.

4 Hidden in this morass of print in both CETA and EUKFTA is a chapter on trade and labour which contains a commitment to the minimum labour standards of the International Labour Organisation (ILO). Thus EUKFTA provides:

> The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the funda- mental rights, namely:
>
> . (a) freedom of association and the effective recognition of the right to collective bargaining;
>
> . (b) the elimination of all forms of forced or compulsory labour;
>
> . (c) the effective abolition of child labour; and
>
> . (d) the elimination of discrimination in respect of employment and occupation.

5 CETA has a similar provision. We assume that that TTIP contains equivalent words, partly because the inclusion of a labour chapter is standard practice in the large number of bilateral free trade agreements concluded by the United States in recent years.[1] However, the apparent attractiveness of the aspirations of these labour chapters present three problems, which their fine words do not resolve.

[1] Details of these agreements may be found on

Ineffectiveness of US Labor Law

6 The first point to note is that despite this commitment to international labour standards in these free trade treaties, the USA falls woefully short in its commitment to these principles. The USA has one of the lowest levels of ratification of ILO standards in the world, having ratified only 14 of the 189 ILO Conventions. More significantly, the USA has not ratified all of the eight core Conventions that form the basis of the anticipated labour chapter in TTIP.

7 So far as we are aware, every country in Europe has ratified all eight core ILO Conventions. Indeed, the EU has adopted a *Charter of Fundamental Rights of the EU* (with a legal status now equal to the EU Treaties), which embodies provisions equivalent to the eight core ILO Conventions. In contrast, the United States has ratified only two of the eight core Conventions (those dealing with forced labour and the worst forms of child labour). This is a very poor record, by any standard of assessment.

8 The United States is thus one of a minority of countries not to have ratified either of the ILO Conventions dealing with freedom of association (Conventions 87 and 98). Nor has it ratified either of the Conventions on the elimination of discrimination and equal treatment (Conventions 100 and 111). So far as we are aware, there is no foreseeable prospect of these Conventions being ratified by the USA, which has not ratified any ILO Convention since the Safety and Health in Mines Convention (Convention 176) in 2001.

9 It might be possible to overlook the failure to ratify these fundamental conventions if the United States nevertheless fully complied with the obligations they contain. But we know from the work of the ILO Freedom of Association Committee that this is demonstrably not the case in relation to ILO Conventions 87 and 98, whatever may be the position in relation to the others. USA law and practice in relation to both the right to bargain collectively and the right to strike fall well short of ILO standards.

10 Although the United States has not ratified ILO Convention 87, the United States has nevertheless been criticised by the Freedom of Association Committee for (i) denying the right to freedom of association to pubic sector workers;[2] (ii) denying trade union officials access to workplaces while trying to organise workers for collective bargaining purposes;[3] and (iii) denying workers the right to strike by allowing lawful strikers to be permanently replaced.[4] The union rights of migrant workers have also raised concerns.

Failures of European Labour Law

11 The second issue with the anticipated labour chapter in TTIP relates to EU law. Whilst, as we point out above, the EU nominally proclaims standards equivalent to the core Conventions in its *Charter,* the legal reality is different. The point was made very clearly when the EU Court (CJEU) in the *Viking* and *Laval* cases was called upon to balance the

[2] International Labour Organisation, Committee on Freedom of Association, Report No 291, Case No 1557 (United States) (International Labour Organisation, Geneva, 1993).
[3] International Labour Organisation, Committee on Freedom of Association, Report No 284, Case No 1523 (United States) (International Labour Organisation, Geneva, 1992).
[4] International Labour Organisation, Committee on Freedom of Association, Report No 278, Case No 1543 (United States) (International Labour Organisation, Geneva, 1991).

fundamental freedoms of business embedded in the EU Treaties against the fundamental rights of workers as now to be found in the EU *Charter*.[5]

12 In this conflict between economic freedom and fundamental rights, the CJEU unhesitatingly gave priority to the former, and in the process put EU Law on the wrong side of ILO standards relating to freedom of association. We know this because a dispute between British Airways and BALPA about a partial transfer of business to France was caught up in the wake of the *Viking* case, providing an opportunity for the *Viking* and *Laval* cases to be considered by the ILO Freedom of Association Committee.[6]

13 In the face of industrial action by BALPA concerned about pilots' jobs, BA threatened to sue the union, relying on the *Viking* line of authority. An attempt by BALPA to have the action declared lawful in the British courts was aborted, and a complaint was made to the ILO Freedom of Association Committee. It was argued by the union that the risk of litigation in the English courts and the possibility of unlimited damages under the *Viking* principles violated the right to freedom of association.

14 In two strongly worded observations (2009 and 2010), the Freedom of Association Committee upheld the union's claims. Thus in 2009, it was said in a manner that could hardly be more explicit:

> The Committee observes with ***serious concern*** the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised.[7]

15 In addition to concerns raised about the compliance of EU law with ILO standards, concerns have also been expressed about the compatibility of EU economic freedoms with the obligations of EU member states under the European Social Charter (a treaty of the Council of Europe and as such a sibling of the European Convention on Human Rights). The European Social Rights Committee brought these concerns into sharp focus in *LO v Sweden*,[8] holding that national legislation to implement *Laval* violated the right to bargain collectively, which Sweden is bound by the Charter to uphold.

