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Asymmetrical institutional responses to civil society clauses in EU international agreements: pragmatic flexibility or inadvertent inconsistency?

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Asymmetrical institutional responses to civil society clauses in EU international agreements:
pragmatic flexibility or inadvertent inconsistency?

by Martin Westlake

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About the author

Martin Westlake has spent over four decades studying European integration and working in European Union government and politics. Having completed a first degree in philosophy, politics and economics at University College, Oxford, he went on to take a master's degree at the Johns Hopkins University School of Advanced International Studies (Bologna Center) and a PhD at the European University Institute in Florence. Since beginning his professional life as a clerk to the Parliamentary Assembly of the Council of Europe in Strasbourg, he has worked in the Council of Ministers and the European Commission, with the European Parliament and, from 2003, in the European Economic and Social Committee, where he served as Secretary-General, 2008-2013. Martin Westlake has published widely on the European institutions and on European and British politics. He is currently a visiting professor at the College of Europe, running a research seminar on 'Constitutional, Institutional and Political Reform in the European Union', and a Visiting Senior Fellow at the European Institute of the London School of Economics, where he co-organizes and co-chairs a seminar on the 'European Union in Practice: Politics and Power in the Brussels System.'

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Abstract

The European Union's new, post-Doha Round, Free Trade Agreements include innovative Trade and Sustainable Development chapters that, with one recent exception, provide for monitoring of the implementation of the innovatory clauses through institutional architecture that is confusingly and inefficiently asymmetrical in terms both of composition and support mechanisms. Less than optimal implementation has, not surprisingly, led to less than optimal results.

‘Nothing is possible without man; nothing lasts without institutions.’ (Jean Monnet)

I. Introduction

This article results from an academic panel conference examining ‘the different ways in which the European Union engages with non-traditional, hence less studied, actors’ and is intended to explore ‘whether EU institutions have naturally incorporated these actors in their already existing structures, or whether they have had to design special processes to deal with the non-traditional actors.’ The article focuses specifically on civil society advisory mechanisms, and particularly the surveillance mechanics of trade and sustainable development chapters, in EU free trade agreements. I write more as an ‘institutionalist’ than a trade expert (and also as a former Secretary General of the European Economic and Social Committee). As will be seen, the provisions for such mechanisms are asymmetrical in nature, particularly with regard to composition. This is something of a puzzle. My ‘naïve’ working hypothesis at the outset is that the asymmetry is either a result of the negotiating process – that is, a result of what the negotiating partner is prepared to accept (hence ‘pragmatic flexibility’) and/or a result of inattention to the need for a consistent approach (between different parts of the European Commission, perhaps) over the various innovatory agreements that have been negotiated to date.

Background

The July 2008 (temporary?) stalling of the Doha Development Round of trade negotiations created a challenge for all major trading partners working under the aegis of the World Trade Organization. Until then, there had seemed to be an inexorable trend towards a multilateral approach in trading relations. The absence of further progress in the Doha Round has given rise to the negotiation of a new generation of bilateral and regional free trade agreements, with the US-led Transatlantic Trade and Investment Partnership (‘TTIP’) and

Trans-Pacific Partnership ('TPP') much to the fore, in terms of media coverage and public attention, as examples of this new trend. The European Union (EU) has also had to adapt to this new world and the temporary absence of the still-preferred multilateral approach. It has embarked on this new approach against the backdrop of a number of specific and general developments. A first is the 2009 Lisbon Treaty's provision of 'fair' as well as 'free' trade as an EU external policy objective (TEU Art. 3.5) and the same Treaty's inclusion of EU trade policy within the 'context of the principles and objectives of the Union's external action' (TFEU Art. 207.1). More generally, the EU has committed itself fully to the United Nation's 2014 Sustainable Development Goals (UN 2030 Agenda) and it remains a full partner in the framework of international labour conventions¹ and the ever-increasing corpus of international and multilateral environmental and other agreements. More recently, the EU's 14 October 2015 Trade for All Strategy (its agenda on jobs and growth) strongly emphasised 'values' and 'responsible' trade. More recently still, the European Commission's 10 May 2017 reflection paper on harnessing globalisation (European Commission, 2017a) underlines the EU's commitment to a 'fair, international, rules-based order based on high standards through cooperation and strengthening of multilateral institutions,' and the European Union's June 2017 European Consensus on Development seeks to 'integrate the economic, social and environmental dimensions of sustainable development' (European Union, 2017) Paradoxically, the world the EU now inhabits is both a more bilateral/multilateral and a more global world.

