

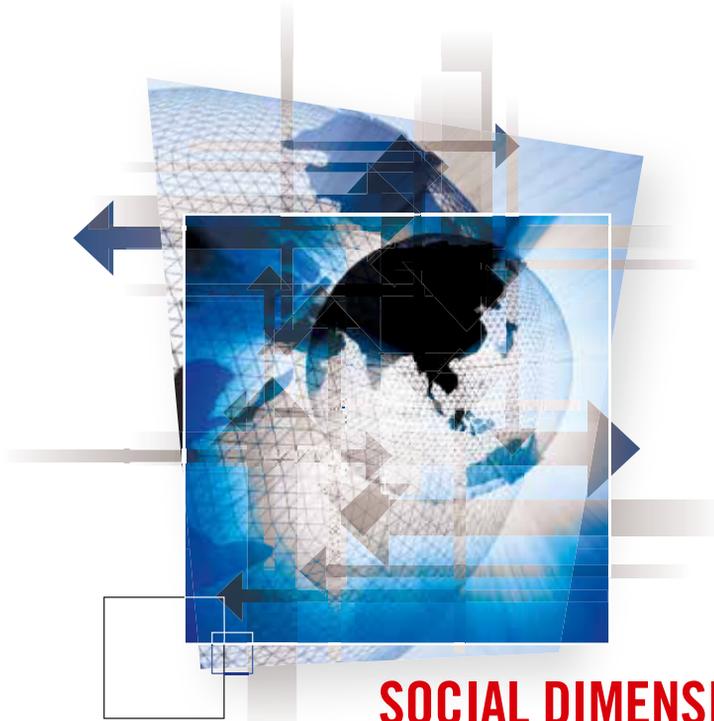


International  
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INTERNATIONAL  
INSTITUTE FOR  
LABOUR STUDIES

STUDIES ON  
GROWTH WITH EQUITY



# SOCIAL DIMENSIONS OF FREE TRADE AGREEMENTS

*Preprint*

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OF FREE TRADE AGREEMENTS**



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INTERNATIONAL LABOUR ORGANIZATION  
INTERNATIONAL INSTITUTE FOR LABOUR STUDIES

The International Institute for Labour Studies (IILS) was established in 1960 as an autonomous facility of the International Labour Organization (ILO) to further policy research, public debate and the sharing of knowledge on emerging labour and social issues of concern to the ILO and its constituents – labour, business and government.

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Social dimensions of free trade agreements / International Labour Organization; International Institute for Labour Studies. - Geneva: ILO, 2013

ISBN 978-92-9-251017-6 (print)  
ISBN 978-92-9-251018-3 (web pdf)

International Labour Organization; International Institute for Labour Studies  
free trade / trade agreement / trade liberalization / NAFTA /social implication /  
economic implication / role of ILO / Canada / Chile / Guatemala / USA

09.05.8

*ILO Cataloguing in Publication Data*

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The responsibility for opinions expressed in signed articles, studies and other contributions of this volume rests solely with their authors, and their publication does not constitute an endorsement by the Inter-national Institute for Labour Studies of the opinions expressed.

Copies can be ordered from: ILO Publications, International Labour Office, CH-1211 Geneva 22, Switzerland. For on-line orders, see [www.ilo.org/publns](http://www.ilo.org/publns)

This publication was produced by the Document and Publications Production,  
Printing and Distribution Branch (PRODOC) of the ILO.

*Graphic and typographic design, layout and composition,  
printing, electronic publishing and distribution.*

PRODOC endeavours to use paper sourced from forests managed in  
an environmentally sustainable and socially responsible manner.

Code: ALI-ATA-IMPR-DISTR

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## FOREWORD

In recent years, social issues have increasingly been integrated into bilateral and regional trade agreements. This new development is somewhat surprising and largely unexpected, given the controversial nature of the debate regarding the renowned "social clause" in the 90s.

However, opinions differ as to the effectiveness of labour provisions in trade agreements. Considered as a panacea for improving labour standards and working conditions by some, others criticise them as window dressing or even disguised protectionism. The debate is made even more complex when taking into account the different types of labour provisions that may be contained in free trade agreements.