Absence of Enforceable Obligations

16 Our third concern with TTIP is that the obligations in the labour chapters of the free trade agreements are imposed on States but not on corporations; ie TTIP will impose no duty to comply with labour standards on the trans-national employers which are the beneficiaries of

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[5] *Case C-438/05, FSU v Viking Line*, 11 December 2007, [2008] IRLR 143; and *Case C-341/05, Laval un Partneri v v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, 18 December 2007, [2008] IRLR 160. The four 'pillars' of the Treaties are: freedom of movement of capital, freedom of movement of labour, freedom to establish a business in any EU State, and freedom to provide a service from one EU State to another. It was the last two business freedoms at issue in *Viking* and *Laval*. The four freedoms also lie at the heart of the trade agreements discussed above.

[6] For full details of this affair, see K D Ewing and J Hendy QC, 'The Dramatic Implications of Demir and Baycara' (2010) 39 ILJ 2.

[7] International Labour Organisation, Report of the Committee of Experts on the Application of Conventions and Recommendations (Report III(1A)) (International Labour Organisation, Geneva, 2010).

[8] European Committee of Social Rights, Complaint No 85/2012.

TTIP. This is in marked contrast to the ISDS machinery that will enable multi-national corporations to sue governments for breach of TTIP obligations to them.

17 The labour chapter of CETA (by way of example) requires States to promote compliance and effectively enforce its labour law by permitting legal action within national courts and tribunals, and requiring the provision of labour inspectors. But there is, in the trade agreements, no international mechanism for the enforcement of labour standards. So if, contrary to the labour chapter of CETA, national law does not permit legal action to enforce a right, a worker has no avenue under CETA to complain anywhere about it.

18 Creating obligations that are unenforceable against either corporations or governments (national or regional), the provisions of the labour chapters are meaningless and add nothing to the obligations by which corporations and governments are already bound. But as we have seen, governments do not comply with these obligations, and in the case of the EU, they appear to be constrained by the CJEU from ever doing so, despite additional Council of Europe obligations.

19 This omission makes clear that TTIP, CETA and EUKFTA are for the benefit of corporations and not the citizens and workers of Europe or elsewhere. The point is perhaps reinforced by the experience of EUKFTA, which contains a labour clause despite serious allegations being made by the ILO in relation to the denial of trade union rights in Korea.[9] The Committee will no doubt wish to explore what steps have been taken by the Korean government to honour its commitment to respect, promote and realise the right to freedom of association.

20 Much more could be said about the effect of these trade agreements on trade union and workers' rights. Thus, will industrial action to secure a collective agreement be held to be anti-competitive and hence give rise to a claim for lost profit in the ISDS? It is clear that the trade agreements have not and will not protect and are likely to diminish rights at work. Indeed, the unanswered questions relate to the threat to labour law, and whether the agreements will empower business rather than protect workers.

Conclusion

21 TTIP gives rise to serious concerns. The fact that the text of the agreement is secret compounds them. The issues we raise here relate to the labour chapter, which has not been as widely discussed as other provisions. In raising these concerns we do not wish to diminish the serious reservations about other provisions of TTIP, which we generally share.

22 In addressing the anticipated labour chapter in TTIP we have have three questions for the Committee:

- Is it proposed that all the parties to TTIP (including national governments) will revise domestic labour laws to bring them into line with ILO standards at the date of entry into force of TTIP?

[9] International Labour Organisation, Committee on Freedom of Association, Report No 359, Case No 2602 (Korea) (ILO, Geneva, 2008).

- How is it proposed that any further erosion of international labour standards by any of the parties to TTIP will be prevented in the future? and

- How is it proposed that trade unions, workers and others will be able to ensure compliance by corporations and governments with the principles in the labour chapter?

23 If it is not possible to answer these questions with positive, credible guarantees, then it must be concluded that the labour chapters in TTIP, CETA and EUKFTA are hollow shams, designed to hide from the citizens of Europe the fact that the protection of their rights has no equivalence to the very concrete and enhanced protections given to multi-national corporations.

24 Indeed, unlike the citizens of Europe and the workers whom the labour chapters feign to acknowledge, corporations will be empowered by ISDS to sue States in secret arbitrations, in respect of democratically adopted policies and laws. In doing so, they will be able to override national, and indeed, Europe-wide courts, and so will be enabled to attack the very laws that the labour chapter is designed to promote.

25 In our view the consequences of TTIP for labour rights need urgently to be addressed. The United States has ineffective labour laws and probably the lowest level of collective bargaining coverage in the developed world, estimated at around 10%. We do not understand the United States to be signing up to TTIP in order to embrace the (admittedly faltering) European social model, and to expand collective bargaining density or enhance worker protection.[10]

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[10] We are unaware that the labour chapters in the existing US bilateral free trade agreements have led to any significant change in US labour law. The largely ineffective National Labor Relations Act of 1935 remains un-amended by the Obama administration, despite the promise of reform in 2008.