

of the worker. Considering that the steady growth of workers over 50 resulting from an aging population and rising retirement age, it is evident that the solutions adopted in the past, including the retirement of these workers, have resulted in a cost of Welfare policies too high to be maintained. For this reason, the solution of the reintegration of workers appears to be the only sustainable, though not easy to implement, even for the greatest difficulty encountered in their formation. Analyzed therefore the existing instruments in national and regional order to encourage the relocation of older workers, it is proposed to enhance the bilateral funds in the prospect of vocational training.

## THE TRANS-ATLANTIC TRADE AND INVESTMENT PARTNERSHIP AND SOCIAL RIGHTS: WHAT KIND OF HARMONISATION?

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SUMMARY: 1. Introduction. – 2. Collective bargaining. Monism v. pluralism. Centralisation v. decentralisation. – 3. Unfair dismissals: employment-at-will v. just cause. – 4. The ISDS clause and the risk of privatisation of labour. – 5. How to avoid a downward harmonisation: for a TTIP labour chapter. – 6. Concluding remarks.

### 3. Introduction

The current negotiations between the USA and the EU of the Trans-Atlantic Trade and Investment Partnership (henceforth TTIP), started in 2013, are aimed at creating the first regional zone of free trade in the world in terms of commercial flows. The goal, in the perspective of the negotiators, should be achieved through the regulatory cooperation among the two sides of the Atlantic: in other words both the EU and the USA legislative frameworks should follow the trajectory of harmonisation, because “non-tariff” barriers (i.e., the different rules on personal data protection, public procurement, health care, labour law...) are deemed an obstacle to the development of a global market based on free trade principles, in front of tariffs already quite low for international trade<sup>1</sup>. Of course, the perspective of harmonisation is not a neutral concept, if the methodological approach is not merely individualistic (the transnational development of commerce), but holistic (the pursuit of collective well-being inside a specific social-political community)<sup>2</sup>: more particularly, the main

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<sup>1</sup> See C. SCHERRER, *The Cover Assault on Labor by Mega-Regional Trade Agreements*, *DLRI*, 2016, 344.

<sup>2</sup> On the difference between holism and individualism in social sciences see K.J. AR-

question arising is if the future approval of the TTIP will lead to a bottom-down or bottom-up harmonisation between the USA and the EU legal frameworks. In this regard labour law has been chosen as a field where testing the possible outcomes of the regulatory cooperation approach. The perspective will be that one of European observers: in times of economic and financial crisis, where austerity policies have strongly eroded the solidaristic and re-distributive paradigm of European Member States labour laws, what is the role played by TTIP on the protection of social rights? Is it possible to reconcile the liberalisation of trade – by abolishing legal barriers – with the common constitutional traditions of EU Member States, based on the Marshallian model of citizenship born in the 50s?

To test the compatibility of the TTIP with the European *Weltaanschauung*, firstly two main domestic areas will be briefly taken into account: collective bargaining and individual dismissals, that clearly exemplify the different historical and political roots of American and European labour law, respectively based on a *laissez-faire* approach and on an egalitarian one<sup>3</sup>. Moving to the international sphere of labour law, the impact of an Investor-to-State dispute settlement (henceforth ISDS) clause on State sovereignty will be discussed: if such a mechanism would form part of the treaty, States could retrench from intervening in a proactive way in labour issues, to avoid the risk of being condemned by private arbitrators for their labour policies. The process of convergence – under a teleological Euro-centric perspective – could be eventually race to the bottom, especially in those Member States whose labour legislations have been rewritten by using a neo-liberal approach to deal with the crisis: this is the case, especially, of Southern European countries, that have reduced the institutional constraints to employers' discretion to compete in the global market under the pressure of the Troika and the *New European Economic Governance*<sup>4</sup>.

To avoid the risk of a downward harmonisation, in its final section

row, *Methodological Individualism and Social Knowledge*, *The American Economic Review*, 84, 1994, 1-9.

<sup>3</sup> For a detailed analysis of the different historical evolution of labour in US and in Europe see R.J. ADAMS, *Industrial Relations under Liberal Democracy. North America in Comparative Perspective*, 1995, 21-62.

<sup>4</sup> See S. DEAKIN, A. KOUKIADAKI, *The sovereign debt crisis and the evolution of labour law in Europe*, in M. FREEDLAND, N. KOUNTOURIS (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge, 2013, 180-185.

the present work proposes the antidotes that could impede a total liberalisation under a multi-level perspective: ILO core conventions and fundamental principles, EU Treaties and the Nice Charter are seen as countervailing market powers<sup>5</sup> that should guide the parties during the negotiations. Suffice it to say, the introduction of a social clause with binding mechanisms is suited, also involving different stakeholders (ILO bodies, EU agencies, trade unions, NGOs...).