This study presents a detailed analysis of how labour provisions are included in trade agreements. It examines the effects these provisions may produce in terms of labour laws or the conditions under which companies operate when engaged in international trade. This research also helps to better identify the question of coherence at the multilateral level, and how this affects the world of work that has been confronted with an increasing proliferation of bilateral and regional agreements in the past years.

The publication is an outcome of a joint project of the French Ministry of Labour, Employment, Vocational Training and Social Dialogue and the International Institute for Labour Studies of the ILO on "Social dimensions of globalisation: Analysis and initiatives to improve the governance of globalisation".

The Report has been prepared by Franz Ebert of the International Institute for Labour Studies, with research assistance from Samira Alloui, Charlotte Carel, Kyle Cote, Daniel Sexton and Srinidhi Rajput. Background research was carried out by Benjamin Alemán-Castilla, Quentin Delpech, Pablo Lazo Grandi, Stephanie Luce, and Lynne Turner. The report has benefited greatly from substantial comments and suggestions received by Lorand Bartels,

Duncan Campbell, Paula Church Albertson, Rudi Delarue, Guillaume DeLautre, Kimberly Ann Elliott, Eric Gravel, Michael Hobby, Pablo Lazo Grandi, Francis Maupain, Kimberly Nolan Garcia, Rafael Peels, Adriana Rossi, Jeffrey Vogt and the EU Commission staff. The report has been coordinated by Marva Corley-Coulibaly, under the supervision of Raymond Torres, the Director of the Institute.

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## LIST OF ABBREVIATIONS

ACP	Africa, Caribbean, and Pacific Group of States
ALC	Agreement on labour cooperation
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
CAN	Comunidad Andina (Andean Community of Nations)
CARICOM	Caribbean Community and Common Market
CAFTA-DR	Dominican Republic-Central America-United States Free Trade Agreement
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
ECOWAS	Economic Community of West African States
ELS	Employment and Labour Sector (of the South African Development Community)
EFTA	European Free Trade Association
ESENER	European Survey of Enterprises on New and Emerging Risks
FPRW	Fundamental principles and rights at work
FTA	Free trade agreement
GDP	Gross domestic product
GSP	Generalized System of Preferences
IILS	International Institute of Labour Studies
ILO	International Labour Organization
LDP	Labour development plan
MENA	Middle East/North Africa
MFA	US-Cambodia Multi-Fibre Agreement
MoU	Memorandum of understanding
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
NAO	National Administrative Office
NGO	Non-governmental organisation
PDT	Labour Development Plan
SUNAT	Superintendencia Nacional de Aduanas de Administración Tributaria (National Customs and Tax Authorities [of Peru])
OSH	Occupational safety and health
OTLA	United States Office of Labor and Trade Affairs

RIA	Regional integration agreement
SADC	South African Development Community
SUTSP	Sindicato Unio de Trabajadores de la Secretaría de Pesca (Single Trade Union of Workers of the Fishing Ministry)
WTO	World Trade Organisation
UNCTAD	United Nations Conference on Trade and Development
USC	United States Code (legal reference)
USTR	United States Trade Representative

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## EXECUTIVE SUMMARY

*The number of trade agreements that include labour provisions has increased significantly over the past two decades...*

Trade agreements with labour provisions have increased significantly in the last two decades, both in absolute and relative terms. Fifty-eight trade agreements included labour provisions in June 2013, up from 21 in 2005 and 4 in 1995. Although labour provisions tend to be concentrated in North-South trade agreements, there is a modest but increasing trend to integrate labour provisions into trade agreements among developing and emerging countries (South-South trade agreements).

About 40 per cent of trade agreements that include labour provisions have a conditional dimension. This implies that compliance with labour standards entails economic consequences – in terms of an economic sanction or benefit. Conditional labour provisions are typical of many of the trade agreements concluded by the United States and Canada.

The remaining 60 per cent of trade agreements that include labour provisions are exclusively promotional in nature. These provisions do not link compliance to economic consequences but provide a framework for dialogue, cooperation, and/or monitoring and are found mainly in EU, New Zealand and South-South trade agreements that consider labour issues. In many trade agreements, in particular the more recent EU agreements, promotional labour provisions are also legally binding and in some instances, compliance problems can also be followed up through a comprehensive institutional framework.