Most recently, the Trump administration's apparent withdrawal from the multilateral approach of its predecessors (*The Economist*, 2017) raises the possibility of a more protectionist approach to trade in general, and the 'Brexit' process also carries with it a clear risk of competitive deregulation. In counter-distinction, the European Union has repeatedly underlined

¹ And, as the ILO has recently pointed out, there has been a major increase not just in the number of bilateral and multilateral trade agreements since 2008 but also in agreements with labour provisions of some sort (see International Labour Organization, 2016a).

its continued adherence to ensuring that commitments in bilateral trade and investment agreements in areas like trade, labour standards, climate and environment protection are respected – there should be no race to the bottom; no downward spiral. Indeed, the past decades have seen a strong prescriptive element emerge in the EU’s trade policy approach, which is a form of enlightened self-interest: helping trade partners to establish a strong and healthy civil society is good for the country concerned (in promoting stability, democracy and prosperity) and good for the EU, not only as a trading partner but more generally as a member of the comity of nations and regions. Thus, as the European Commission declared in *Trade for All*, the EU believes that trade agreements should be used ‘to promote, around the world, values like sustainable development, human and social rights, fair and ethical trade and the fight against corruption.’ (European Commission, 2015) More generally, among all these contrasting and contradictory internal and external trends, the European Union has sought to champion ‘a progressive trade policy in a protectionist age’ (Cecilia Malmström, 29 March 2017).

2. Institutionalising a Progressive Policy

The question immediately arises, how might such a progressive policy be championed? The European Union’s answer (under the strong impetus of the European Parliament) has been to include in all free trade agreements a chapter on trade and sustainable development. The sustainable development chapters in the new generation of free trade agreements have generated a great deal of academic and policy-based interest, as the bibliography attests, not least because this is a new and important departure for the European Union. The EU is becoming (or intends to become) a prescriptive actor in international relations (a ‘force for good’) and it is seeking to do so through a promotional, cooperative approach (as opposed to the US model of conditionality). Thus, the collapse of the Doha Round could be seen as both a disappointment

but also as a sort of liberation that has enabled the Union to go further bilaterally, in prescriptive terms, than would have been the case under the multilateral/global approach.

The first example of the implementation of this new approach came in 2011, with the EU-Korea Free Trade Agreement. Others have followed (seven altogether to date,;- eight with CARIFORUM): Colombia and Peru (2012); Central America (2012); Moldova (2014); Georgia (2014); Ukraine (implemented 2016); and the South African Development Community (2016). Mention should also be made in the same context of the 2008 Economic Partnership Agreement between the EU and the CARIFORUM states. Harking back to the Jean Monnet quotation with which this article began, the mechanical provisions for oversight of the trade and sustainable development chapters are, of necessity, institutional. For the EU-Korea Free Trade Agreement, the first example of the new model:

- Each partner country is to establish a Domestic Advisory Group (DAG);
- The Domestic Advisory Groups monitor implementation of the Chapter;
- Members of the two Domestic Advisory Groups meet at an annual Civil Society Forum

In other words, in the context of this panel's main line of inquiry, the EU designed special processes to deal with the non-traditional actors (civil society actors, particularly in third countries), but necessarily also created an interface between those processes and existing processes.² The Box sets out the relevant provisions of the EU-Korea Agreement.

² NB: In an important and potentially significant development, no mechanism, and hence no Domestic Advisory Groups, were foreseen under the EU-South African Development Community EPA. The possible implications of this exception will be discussed further on in the article.