## 2. Collective bargaining. Monism v. pluralism. Centralisation v. decentralisation

To properly understand the different systems of industrial relations in the USA and the EU, it is necessary to move from their constitutional traditions under an historical perspective: if the US bill of rights does not mention social rights at all, even if emended 27 times during its history; on the contrary the EU Charter of Fundamental Rights fully recognises the right to collective bargain in compliance with EU law and Member States common constitutional traditions (art. 28). The main outcome of the US *Grundnorm* silence on social rights is represented by a weak protection of collective bargaining granted by statutory law, as contained in the Wagner Act enacted in 1935<sup>6</sup>: in fact, the right to bargain collectively in the workplace is not automatically granted, being subject to a complicated procedure: firstly, a preliminary petition for union's recognition in the bargaining unit must be signed by 30% of workers; later, the majority of employees of the same unit must vote for being represented by the union during a secret ballot. Therefore, the strongest expression of the freedom of association is the eventual presence of just one trade union within the company/plant, that legally represent all the workers. In addition, especially after the neo-liberal ideology rooted in the Reagan era, U.S. tribunals have given a market-oriented interpretation of the Wagner Act rules: i.e., they have considered lawful the so-called "captive audience meetings" in which employers threaten workers to close plants or discharge them in case of trade union's victory in the

<sup>5</sup> On the notion of countervailing market power see J.K. GALBRAITH, *Le capitalisme américain: le concept du pouvoir compensateur*, Paris, 139 ss.

<sup>6</sup> For an introduction to the US system of labour relations see W.B. GOULD, *A primer on American labor law*, Cambridge, 2013; AA.VV., *Labour Law in the Contemporary Workplace*, St. Paul, 2014.

secret ballot<sup>7</sup>; moreover, in the U.S. several categories of workers are excluded from the right to join or form a trade union in compliance with the same provisions of the Wagner Act (e.g., agricultural and domestic workers, independent contractors, supervisors)<sup>8</sup> or the interpretation made by the Supreme Court (i.e., professors at private universities<sup>9</sup> or managers<sup>10</sup>); last but not least, US law allows employers to permanently replace workers who exercise the right to strike<sup>11</sup>. In addition – having regard to the public sector – in recent times several States have introduced legislation forbidding or highly restricting the right to unionise of civil servants on the basis that unionisation within the public administrations may distort democracy and the political process<sup>12</sup>. Such an institutional context hostile to organised labour is also evident in the sphere of international labour law: in fact the U.S. have not ratified ILO Conventions nos. 87 and 98 protecting the freedom of association and the right to organise, that could be the milestone of a process of legal harmonisation based on a human rights approach.

On the contrary, moving to Europe, there are several sources of constitutional law protecting the freedom of association and the right to collective bargain both at EU, European Council and domestic levels: trade unions activity is a core element of the industrial citizenship, that entails a collective action based not only on wages claims within the single bargaining unit, but also a solidaristic pattern at national level. Unfortunately, the economic crisis conventionally born in 2008 has led to an unprecedented deconstruction of the redistributive paradigm of industrial relations, not based anymore on the dogmatic category of inderogability, very well embedded in the binomial statutory law and industry-wide agreement: several Member States, especially those belonging to the Euro-Mediterranean model (Italy, Spain, Portugal, Greece and France), have modified their systems of collective bargaining as a measure to foster economic recovery, under the pressure of the Troika (European Commission,

<sup>7</sup> See *Litton Sys., Inc.*, 173 N.L.R.B. 1024, 1030 (1968), holding employer may discipline employee who leaves captive audience meeting.

<sup>8</sup> See Section 2(3) of the Wagner Act.

<sup>9</sup> See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

<sup>10</sup> See, e.g., *NLRB v. Bell Aerospace Corp.*, 416 U.S. 267 (1974): the judicial interpretation of the Supreme Court decided to equate a managerial employee with the term «employer», rather than with the term «employee» under Section 2 of the Wagner Act.

<sup>11</sup> See *N.L.R.B. v. Mackay Radio and Telegraph Co.*, 304 U.S. 333 (1958).

<sup>12</sup> See M.H. MALIN, *Does public employee collective bargaining distort democracy? A perspective from the United States*, *Comp. Lab. L. & Pol'y J.*, 34, 2012-2013, 285-289.

International Monetary Fund, European Central Bank) by signing Memoranda of Understandings or within the Open Method of Coordination as a part of the *New European Economic Governance*<sup>13</sup>. The *leit-motiv* is the decentralisation of collective dynamics: company agreements are more and more given exceptions to waive multi-employer bargaining in the main areas of the employment relationship (working time and rests, salary, jobs, precarious forms of employment...)<sup>14</sup>; in the case of Italy, in compliance with art. 8 Act 148/2011 and Legislative Decree 81/2015 the liberalisation is total, being possible for a company agreement to waive even statutory law, excepted non-discrimination and health and safety legislations. Moreover, in the cases of Spain and Greece the ILO Committee of Experts on the Application of Conventions and Recommendations has found that national legislators have violated the freedom of association as recognised in Conventions nos. 87 and 98, by imposing on social partners a binding architecture of industrial relations based on the imperative priority of the company agreement<sup>15</sup>.