*... and this trend has influenced labour standards through, first, the ratification process...*

In some cases, the improvement of labour standards has been made a condition for ratification of the agreement. This has been particularly the case in agreements with the United States, where the political process plays a strong role in setting the conditions for ratification. There are examples where pre-ratification conditionality has contributed to significant reforms of domestic labour legislation and practice. Thus, in Oman, such reforms resulted in workers being granted the right to form and join trade unions, under certain conditions. In Bahrain and Morocco, protection against anti-union discrimination was reinforced.

In other instances, labour provisions of trade agreements may have contributed to facilitating labour law reforms and strengthening the enforcement framework. In the case of Peru, for instance, this included an extension of the authority of labour inspectors to sanction the fraudulent use of temporary contracts and outsourcing, as well as lowering the legal requirements regarding strikes. In Panama, a number of legislative amendments were adopted in relation to the trade agreement with the United States to improve freedom of association and enhance the legal protection of short-term contracts.

*... second, cooperation activities between signatory parties...*

The conclusion of trade agreements with labour provisions has often led to a wide range of cooperation activities among signatory parties.

Particularly comprehensive cooperative activities have emerged under some regional integration agreements. For example, the MERCOSUR Regional Plan on Labour Inspection has triggered joint multinational inspection activities, often facilitating improvements in national practice. Under the Andean Community framework, a number of policy and dialogue activities in the area of occupational safety and health have taken place. Comprehensive labour cooperation agendas have also been established under certain African regional integration agreements, such as the Economic

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Community of West African States (ECOWAS) and the Southern African Development Community (SADC).

New Zealand's trade agreements have also given rise to several cooperation activities. In the agreement with Chile, Singapore and Brunei, a labour-related policy dialogue has been established. In the agreement with Thailand, operational cooperation projects, such as on labour inspection, have been launched.

Many of the trade agreements concluded by the United States and Canada have given rise to increased cooperation on labour standards issues. Recently, agreements under NAALC have focused on institutional capacity building. An important example is Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), which has led to a variety of development cooperation projects to strengthen the enforcement capacity of domestic labour institutions and raise awareness of workers' rights.

Promotional activities have also been carried out under several trade agreements concluded by the EU. This includes technical cooperation projects, such as under the EU-ACP (African, Caribbean and Pacific Group of States) Agreement. Some EU agreements have also led to comprehensive exchanges of information and experiences on labour standards. Also, under recent EU trade agreements, consultative bodies including, among others, trade unions and employer organizations, monitor the implementation of the labour provisions.

*... and third, to a lesser extent, complaint mechanisms.*

Complaint mechanisms, where available, have rarely been activated. The study finds that complaint mechanisms were used in four cases, all of them involving the United States. So far, no complaint has given rise to a decision of a dispute settlement body or even led to sanctions. Some of the complaints have, to varying degrees, had effects on labour standards in the countries concerned.

The impact of both the pre- and post-ratification conditionality of labour provisions has crucially depended on the political will of the countries concerned. The role of accompanying advocacy measures by civil society, in particular workers' organizations, has proved instrumental in activating the different dimensions of labour conditionality in trade agreements.

*There are issues concerning the design of labour provisions and global coherence.*

The study finds that more and more economies are engaged in bi-lateral trade agreements that contain different labour provisions. It is therefore important to ensure adequate complementarities regarding the promotion of labour standards. The issue of monitoring of labour provisions is also important. Social partners are not always engaged in such monitoring, which may in some cases affect implementation.

Finally, there are global coherence issues. Labour provisions in trade agreements increasingly refer to ILO instruments, particularly the 1998 Declaration on Fundamental Principles and Rights at Work, and, in the case of recent EU agreements, also to ILO conventions. This development raises the challenge of applying these provisions in coherence with the relevant ILO instruments. There are a number of possible ways of involving the ILO in the implementation of labour provisions in order to inform their application and avoid inconsistencies with the relevant ILO instruments. In addition, ILO expertise could be more systematically harnessed to assist countries with enhancing the implementation of labour provisions, and design and implementation of cooperative activities.