Box: EU-Korea Free Trade Agreement Provisions on Monitoring Mechanisms

Article 13.12.4: ‘Each Party shall establish a Domestic Advisory Group(s) on sustainable development (environment and labour) with the task of advising on the implementation of this Chapter.

Article 13.12.5: ‘The Domestic Advisory Group(s) comprise(s) independent representative organisations of civil society in a balanced representation of environment, labour and business organisations as well as other relevant stakeholders.’

Article 13.13 Civil society dialogue mechanism

Article 13.13.1: ‘Members of Domestic Advisory Group(s) of each Party will meet at a Civil Society Forum in order to conduct a dialogue encompassing sustainable development aspects of trade relations between the Parties. The Civil Society Forum will meet once a year unless otherwise agreed by the Parties. The Parties shall agree by decision of the Committee on Trade and Sustainable Development on the operation of the Civil Society Forum no later than one year after the entry into force of this Agreement.

Article 13.13.2: ‘The Domestic Advisory Group(s) will select the representatives from its members in a balanced representation of relevant stakeholders as set out in Article 13.12.5

Article 13.13.3: ‘The Parties can present an update on the implementation of this Chapter to the Civil Society Forum. The views, opinions or findings of the Civil Society Forum can be submitted to the Parties directly or through the Domestic Advisory Group(s).’

Such an institutional approach immediately raises questions in three related fields. The first is the composition (and representativeness) of the membership of the Domestic Advisory Groups. How are members to be appointed? What *is* civil society to be understood to mean and who should define it? ‘Us’? ‘Them’? And who, in any case, might ‘us’ be? The second field concerns the organisation of these institutional provisions. Who should provide the secretariat? Who should provide the resources (including travel expenses for members)? How are meetings to be managed? What should meetings produce and how might those products be operationalized? A third set of questions concerns interaction; specifically, how should the

Domestic Advisory Groups interact with their respective ‘governments’? how should ‘governments’ provide feedback? How should disputes be settled?

In the case of the EU-Korea Agreement, the result, almost immediately, has been asymmetric responses in all those fields, both within the two parties and between them. To take one example, on the composition of the Domestic Advisory Group on the EU side, the European Commission sought to clarify the situation by appending a statement to the 16 September 2010 Council decision on the signing of the EU-Korea free trade agreement.³

With a view to ensuring a proper implementation of the Chapter on Trade and sustainable development, a Domestic Advisory Group shall be established. This group will include equal representation of business, trade unions and the non-governmental organisations. The Economic and Social Committee shall also be adequately represented...

The uninitiated might wonder what ‘adequately’ could mean in this context; it is almost certainly an oblique reference to the three-Group structure of the European Economic and Social Committee (see Westlake, 2016, pp. 42-50) But the underlying conundrum is that the EESC represents, very precisely, ‘business, trade unions and the non-governmental organisations’.

The European Economic and Social Committee

The EESC, a sort-of institution (though not an **Institution**, with a capital ‘I’, in the sense of TEU Article 13), is a relatively obscure part of the EU’s machinery but, as will be seen, it is an obvious and longstanding partner in the Union’s external relations. TEU Article 13.4 provides that: ‘The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee ... acting in an advisory capacity’. TFEU Article 300.2 defines the Committee’s membership as consisting of ‘representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socio-economic, civic, professional and cultural areas’.

³ Statements in the Council minutes are a recondite means of providing some non-legislative clarity going beyond the Council’s formal decisions – see Nicoll (1999).