The comparative analysis demonstrates that neither the US or the European systems of collective bargaining enjoy good health in terms of protection of organised labour as weak contractor in the labour market. The matter is further complicated, because if it is true that on the one side there is a basic collective rights imbalance between the USA and Europe, on the other side in recent times European systems look at the decentralised US model as an ideal-type in terms of cultural orientation: in fact, under a functionalist perspective, despite the structural divergences of EU labour laws, there is a common convergence towards the decentralisation of collective dynamics. If so, the competition philosophy of the TTIP could negatively impact on the conditions of European workers, reducing the already weakened collectively bargained standards, especially for those ones who are performing less qualified jobs (i.e., atypical workers)<sup>16</sup>.

<sup>13</sup> See S. BOLOGNA, *Liberalizing Industrial Relations in Times of Crisis: Towards the End of a Coordinated and Egalitarian Model*, *EL*, 2016, 101-120.

<sup>14</sup> E.g., in Greece (Act 4024/2011) and Spain (Act 3/2012) company agreements have an imperative priority over the branch one; in addition, in France after the recent approval of the so-called *Loi Khomri* (August 2016) the branch agreement applies only in lack of *accord d'entreprise*. See P. MARGISON, *Coordinated bargaining in Europe: from incremental corrosion to frontal assault?*, *European Journal of Industrial Relations*, 2015, 97-114; P. LOKJEC, *Revoir l'exercice du pouvoir dans l'entreprise*, *DS*, 2016, 502-504.

<sup>15</sup> See A. BAYLOS, N. CASTELLI, F. TRILLO, *Negociar en crisis. Negociación colectiva en los países del Sur de Europa*, 2015, 67-68.

<sup>16</sup> C. SCHERRER, *The Cover assault on labor*, cit., 360.

#### 4. *Unfair dismissals: employment-at-will v. just cause*

The rules on dismissals are also symptomatic of the difficulties in an hypothetical process of legal harmonisation as a part of the TTIP: like in the case of industrial relations, the values beneath the statutory protection granted in the European Member States and the USA are linked to a different idea of labour law. As it has been noted<sup>17</sup>, the approach followed on the other side of the Atlantic is based on *laissez-faire* capitalism: in fact, the employment contract is still ruled by common law and therefore there is no general protection against unfair dismissal or discharge without just cause, nor even any period of notice (employment-at-will doctrine); therefore the employment relationship is terminable by either the employer or the employee for any reason whatsoever. In any case the employment-at-will doctrine has been mitigated either by statutory law, collective bargaining and judicial created exceptions: the Civil Rights Act (1964) and the American with disabilities Act (1990) forbid a discharge based on discrimination because of race, creed, nationality, sex, age and disability. In addition, by the 50s the majority of collective agreements prohibit dismissals without just cause, with clauses enforced through arbitration and the courts. Last but not least, since the 60s courts have tried to limit employers' discretion in the termination of the contract of employment, by creating several exceptions, such as the "public policy rule" and the "covenant-of-good-faith"<sup>18</sup>: under the former an employee is wrongfully discharged when the termination is against an explicit public policy of the State; under the latter employer's personnel decisions are subject to a standard just cause and terminations made in bad faith are forbidden.

Even the presence of collective agreements, statutory law or judicial review are not enough to give effectiveness to the protection against unfair dismissals in the US: according to most recent data it must be noted that in the private sector around seven percent of employees are covered by collective agreements<sup>19</sup>. In addition, only a minority of States have en-

<sup>17</sup> See C.W. SUMMERS, *Employment at Will in the United States: the Divine Right of Employers*, U. Pa. J. Lab. Emp. L., 65, 2001, 68.

<sup>18</sup> See C.J. MUIHL, *The employment-at-will doctrine: three major exceptions*, Monthly Lab. Rev., 2001, 3-11.

<sup>19</sup> See BUREAU OF LABOR STATISTICS (BLS), *New Release Unions Members Summary*, USDL-15-0072 (Jan 28, 2016) (last access 22<sup>nd</sup> November 2016), available at SSRN in www.bls.gov.

acted legislation based on the covenant of good faith and too many times the exceptions have been restricted by courts: in most tribunals the public policy exception it is not utilised unless the same concept of public policy is formulated in constitutional or statutory provisions<sup>20</sup>. To sum up, as argued by Summers, the contract of employment is still similar to the ancient master-servant relationship, where the employee is a supplier of labour with the sole interest to be paid<sup>21</sup>.