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## **CHAPTER 1**

# **THE RAPID DEVELOPMENT OF LABOUR PROVISIONS IN TRADE AGREEMENTS**

### **KEY FINDINGS**

- In 2012, these agreements covered up to 5.5 per cent of global trade, compared with 0.6 per cent in 1995. Emerging Asian economies have been a major driver behind new bilateral agreements. Eight of the ten trading partners with the highest export volume in 2012 included at least one Asian economy, and six of those ten agreements were between two exclusively Asian parties.
- Based on a review of available research, the chapter finds that the labour market and social impacts of bilateral agreements depend heavily on policy settings. With adequate economic, employment and social policies, the agreements can yield positive effects. But this is not the case in other settings.
- This provides an economic and social rationale for the inclusion of labour provisions in trade agreements. The fact is that such provisions have proliferated over the last two decades: from only three in 1995, the number of trade agreements that include labour provisions increased to 21 in 2005, and to 58 in June 2013—including 16 South-South trade agreements.
- Of about 190 countries with trade agreements, roughly 120 are partners to trade agreements that include labour provisions. The majority of labour provisions focus on cooperation and monitoring (promotional elements); while only two-fifths also contain conditional elements, linking compliance with labour standards to economic consequences. The dominance of exclusively promotional labour provisions is particularly strong in South-South trade agreements, of which only two include the possibility of dispute settlement and, eventually, economic sanctions.

## INTRODUCTION

An important part of the debate about making globalization more socially sustainable deals with the question of how to ensure that trade liberalization upholds or improves labour standards, rather than puts them at risk. In recent years, labour standards and other labour issues have increasingly been integrated into bilateral and regional trade agreements.<sup>1</sup> Trade unions and civil society actors invest substantial resources in advocating for the inclusion of labour provisions in trade agreements and the issue is on the agenda of an increasing number of trade negotiators. There are widely divergent views on their effectiveness, however. While some consider them a panacea for improving labour standards and working conditions, others criticize them as mere window dressing or even disguised protectionism. The debate is made even more complex by the variety of labour provisions with different legal and institutional implications. This makes it difficult to generalize about their effects.

In this study labour provisions are defined as: “(i) any labour standard which establishes minimum working conditions, terms of employment or worker rights, (ii) any norm on the protection provided to workers under national labour law and its enforcement, as well as (iii) any framework for cooperation in and/or monitoring of these issues”.<sup>2</sup> This chapter provides an overview of the social and economic rationale for labour provisions in trade agreements as well as the various approaches that have been taken in different country contexts.<sup>3</sup>

There are a number of rationales for including labour provisions in trade agreements. From a social perspective the rationale is the safeguarding of social protection, while from an economic perspective labour provisions are tools against unfair competition, the main idea being that violations

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<sup>1</sup> This research focuses on bilateral and regional trade agreements. The inclusion of labour provisions in unilateral trade arrangements has been dealt with in earlier work of the ILS (World of Work Report, 2009; Ebert and Posthuma, 2011) and is therefore not further discussed here. Additionally, multilateral trade agreements and reference to international labour standards falls outside the scope of this research. Limited progress in the Doha Round among the World Trade Organisation (WTO) shifted attention towards bilateral and regional trade agreements.

<sup>2</sup> ILO (2009).

<sup>3</sup> This chapter is partly based on an earlier analysis in ILO (2009).

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of labour standards can distort competitiveness (“social dumping”) and should be addressed in a manner similar to that employed against other unfair trading practices.<sup>4</sup> In addition, there is the concern that trade liberalization without the necessary safeguards may lead to a race to the bottom as regards labour standards.<sup>5</sup> There is also a human rights rationale, whereby labour provisions can be used as a means of ensuring respect for labour-related human rights that reflect values universally accepted by the international community.<sup>6</sup> Through cooperative activities and dialogue such provisions can also be used as a catalyst for improvement of labour standards by increasing the labour-related implementation capacity of the countries concerned.

<sup>4</sup> See de Wet (1995); Granger and Siroën (2009).

<sup>5</sup> See, for example, Elliott (2011). Others have questioned this rationale, alleging, among others, a lack of evidence of a race to the bottom, and have criticized it as potentially giving rise to protectionism. For an overview of the arguments, see Salazar-Xirinachs and Martínez-Piva (2002); Stern (2003); Elliott and Freeman (2003).