And TFEU Article 304 provides that: ‘The Committee shall be consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide. The Committee may be consulted by these institutions in all cases in which they consider it appropriate’. However, beyond these formal provisions, ‘Increasingly, the European Commission in particular has come to rely on the EESC to cover the civil society aspects of the European Union’s external relations’. (Westlake, 2016, p. 115) Perhaps precisely because the Committee’s advisory and apolitical status denies it the visibility of one of the EU’s Institutions, this hybrid role is largely unknown outside of specialised circles yet is highly developed and covers pretty much all of the EU’s external relations: enlargement and the candidate countries (Joint Consultative Committees); EFTA and the EEA (EU-EEA Joint Consultative Committee); the Western Balkans: Albania, Bosnia-Herzegovina, FYROM, Montenegro, Serbia and Kosovo (Follow-Up Committees); the Eastern European Neighbours: Ukraine, Moldova, Belarus, Georgia, Armenia, and Azerbaijan (Follow-Up Committees); Russia (Follow-Up Committee); the Southern European neighbours and Euromed (Follow-Up Committee); the ACP-EU (Follow-Up Committee); Latin America (Follow-Up Committee); EU-Brazil (Round Table and Contact Group); Chile (Joint Consultative Committee); EU-China (Round Table and Contact Group); Japan (Follow-Up Committee). All of these bodies have been established to foster links and structured dialogue with civil society in the partner countries and, implicitly, to foster the healthy growth of civil society organisations in the partner countries. In addition, the Committee provides a Follow-Up Committee on International Trade and, in the specific context of this article, the FTAs, the Committee is active vis-à-vis the CARIFORUM-EU Joint Consultative Committee plus the six Domestic Advisory Groups (in the context of the Free Trade Agreements listed above.

Thus, from all of the foregoing it can be seen that if the EU opts for an institutional approach, as it has done, the EESC is clearly the obvious institution to provide the EU's civil society representation. It *is* an institution, with a structure, permanence and Treaty-based legitimacy; it is practised at diplomacy; it is reliable and a loyal partner; it has expertise and experience; in particular, it has a pool of 353 members representing all sorts of civil society organisations in the member states; it has a secretariat and resources (although see below on that point); and it works. These are considerable advantages, particularly when all of the emphasis should, from the prescriptive point of view, be on the other side of the agreement. This is not to say that there are not potential downsides to an exclusive use of the Committee. Some would point to the Committee's restrictive architecture (the three groups), for example. At the same time, the EESC has no Treaty-based role with regard to external relations.

However, the EESC is not alone. In 1998, the European Commission's DG Trade established a civil society dialogue on trade to create; 'a structured dialogue with its stakeholders with the purpose of strengthening communication and mutual understanding'.⁴ The intention was 'to consult civil society widely, to address its concerns on trade policy, to improve EU trade policymaking and to promote transparency and accountability'.⁵ You cannot create something and then not use it. Moreover, the European Commission has always exhibited a sort of 'double vision' of seeing the advantages both of the institutional approach and the direct stakeholders approach. In practice, the Commission therefore tend to carry out both indirect (advisory body) and direct ('stakeholders') consultations. Moreover, powerful umbrella civil society organisations (for example, Business Europe, the European Trade Union Confederation, the European Consumer Organisation) legitimately wish to have their say. The result is, frequently, an inconsistent combination of double or even triple vision, leading one frustrated EESC member to remark, "The Commission keeps an inconsistent policy when it

⁴ <http://trade.ec.europa.eu/civilsoc/>

⁵ *Ibid.*

comes to deciding what ‘EU civil society’ means in terms of involvement in international agreements. It is a permanent struggle for us.’ (anonymous interview with the author).

Asymmetric implementation

The result is asymmetry. The EESC is represented on all of the DAGs, numerically in the same fashion but proportionately in different ways: EU-Korea: 3 members out of 12; EU-Colombia and Peru: 3 out of 9; EU-Central America: 3 out of 9; EU-Georgia: 3 out of 5; EU-Moldova: 3 out of 6; EU-Ukraine: 3 out of 12; and EU-CARIFORUM: 3 out of 15. The other places are taken by other civil society representatives chosen otherwise (mainly by DG Trade). As to organisation, in reality, a pragmatic, though largely under-the-radar, agreement was reached between the EESC and the European Commission’s DG Trade whereby the EESC provides the secretariat for all the DAGs, leading one expert commentator to observe that ‘the EESC is an important actor in this regard.’ (Orbie et al, 2016) But so far the budgetary authority has failed to recognise the implications that these ever-increasing responsibilities place upon the Committee’s relatively small operational budget (and, in the longer run, this benign negligence will clearly prove unsustainable).