On the contrary, the European legal aptitude on dismissals is much more holistic, and it reflects the ideology that democratic principles are to be applied also to the business enterprise: art. 30 of the EU Charter of Fundamental Rights clearly states that «every worker has the right to protection against unfair dismissal, in accordance with Community law and national law and practices». The protection is twofold: the employer must justify the end of the contract, and the technique of protection against the abuse of managerial power must be effective, deterring or preventing the employer from simply ending contracts at will<sup>22</sup>. In other words art. 30 – as concreted at national level – is to find the right balance between the employer's managerial prerogative to make business decisions and the worker's reasonable expectation of job security. Of course, the principles set in art. 30 do not imply a common and standard protection against an unlawful termination of the contract of employment among the 28 EU Member States: if we consider the implementation of EU rules at domestic level, the width of protection varies from country to country: reinstatement is not a general technique, and the amount of monetary compensation is comprised within different ranges.

At a first glance in the field of dismissal the regulatory cooperation – even if minimum – seems to be highly difficult in the perspective of a bottom-up integration: imagine how realistic could be that the US introduce a general (even if lower than Europe) protection against unfair dismissals, loosing their comparative advantage in terms of firing costs with European Member States. The opposite trend could prove easier, or the European down-ward harmonisation, already put in to practice by Southern European Member States: under the pressure of the New European Economic Governance the domestic legislations on dismissals have shifted

<sup>20</sup> See *Brockmeyer v. Dun and Bradstreet*, 85 Ill. 2d 561, 335 N.W. 2d 834 (1981).

<sup>21</sup> See C.W. SUMMERS, *Employment at Will in the United States*, cit., 65.

<sup>22</sup> For a commentary to art. 30 of the Nice Charter see J. KENNER, *Article 30. Protection in the Event of Unjustified Dismissal*, in S. PEERS, T.K. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights: A Commentary*, 2014, 805-832.

from reinstatement to mechanisms of monetary compensation, abandoning the *property job* model for the individual worker (i.e., Italy with Legislative Decree 23/2015 and Spain with Act 4/2013).

##### 5. *The ISDS clause and the risk of privatisation of labour*

If we analyse the possible TTIP regulatory cooperation not on the basis of the harmonisation of domestic legislations, but on the grounds of transnational forms of dispute resolutions, the most controversial issue is represented by the Investor-to-State Dispute Settlement (ISDS) clause. To sum up, such a mechanism would entitle a multinational corporation to convey a State in front of an international arbitral panel if the changes in legislation are perceived as an obstacle to its gains by invoking – i.e. – the *Open discrimination*, the *Direct Expropriation* or the violation of the *Fair and Equitable Treatment* principle<sup>23</sup>. The ISDS clause excludes *a priori* any judicial claim. The risk of privatisation of the general interest expressed by a political community is maximum: in fact the State – if condemned by the arbitral panel – normally pays a huge fee for the damage to the interests of the claimant, also including the cost of arbitration swinging among 1,000 \$ and 3,000 \$ for hour<sup>24</sup>. The functioning of an ISDS complaint is entirely submitted to the logic of private law, if we take into account the secrecy of the proceedings, the mutual recognition between the contractors and the recruitment of lawyers and arbitrators from about only 20 international law firms. Moreover, the impartiality of ISDS tribunals decisions are dubious: according to the current procedure of annulment of the International Centre for Settlement of Investment Disputes, a review of the merit is not permitted, unless in case of irregular constitution or corruption of the arbitral tribunal, manifest abuse of power, failure to state reasons for the award and serious departure from fundamental rule of procedure<sup>25</sup>. Since the 2000s the number of ISDS complaints has significantly increased: it has been estimated that by the end

<sup>23</sup> ISDS is ruled by the 1966 ICSID Convention (Convention on the Settlement of Investment Disputes between States and National of Other States), that allows arbitration among foreign investors and subnational units (States, provinces...). For further details see art. 25, para. 1 of the same ICSID. According to art. 25, para. 3, the contracting State must agree case by case to the ISDS, unless this condition is derogated.

<sup>24</sup> See C. SCHERRER, *The cover assault on labor*, cit., 351.

<sup>25</sup> See UNCTAD, *World Investment Report 2013*, 180, available at [www.unctad.org](http://www.unctad.org).

of 2012 500 of them are pending, with EU and US companies leading such a trend<sup>26</sup>.