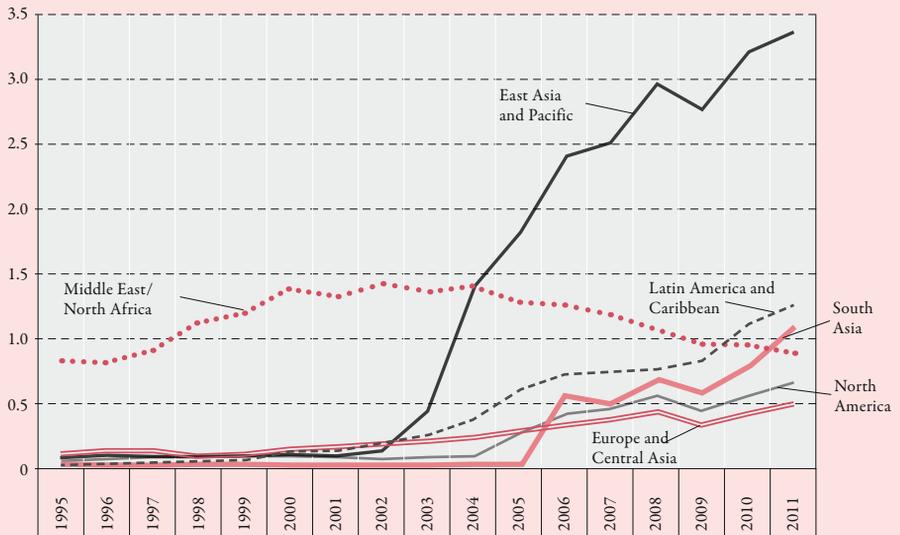
<sup>6</sup> See Trebilcock (2002).

Figure 1.1 Growth of Global Exports and the Importance of Bilateral Trade Agreements, 1995-2012



Source: UNCTADStat, World Bank Global Preferential Trade Agreements Database.

Figure 1.2 Exports under bilateral trade agreements as a percentage of GDP by region, 1995-2011



Source: UNCTADStat, World Bank Global Preferential Trade Agreements Database.

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## A PPROLIFERATION OF BILATERAL TRADE AGREEMENTS

Bilateral free trade agreements were first formed in the 1970s, and their major proliferation occurred in the 1990s and 2000s. Much of this growth in the number of treaties can be attributed to large economic unions, such as the European Union, forming bilateral free trade agreements with smaller nations. Today, there are approximately 250 trade agreements that have been notified with the World Trade Organization and they account for an increasingly significant amount of global trade.

In 1995, exports between countries sharing a bilateral free trade agreement comprised only 0.6 per cent of all global exports (Figure 1.1).<sup>7</sup> By 2012, however, exports under bilateral agreements rose to 5.5 per cent of all global exports. Furthermore, the percentage of exports conducted under bilateral agreements has increased at roughly the same rate as all global exports, experiencing the same sharp increase in the mid-2000s.

A significant share of the trade flows under bilateral trade agreements takes place under agreements concluded by Asian countries. In 1995, exports under bilateral agreements were less than one per cent of GDP in East Asia and the Pacific, but reached over 3.25 per cent of GDP by 2011. As seen in Figure 1.2, every region except for the MENA countries had exports under bilateral trade agreements at less than one per cent of GDP. As of 2011, the only regions forming a distant second and third to East Asia's dominance of bilateral trade were Latin America and South Asia.

In addition, export volume between economies with bilateral free trade agreements in 2012 was highest in Asian economies. Eight of the ten bilateral trade partners with the highest export volume in 2012 included at least one Asian economy, and six of those ten agreements were between

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<sup>7</sup> Includes yearly exports between countries listed as having a "Bilateral Trade Agreement" according to World Bank's Global Preferential Trade Agreements Database classification. This does not include Regional/Plurilateral Free Trade Agreements, Association Free Trade Agreements or Customs Union Primary Trade Agreements. For list of classifications see <http://wits.worldbank.org/gptad/library.aspx>.

two exclusively Asian parties (Table 1.1). Bilateral trade agreements have been a significant part of exports in emerging Asian economies, generally accounting for 5-15 per cent of all exports from a given Asian economy or economic union (i.e., ASEAN).