Meanwhile, regarding the more general implementation of the institutional provisions in the agreements, the views of informed academics⁶ vary from scepticism about gesture politics and the legitimisation of liberalisation to more technical criticism about the mechanisms and their construction. The hoary old chestnuts ‘early days yet’ and ‘teething problems’ may go some way towards explain some of these problems – but surely not all. Criticisms and shortcomings highlighted in a non-exhaustive survey of the literature (see bibliography) include:

⁶ Academic research has in particular been centred on two teams, one working at the University of Saint Mary, London, and the other working at the University of Ghent (CLEER). And I am grateful to Shuxiao Kuang (Université Libre de Bruxelles) for making an early draft of her article on ‘Social Clauses Versus Economic Interests?’ available to me.

- An excessive concentration on process, and lengthy delays in establishing the Domestic Advisory Groups, let alone in their functioning ('In sum, the organisation of C(ivil) S(ociety) M(echanisms) has had a rough start' – Orbie et al, 2016);
- Significant differences in the institutional frameworks from agreement to agreement;
- Differences between de jure and de facto establishment;
- Significant variations in formal composition;
- Significant variations in actual composition (diversity);
- Significant variations in selection mechanisms;
- Lack of transparency in selection mechanisms;
- Shortcomings in non-EU-based organisation and meetings;
- The absence of similar bodies to the EESC in partners;⁷
- Significant variations in frequency of meetings;
- At times, grave lack of resources, especially for participants, effectively disqualifying them from attendance;
- Significant variations in interaction with governments;
- Lack of clarity about purpose and objectives (support the FTA? Monitor and Inform? Dialogue and Deliberation? Advising Governments?);
- Subsequent difficulty of assessing/evaluating effectiveness.

In fact, all of the potential problems identified earlier in this article as possible consequences of adopting an institutional approach have occurred in part, whether through oversight, negligence, poor planning, lack of attention to effective implementation, competing

⁷ Though that is not entirely true across the board. In Central America, for example, a Consultative Committee for the Central America, Integration System exists and is already a long-term partner of the REX Committee of the EESC, and the Korean Republic has an Economic and Social Committee. As an EESC member has put it, 'In both cases, those institutions could have made the perfect counterpart, but they were simply ignored by their governments when appointing their DAGs. We are not alone in being neglected!' (Interview with the author.)

priorities, lack of resources, or some other reason(s), leading to ironic questions from expert observers such as, ‘Window dressing or window of opportunity?’ (Orbie et al, 2016, p. 46).

Different EU actors and points of view

Part of the problem on the European Union’s side is related to the different actors involved and the different views they take based, understandably, on their different vantage points. Thus, apart from the over-arching priorities of the Union and its Member States, as expressed through the European Council, at least three further points of view can be discerned. The first is the European Commission, and DG Trade, in particular. From the European Commission’s point of view, the agreements are vast in scope. All aspects have to be implemented and monitored. The trade and sustainable development chapters are among the more difficult to negotiate and to implement. The second is the European Parliament, with its concern for civil society aspects in general (and not just *organised* civil society). It “stresses that international trade is a core tool for Union foreign policy which, if it is sufficiently funded and implemented by means of coherent strategies, contributes to sustainable development, particularly in developing countries” (European Parliament, 2017). For its part, the European Economic and Social Committee is also concerned with the overall implementation of the agreement but, by its very nature and by the role it plays with the DAGs, is particularly concerned with the organised civil society aspects of the agreements. It has proposed a series of reforms and insists there should be consistency, in particular, on the need for: joint meetings between the DAGs of both sides to be featured explicitly in the text of the agreements; balanced and representative membership of DAGs; adequate financial support – on both sides; and to avoid duplicating civil society bodies in the same agreement: ‘One agreement, one civil society body’.