Labour law could be one of the fields in which U.S. corporations could theoretically make use of the ISDS if provided by the TTIP, considering an *in melius* change in legislation in contrast with their financial and economic interests (i.e., the introduction of a basic income, of reinstatement as general technique of protection against unfair dismissals, or the abolition of the opting-out clause in collective dynamics). In recent times there are at least four cases that show how ISDS clause could negatively impact workers' rights. The first one is *Veolia Propreté v Egypt*, occurred in the wake of the Arab springs: in 2012 Veolia, a French multinational, contested through the ISDS clause the raise made by Egypt of minimum wage from 400 to 700 liras per month on the basis of the infringement of the private-public agreement among Veolia and Egypt for waste disposal, and asked for damage compensation of USD 110 million; in particular, Veolia contested that the increase in minimum wage erased its profitability in waste-water services because it could not transfer the unforeseen higher labour cost on consumers<sup>27</sup>. In a similar vein, mention must be made of the 2009 case *Centerra v. Kyrgyz Republic*: Centerra, a company in the field of gold mining sector, claimed that the legislative raise of the salary for high altitude workers in Kyrgyzstan entailed an unexpected increase of production costs. Eventually, in *Achmea v. Slovakian Republic* the Dutch insurance company was granted USD 25 million as a compensatory measure for a Slovakian bill limiting the chance for private health companies to distribute their gains<sup>28</sup>. Only in a 2013 ISDS case labour reasons prevailed over free trade: the same Achmea resorted to international arbitration to stop Slovakian draft legislation introducing a unique universal health insurance scheme, but the arbitral panel stated that «the design and implementation of its public health policy is for the State alone to assess»<sup>29</sup>. All the cases, whose documents are unpublished, are an ideal-type of how procedural rules contained in mega-treaties could be easily invoked by foreign investors to indirectly modify labour law: States could retrench from an *in melius* intervention in the fields of welfare and

<sup>26</sup> See C. SCHERRER, *The cover assault on labor*, cit., 351.

<sup>27</sup> See G. CELI, *How beneficial is TTIP for EU countries? Economic gains and social costs of an ambitious project*, *EL*, XLIX, 2015, 29.

<sup>28</sup> For the available documents see [www.italaw.com](http://www.italaw.com).

<sup>29</sup> See Ministry of Finance of the Slovak Republic, in [www.finance.gov](http://www.finance.gov).

social rights<sup>30</sup>. In addition, they demonstrate how the ISDS model is totally opposite to that one of State action, aimed at giving shape to the integration of general-political interests in a transparent way<sup>31</sup>.

International politics and investors seem to be oriented towards a model of treaty incorporating *tout court* ISDS: apart from the NAFTA in the recent China-Australia Free Trade Agreement (CHAFTA), signed in 2014, investment arbitration was included. The worries under a labour rights perspective join their peak if we have a look at the TTIP homologous, the Trans-Pacific Partnership (hereinafter TPP)<sup>32</sup>, that includes in its body an ISDS clause<sup>33</sup>. The destiny of the ISDS within the TTIP is uncertain: if on the one side the European Commission has excluded the ISDS from the topics of negotiations<sup>34</sup>, meanwhile there are some European political parties – the Populists, whose vote is essential for the approval of the Treaty<sup>35</sup> – that are in favour of such a mechanism. The European Commission in 2015 has proposed a soft form of ISDS, the Investment Court System (ICS), that lefts untouched the lack of democratic legitimacy of the process: the improvements, a mere form of legal *maquillage*, would be represented by a selection process for arbitrators, enhanced ethics rules and the settlement of an appellate body<sup>36</sup>.

<sup>30</sup> See M. FAIOLI, *Libero scambio, tutele e sostenibilità. Su cosa il TTIP interroga il (nuovo) diritto del lavoro*, RGL, 2015, 781-795; A. SIMONAZZI, A. M. FAIOLI, *Introduction*, EL, XLIX, 2015, 7-10.

<sup>31</sup> See M. DI PIETRO, *Il TTIP (partenariato transatlantico per il commercio e gli investimenti) e la cooperazione normativa*, EL, XLIX, 205, 121-130; UNITED NATIONS, *Report of the Independent Expert on the promotion of democratic and equitable international order*, General Assembly 2015, in [www.un.org](http://www.un.org).

<sup>32</sup> The TPP is a treaty on international trade concluded on 5<sup>th</sup> October 2015 by USA and twelve Asian countries, China excluded. During these months national authorities should ratify the agreement, whose *iter* is highly uncertain in the USA after the presidential elections that have brought to the victory of Donald Trump, with a protectionist approach in political economy.

<sup>33</sup> See T. TREU, *TTIP: raccomandazioni europee per un labor chapter*, DRI, 2015, 937.

<sup>34</sup> In particular, the European Parliament in its Resolution of 8<sup>th</sup> July has indicated to the European Commission a pro-labour approach in the negotiations: the most interesting proposal is the creation of a permanent Court on investments as an alternative strategy to ISDS and arbitration. See T. TREU, *TTIP*, *op. cit.* The full text of the resolution is available at [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>35</sup> See A. MOSCA, V. BORDONARO, *Il parlamento e la nuova politica commerciale: riflessi transatlantici*, EL, XLIX, 2015, 140.

<sup>36</sup> See P. EBERHARDT, *The zombie ISDS Rebranded as ICS, rights for corporations to sue states refuse to die*, Brussels, 2016, in [www.corporateeurope.org](http://www.corporateeurope.org).