**Table 1.1 Export volume between economies with bilateral free trade agreements, 2012**

Trade Agreement (year in force)	(1) 2012 export volume between the two parties in trade agreement (billions of USD)	(2) Party 1's exports to Party 2 as a % of Party 1's total exports in 2012	(3) Party 2's exports to Party 1 as a % of Party 2's total exports in 2012
ASEAN - China (2003)	297,1	10,3	8,3
ASEAN - Japan (2003)	187,3	7,0	12,4
China - Singapore (2009)	84,3	2,0	10,8
Japan - Thailand (2007)	67,2	5,5	10,3
United States - Singapore (2004)	53,1	2,0	5,5
Indonesia - Japan (2008)	50,4	15,9	2,5
Japan - Singapore (2002)	41,4	2,9	4,4
Australia - United States (2005)	40,7	3,7	2,0
United States - Israel (1985)	32,7	0,9	29,1
Chile - China (1997)	31,6	24,0	0,6

Source: UNCTADStat, World Bank Global Preferential Trade Agreements Database.

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## B TRADE LIBERALIZATION AND LABOUR MARKET OUTCOMES

Given the growing prominence of bilateral agreements, an assessment of their labour market and social impact is important. There are a vast number of studies focussing on the impact of trade liberalization on labour market outcomes such as unemployment and wages, and the evidence on working conditions has grown considerably. In addition, a recent study by the ILO and EC takes stock of the evidence, particularly with regard to the employment and distributional impacts of trade.<sup>8</sup>

However, the results from these studies are not conclusive and even though trade openness is expected to translate into welfare gains and labour market improvements these gains are not guaranteed. One reason is that such bilateral or regional agreements may generate trade diversion. This efficiency loss could result in lower levels of productivity, increasing the probability of higher levels of unemployment, lower wages, or higher levels of informality. Table 1.2 summarises the results of empirical studies that analyse the impact of trade liberalization on unemployment, wages, informality, and labour union strength:

- **Employment:** From an empirical perspective, the impact of trade liberalization on unemployment is perhaps one of the issues that have received more attention from international economics literature<sup>9</sup>. The results in the literature are mixed, with positive effects.<sup>10</sup> For example, Edwards and Cox (1996) explore the Chilean trade reform of the 1970s, and find weak links between aggregate unemployment and trade liberalization. Rama (1994) evaluates the effects of trade liberalization on employment over

<sup>8</sup> ILO (2011). This publication is an outcome of a joint project of the European Commission and the International Labour Office on "Assessing and addressing the employment effects of trade".

<sup>9</sup> As the afore mentioned H-O-S model assumes full employment, it does not help us to understand the relation between international trade and employment, certainly in a context of developing countries that are characterized by high unemployment. Expected efficiency gains through the reallocation of production factors and consequently growth is still the dominant rationale for trade liberalization leading to increased employment. An extensive body of literature refines and questions this straightforward relation (see McMillan and Verduzco, 2011 for an overview).

<sup>10</sup> Winters et al. (2004) examine the evidence about whether developing countries' own trade liberalizations have reduced or increased poverty; the latter measured through growth, households and markets responses to trade, wages and employment.