3. Latest developments

In its 2015 *Trade for All* communication, the European Commission failed to refer to the civil society mechanisms covering the Trade and Sustainable Development chapters in the existing agreements, nor how these might be developed and strengthened. In the European Commission's more recent consultative review (European Commission, 2017), the focus seems mainly to be on whether a sanctions-based approach might be more effective (an option almost certainly proposed in order for it to be excluded – for the Commissioner herself is on the record as being against such an approach). The Commission in any case restricts itself to suggesting that the advisory role of civil society might be enhanced by 'improving the functioning of the Domestic Advisory Groups and the Joint Forums'.⁸ The European Parliament favours a consistent (not necessarily identical) approach with the establishment of appropriately-resourced Domestic Advisory Groups much to the fore. One amendment tabled in the INTA Committee, "calls for the inclusion of Domestic Advisory Groups and Joint Platforms into Citizens' dialogue as they are the main vehicles towards achieving civil society's effective participation in the enforcement and monitoring of trade sustainability chapters of trade agreements" (Alessia Maria Mosca amendment 7). And at least one of the larger groups (S&D) has begun to address the resources issue: another draft amendment (6756) declares that:

Domestic Advisory Groups are the main vehicles towards achieving civil society's effective participation in the enforcement of trade and sustainable development chapters in trade agreements. Those bodies are supported mainly by the members and staff of the European Economic and Social Committee. In view of upcoming new mandates to the EESC (Canada, Mexico, Mercosur, Japan, Vietnam, Singapore, Indonesia) an increase in the budget line for EESC members' activities as part of those DAGs is requested.

⁸ European Commission, 2017, p. 6.

4. Conclusion

This paper asked, ‘Asymmetrical institutional responses to civil society clauses in EU international agreements: pragmatic flexibility or inadvertent inconsistency?’. In the light of the foregoing, the answer is ‘neither’. *A la limite*, it might even be argued that the apparent ‘flexibility’ is inadvertent and the inconsistency pragmatic! But the probable truth is that although the trade and sustainable development provisions in the new generation of EU free trade agreements constitute a commendable attempt by the EU and the Commission and DG Trade, in particular, to incorporate new, non-traditional, actors in a ‘progressive trade policy in a protectionist age’,⁹ attention to effective implementation of those provisions has so far been patchy and inconsistent, in some part due to what might be termed institutional inertia.

As to whether EU institutions have naturally incorporated these actors into their already existing structures, or whether they have had to design special processes to deal with the non-traditional actors, the answer is ‘both’. The simple logic would be to provide explicitly for the EESC’s role (part representation and secretariat) in the DAGs in the agreements themselves, but the EU is, of necessity, frequently characterised by more complex logic. The European Commission (DG Trade) has adopted a dual approach, using both existing and new structures.

But the challenge has now moved on. It is not about creating structures, but about making them work effectively, and doing that will require a holistic approach that is sensitive to all the points of view described in this article. In that context, the European Commission’s recent non-paper and the EESC’s recommendations and the Parliament’s recommendations (INTA position) demonstrate clearly that there is a considerable ‘*marge d’amélioration*’, although the EU’s approach is already evolving, as a comparison between the Korea and Ukraine provisions demonstrates clearly (the EESC’s representative role, for example, is mentioned explicitly in the latter agreement).

⁹ Malmström, 2017.

On the other hand, although the latest Economic Partnership Agreement (2016) between the European Union and the South African Development Community puts sustainable development centre stage (Part I) and makes no provision for Domestic Advisory Groups. It is reported that some SADC countries refused to countenance any civil society provisions and that DG Trade ‘took the loss’ in favour of clinching the overall deal. The European Parliament was critical but pragmatically supported the deal, and the European Commission has meanwhile promised to come back to the issue, though obviously not in the text of the agreement. This episode reveals the risks inherent in the institutional, promotional approach, namely: third country parties tend to be most interested in the commercial aspects of the agreement; they tend to be suspicious about such TSD chapters, which they suspect might be non-trade barriers and a disguised back door for protectionism; more generally, the institutional approach can be resented as an imposition, and/or as condescension, and/or as gesture politics.

The consensus among observers would appear to be *not* to abandon the promotional approach, but to negotiate it and implement it more effectively and less asymmetrically. The EU must not just ‘talk the talk,’ but ‘walk the walk’.

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