Apart from political disputes – as already noted<sup>37</sup> – the ISDS poses a problem of compatibility with the existing EU legal framework on European Union's liability within international agreements of which the same EU is part, as contained in EU Regulation 912/2014: the regulation, that codifies the *Fiamma* principle elaborated by the European Court of Justice<sup>38</sup>, foresees that foreign investors cannot have a privileged treatment than that one offered to European ones in compliance with EU legal system and the general principles common to the laws of the Member States (essentially the right to judicial protection of rights and interests). Accordingly, as highlighted by the European Parliament in 2013, the Court of Justice has clearly stated that the Union's liability for legislative acts, especially when dealing with international law, «must be framed narrowly and cannot be engaged without the clear establishment of fault»<sup>39</sup>.

#### 6. How to avoid a downward harmonisation: for a TTIP labour chapter

In order to avoid a downward harmonisation, several scholars have already proposed the introduction of a specific *labour template/chapter on sustainability* in the TTIP<sup>40</sup> whose *fil rouge* is the holistic approach to the regulation of international trade. Being aware that the EU and US market will be more and more integrated, the labour chapter could represent a countervailing market power to avoid a race to the bottom approach. If we move from a human rights perspective, acceptable from both parties, no clause of the Treaty could infringe the core labour standards, as contained in the ILO Declaration on Fundamental Principles and Rights at Work of 1998 and in the 2008 ILO Declaration on Social Justice for

<sup>37</sup> See M. FAIOLI, *The quest for a new generation of labor chapter in the TTIP*, EL, XLIX, 2015, 109 ss.

<sup>38</sup> See Justice Court 9 september 2008, Joined Cases C-120/06 P and C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v Council of the European Union and Commission of the European Communities*, in [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu).

<sup>39</sup> See European Parliament 2013 Report, in [www.eurparl.europa.eu](http://www.eurparl.europa.eu).

<sup>40</sup> See L. COMPA, *Labor rights and labor standards in Transatlantic Trade and Investment negotiations: a US perspective*, EL, XLIX, 2015, 101; M. FAIOLI, *Libero scambio*, cit., 790; A. PERULLI, *Sustainability, Social Rights and International Trade: The TTIP*, *The International Journal of Comparative Labour Law and Industrial Relations*, 31, 2015, 479 ss.

a Fair Globalisation: a) the 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. In other words, under an axiological and normative perspective, there are some internationally social rights that cannot be waived by the treaty or the multinational corporations, because they represent *jus cogens*<sup>41</sup>: i.e., if the TTIP would be based on social rights internationally recognised, the right to unionise and trade union pluralism in a bargaining unit could not be contested by U.S. corporations as a potential threat to their profits.

The TTIP could give effectiveness to such an approach by introducing a social clause accompanied by positive and negative sanctions of both soft and hard law: firstly, social partners should develop international framework agreements (IFAs) where a common set of rights are recognised to the employees of the same corporation, with independence of the place where the bargaining unit is based (US or Europe). Secondly, under an hard law approach the TTIP should even require multinational firms benefiting from it to apply the highest standards of industrial relations and workplace conditions in all their operations (USA/EU)<sup>42</sup>; in addition, a permanent and independent EU-US monitoring mechanism of the effects of the agreement should be put in practice, involving also ILO bodies and the civil society (trade unions, NGOs...). In order to give the strongest effectiveness to the dimension of fair trade, the social clause should contemplate a binding mechanism of commercial sanctions in case of infringement of mutually recognised social rights<sup>43</sup>: an helpful indication is contained in the Directive of negotiation of the Council, that points out that «the agreement must foresee a clause on general exceptions inspired on articles XX and XXI of the GATT (art. 12)»<sup>44</sup>; in other words a State may invoke an established benchmark of social rights to suspend

<sup>41</sup> See J.-M. SERVAIS, *International Labour Law*, The Netherlands, 2014, 82-85.

<sup>42</sup> I.e., EU Directives on company works councils should apply to European firms in their US operations.

<sup>43</sup> See A. PERULLI, *Commercio globale e diritti sociali. Novità e prospettive*, RGL, 2016, 736.

<sup>44</sup> Under Art. XX GATT a State is entitled to adopt restrictive measures in global trade to protect its internal market from products made with low-cost labour. Forms of social clause with binding mechanisms are to be found in the North American Agreement on Labor Cooperation (NAALC) and in the Central America Free Trade Agreement (CAFTA). For further details see A. PERULLI, *Clausola sociale, Enc dir.*, 2014, 200-203.

duties and obligations arising from the treaty, if the counterpart has infringed the TTIP rules on sustainable and fair trade.