**Table 1.2 EMPIRICAL FINDINGS OF THE EFFECT OF TRADE LIBERALIZATION ON LABOUR MARKET OUTCOMES**

Labour Market Outcome	Empirical Study	Effect of Trade Liberalization
<b>Unemployment</b>	Edwards and Cox (1996) for Chilean 1970s trade reform.	Weak links with aggregate unemployment.
	Rama (1994) for 39 sectors in Uruguay during 1979-86.	Increases in manufacturing sectors.
	Reventa (1994) for 1985-87 Mexican trade liberalization.	Increases moderately.
	Dasgupta et al (2002) for 59 countries, including Middle East and North Africa (MENA) economies.	Decreases for non-MENA countries, no effect for MENA countries.
	Goldberg and Pavcnik (2007) for 1980s and 1990s urban sector in Colombia.	No association.
<b>Wages</b>	Krishna et al (2012) for 1990-98 Brazilian trade liberalization.	Greater increase in wage dispersion for high education workers relative to low education workers.
	Amiti and Davis (2011) for 1991-2000 Indonesian trade liberalization.	Decrease in domestic-oriented firms, increase in export-oriented and importing firms.
	Peluffo (2011) for Uruguayan manufacturing sector following MERCOSUR creation.	Wages increase, and the white collar – blue collar workers wage gap decreases.
	Hanson (2003), Hanson & Harrison (1999), and Cragg & Epelbaum (1996) for the 1980s and 1990s Mexican trade liberalization episodes.	Increase in wage dispersion between high-skilled and low-skilled workers.
	Attanasio et al. (2003) for the 1980s and 1990s tariff reductions in Colombia.	Increase in wage dispersion.
<b>Informality</b>	Goldberg and Pavcnik (2003) for the 1980s and 1990s trade liberalization in Brazil and Colombia.	Weak evidence of an increase in informality.
	Aleman-Castilla (2006) for the Mexican experience under NAFTA.	Decreases in tradable industries, with a stronger effect in export-oriented industries.
	Viollaz (2010) for Buenos Aires, Argentina, during 1980-2001.	Increases.
	Dunusinghe (2011) for the 1996-2007 trade liberalization experience in Sri Lanka.	Higher informality in more liberalized industries.
	Paz (2012b) for Brazil.	Increases with unilateral liberalization, but decreases with bilateral liberalization.
	Fieiss and Fugazza (2012) using international cross-section and panel data.	Decreases with trade openness.
<b>Labour Unions Strength</b>	Dumont et al. (2010) for Belgian firms.	Bargaining power of employees falls with imports and offshoring for low-skilled workers.
	Abraham et al. (2009) for Belgian manufacturing firms.	Import competition weakens unions' bargaining power.
	Piazza (2005) for 15 advanced countries after the 1980s.	Union militancy decreases with globalization.
	Arbache (2004) for the 1990s Brazilian trade liberalization episode.	Unions increased their influence on the wage structure and wage dispersion.

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the period 1979-86 in 39 sectors in Uruguay. He finds that liberalization increases unemployment in manufacturing. Revenga (1994) analyses the impact of the Mexican trade liberalization of 1985-87 on employment in the industrial sector. Using plant-level data and trade data at the sector level, she also finds that trade liberalization is associated with moderate reductions in firm-level employment. On the contrary, Dasgupta et al. (2002) examine the medium-term relationship between international trade and employment in manufacturing in 59 developing countries, particularly in the Middle East and North Africa (MENA) economies and find a positive association between employment and openness to trade (but no significant effect is obtained for MENA countries). More recently, Goldberg and Pavcnik (2007) study the relation between globalization and poverty in the urban sector of Colombia during the 1980s and 1990s and they find no association between trade liberalization and unemployment.

- **Wages:** There are also a vast number of empirical studies on the impact of trade liberalization on wages, with variable results but most point to an increase in wages for export-oriented firms and increased wage dispersion (according to skill).<sup>11</sup> To mention a few recent examples, Krishna et al. (2012) uses a matched employer-employee dataset from Brazil for 1990-98 to study the effects of trade liberalization on wage variation. They find differential effects across worker groups, with more highly educated workers experiencing greater increases in wage dispersion relative to workers with low education workers.

Amiti and Davis (2011) analyse the Indonesian trade liberalization of 1991-2000 at the firm level and find that reductions in output tariffs reduced wages for firms oriented exclusively toward the domestic economy, but increased wages in export-oriented firms. Similarly, reductions in input tariffs raise wages significantly in firms that import. Peluffo (2011) analyses the effects of increased competition resulting from the

<sup>11</sup> The H-O-S model states that in an open trading system, countries will specialise in the production of those goods that make intensive use of the production factor that is relatively abundant in a country. Consequently, a rise in the relative price of a good is believed to result in an increase in the return to the intensively used factor (e.g. wages of low-skilled labour in the case of developing countries), and conversely, to a decrease in the return to the other factor. See Stone and Cavazos Cepeda (2012) for further elaboration on the relation between international trade and wages.

creation of MERCOSUR on productivity, employment and wages for the Uruguayan manufacturing sector at the firm level. She finds that increased trade liberalization raises wages and reduces the wage gap between white and blue collars. Nevertheless, country specific labour and social policies were found to influence the effect of trade liberalization on wage gaps.

Hanson (2003), Hanson and Harrison (1999), and Cragg and Epelbaum (1996) examine the impact of trade liberalization on the wages structure in Mexico for different periods during the 1980s and 1990s. They all find that the policy reforms resulted in an increase of wage dispersion between high-skilled and low-skilled workers. Finally, similar results are obtained by Attanasio et al. (2003) for the case of the 1980s and 1990s tariff reductions in Colombia.