If we adopt a Euro-centric perspective, the TTIP should be negotiated in compliance with fundamental principles of EU law, that are applicable also to the external action of the EU institutions: more precisely, the horizontal social clause (art. 9 TFEU), if jointly read with arts. 2 and 3 TUE, forbids any EU intervention going against the rationales of the EU system, such as equality, the creation of a social market economy, the fight against social exclusion and the rule of law. In addition, such a teleological approach is fully consistent with the main sources of international labour law: both the Charter of Fundamental Rights of the EU, annexed to the Treaty of Lisbon, and the two EU treaties (TUE and TFUE) recall the eight core ILO conventions in their wordings<sup>45</sup>. Within this conceptual framework social rights are norms of programmatic nature, that give instructions to EU institutions in pursuing their policies<sup>46</sup>. Last but not least, the Treaty of Lisbon has fully legitimated an EU external action based on the linkage among social rights and fair trade<sup>47</sup>: more precisely, according to art. 205 TFUE «The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union»<sup>48</sup>. Subsequently no space would be left, i.e., to an ISDS clause on labour issues, clearly infringing both the rule of law and the principle of material equality.

In this work it has been highlighted the risk of a possible Americanisation of the EU social model arising from the regulatory approach draft

<sup>45</sup> See G. CASALE, *International labour standard and EU labour law*, in N. COUNTOURIS, M. FREEDLAND (eds.), *Resocialising Europe*, cit., 87-88.

<sup>46</sup> See F. HENDRICKX, *Completing economic and social integration: towards labour law of the United States of Europe*, in N. COUNTOURIS, M. FREEDLAND (eds.), *Resocialising Europe*, cit., 71.

<sup>47</sup> See A. PERULLI, *Fundamental Social Rights, Market Regulation and EU External Action*, *The International Journal of Comparative Labour Law and Industrial Relations*, 2015, 39.

<sup>48</sup> In a certain way such an approach seems to be confirmed by the so-called *Mandate*, document declassified in 2014 and containing the guide-lines elaborated by the Council for Foreign Affairs to negotiate the TTIP: «the partnership with the US is based on common principles and values consistent with the principles and objectives of the Union's external action» (section «general principle»). See V. CAGNIN, *What future for social rights under the new Transatlantic Trade and Investment Partnership (TTIP)? Some reflections on TTIP*, *EL*, 2015, 80.

by the TTIP: in order to avoid stereotypes it should be considered that too many times European corporations, when acting outside the EU, have followed a “When in Rome” trajectory<sup>49</sup>: an example is to be found in the Chattanooga case, where the Volkswagen – that in the EU has always followed a cooperative approach with trade unions – has thwarted for several months the unionisation of its plants in the Tennessee city of Chattanooga with rigid union-busting practices that many American companies normally put in practice<sup>50</sup>. A social clause in TTIP would benefit not only European workers, but also U.S. ones, averting the deconstruction of both models of labour law.

But there is more: in times of unprecedented austerity policies carried out by the EU institutions, with limited chances of public expenditure for Member States, EU may also learn from US within the regulatory “social” cooperation in the envisaged TTIP labour template. The principles governing the federal system of US insurance against unemployment may represent a useful point of departure for an EU intervention against social exclusion: in a nutshell, the US Social Security Act of 1937 establishes money transfers from the federal budget to those States with an high idiosyncratic shock of unemployment for short periods of time, paying to the unemployed the benefits that the single State should correspond: by this way States may use the funds saved for social security to carry out an expansive economic policy<sup>51</sup>. The introduction of a similar model – the so-called European Unemployment Benefit Scheme – could contribute to resocialise an EU, whose institutions lack of democratic consensus and in recent times have merely imposed cuts to the public expenditures on social security and protection from temporary unemployment<sup>52</sup>.

<sup>49</sup> See L. COMPA, *Labor rights and labor standards in Transatlantic Trade and Investment negotiations*, cit., 94; HUMAN RIGHTS WATCH, *A Strange Case: Violation of Workers' Freedom of Association in the United States by European Multinational Corporations*, 2010, in [www.hrw.org](http://www.hrw.org).

<sup>50</sup> Union-busting is effective combinations of legal, psychological and political strategies that represent a formidable obstacle to the protections afforded employees from unionism. See J. BERNSTEIN, *Union-Busting: From Benign Neglect to Malignant Growth*, U.C. Davis L. Rev., 1980-1981, 1, 1-78.

<sup>51</sup> See S. DULLIEN, *A European Unemployment Benefit Scheme. How to Provide for More Stability in the Eurozone*, Verlag Bertelsmann, 2014; M. FAJOLI, *Diritti al Jobs Compact europeo. Cosa può fare il diritto del lavoro a sostegno dell'Europa che cambia*, in [www.nelmerito.com](http://www.nelmerito.com); T. TREU, *TTIP: raccomandazioni europee per un labor chapter*, cit., 931.

<sup>52</sup> See A. MOREIRA, A. ALONSO DOMÍNGUEZ, C. ANTUNES, M. KARAMESSINI, M. RAI-

## 0. Concluding remarks

This paper has briefly discussed the problem of legal harmonisation between the US and EU Member States social laws related to the current negotiations of the TTIP. As already noted, the two systems greatly differ from each other in terms of historical and social roots: if the American model of labour law is market-driven, the European one – despite several domestic divergences – is more social-oriented even if reshaped in a neo-liberal way after the financial crisis. Such a theoretical assumption has been demonstrated by comparing the different legal frameworks on industrial relations and dismissals: a TTIP merely based on a free trade approach could foster the race to the bottom trajectory of social law, that EU Member States has already embarked on. Moreover, an ISDS clause within the TTIP could privatise labour disputes and neutralise State proactive action aimed at improving workers' conditions. Under a *de jure condendo* perspective, the paper has focused on some tools that could create a TTIP based on the dimension of fair trade instead of free trade through a complex public-private policy mix: the holistic regulation of international commerce could be achieved through a labour chapter based on international fundamental labour rights as contained in ILO core principles, implemented also by social partners via international framework agreements and by a binding social clause. In addition, a European approach founded on TFEU and TEU fundamental principles should forbid any race to the bottom strategy. The TTIP negotiations have not yet ended: the implementation of a labour chapter is an essential strategy to build up a model of globalisation based not simply on economic rationality but also on methodological and normative holism, linking free trade with social justice. Apart from this, the future of the same TTIP is highly uncertain, especially after the victory of Donald Trump at the US presidential elections, who based his electoral program on protectionism having regard to political economy and global trade: in this connection the forthcoming President has already declared that the US will leave within 2017 the TPP, the TTIP homologous negotiated during the Obama presidency with Pacific countries<sup>53</sup>.

TANO, M. GLATZER, *Austerity-Driven Labour Market Reforms in Southern Europe: Eroding the Security of Labour Market Insiders*, *European Journal of Social Security*, 2015, 2, 202-205.

<sup>53</sup> See *Trump to withdraw from Trans-Pacific Partnership on first day in office*, in [www.theguardian.com](http://www.theguardian.com).



THE TRANS-ATLANTIC TRADE AND INVESTMENT PARTNERSHIP AND SOCIAL RIGHTS: WHAT KIND OF HARMONISATION? – Summary. The present work focuses on the negotiations of the trans-atlantic trade and investment partnership (henceforth TTIP) between the USA and the EU and its impact on the protection of social rights in Europe. In particular, the paper highlights the potential threats to the Marshallian paradigm of social rights in Europe arising from the TTIP, having regard to industrial relations and employment law. In fact, historically and legally speaking the EU Member States and the USA greatly differ from each other when protecting labour. In addition, in the field of labour justice the introduction of an Investor-State Dispute Settlement (ISDS) could jeopardise national sovereignty within labour issues, being possible that a multinational corporation submits a claim to international arbitration because of State action in the social field. In order to avoid a downward harmonisation, the work concludes by exploring the introduction of a labour chapter in the TTIP and its related “tools” (binding social clause, the respect of ILO conventions and TFUE provisions on EU external action).

IL TRANS-ATLANTIC TRADE AND INVESTMENT PARTNERSHIP E I DIRITTI SOCIALI: CHE TIPO DI ARMONIZZAZIONE? – Riassunto. Il presente lavoro analizza il processo di negoziazione del Trattato di libero scambio tra USA ed Unione Europea, il *Trans-Atlantic Trade and Investment Partnership* (c.d. TTIP), con particolare riguardo all'impatto che potrebbe avere sui diritti sociali nel vecchio continente. Più in particolare, l'articolo analizza i rischi di abbassamento delle tutele che il TTIP avrebbe su contrattazione collettiva e licenziamenti, facendo leva su un argomento storico-giuridico: infatti le culture giuridiche degli Stati membri dell'Unione, nonostante presentino a volte marcate differenze, differiscono dal modello individualistico e liberale del diritto americano. In relazione al contenuto del TTIP viene analizzata la clausola *Investor-State Dispute Settlement* (ISDS) che – ove recepita – consentirebbe ad una multinazionale di convenire in sede di arbitrato internazionale uno Stato a causa della legislazione lavoristica. In un'ottica *de jure condendo*, il presente contributo auspica l'introduzione di alcune misure volte a mitigare/neutralizzare l'impatto negativo del TTIP sui diritti sociali in Europa (clausola sociale, rispetto delle Convenzioni OIL e del TFUE).

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# Il diritto del mercato del lavoro

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La Direzione della Rivista ha sede presso lo studio del prof. avv. Francesco Santoni, Piazza della Repubblica n. 2, 80121 Napoli, [studiosantoni@libero.it](mailto:studiosantoni@libero.it), cui devono essere inviati i contributi di dottrina e di giurisprudenza.

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