- **Informality:** The empirical evidence on the effect of trade liberalization and informality has grown considerably in recent years<sup>12</sup>, with most showing increased informality as the result of trade liberalization. One of the first studies is Goldberg and Pavcnik (2003), which analyses the cases of Brazil and Colombia during the 1980s and 1990s. Linking data on industry-level tariffs to labour force data on individual workers, they find little evidence that the informal sector was impacted by trade policy. Aleman-Castilla (2006) studies the impact of NAFTA on informality in Mexico and finds that reductions in Mexican import tariffs are related to reductions in the likelihood of informality in the tradable industries, and that this effect is stronger in industries that are relatively more export oriented.

Viollaz (2010) studies the relation between trade reforms and informality in manufacturing industries of Great Buenos Aires, Argentina, during 1980-2001. She finds that trade liberalization explains 4 per cent of the increase in informality in these industries. Dunusinghe (2011) examines the relationship between tariff liberalization and informality for the case of Sri Lanka during 1996-2007. He finds that industries that are heavily

<sup>12</sup> For a very complete review of the relationship between globalization and informality in developing countries, see Bacchetta et al. (2009). In theoretical terms, the H-O-S model explains the trade-informality relationship. As mentioned before, based on this model, a country that has abundant low-skilled labour will have a comparative advantage in low-skilled labour-intensive goods. Consequently, a rise in the relative price of a good is believed to lead to an increase in the return to the factor that is used more intensively in the production of that good. As informality tends to go hand-in-hand with low-skilled labour, one could expect this to benefit from trade opening. As empirics clearly show, the relation between both is less straightforward.

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protected experience lower levels of informal employment than more liberalized ones.

Paz (2012b) examines the effects of the 1989-2001 Brazilian trade liberalization episodes on the industry-level share of informal workers and on the average formal and informal wages. He finds that a decrease in import tariffs increases the informality share, while a decrease in foreign import tariffs decreases the informality share, the latter having a larger effect than the former. Finally, Fiess and Fugazza (2012) assess the relationship between trade openness and informality on the basis of internationally comparable data. Using three different datasets in cross-sectional and panel econometric exercises, they find that informal employment falls with trade openness.

- **Unionization:** Many researchers have previously analysed the relation between trade liberalization, or globalization, and unions, with the majority finding negative effects on unionization and bargaining power of employees.<sup>13</sup> For example, Dumont et al. (2010) assess the impact of globalization on the bargaining power of employees. Using Belgian firm-level data to identify the determinants of labour bargaining power, they find that it falls with imports and offshoring for low-skilled workers. Abraham et al. (2009) analyse how increased economic integration has affected labour and product markets in Belgian manufacturing firms, and find that import competition puts pressure on union bargaining power, especially when there is increased competition from low wage countries.

Piazza (2005) examines the role played by globalization in the decline of strike rates in industrialized countries after the 1980s. Based on 15 advanced economies in North America, Western Europe and East Asia, he finds that globalization is negatively related to union militancy (strike rates). Additionally, where union density is on average high but has decreased during globalization, globalization is a highly significant fac-

<sup>13</sup> The theoretic rationale on the relation between international trade and unionization mainly goes back to changes in the relative bargaining power between labour and capital in a context of international trade (i.e. capital being more easy to relocate) (McMillan and Verdusco, 2011).

tor contributor to union militancy. Finally, Arbache (2004) investigates the influence of unions on wage dispersion and wage structure in Brazil before and after the trade liberalization episode of the 1990s.<sup>14</sup> Based on micro data, he shows that unions increased their influence on the wage structure and wage dispersion.

<sup>14</sup> Brazil was at that time in a democratization process which has also impacted on unions' influence.

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## C THE QUANTITATIVE SIGNIFICANCE OF TRADE AGREEMENTS WITH LABOUR PROVISIONS

Early attempts by industrialized countries to include labour provisions in the multilateral trade framework were not successful. Yet, despite the absence of such provisions on the global stage, labour standards have increasingly become part of bilateral and regional trade negotiations.

### *The evolution of labour standards in the trade context*

Approaches that link labour standards and trade arrangements have existed for some time, originating in national trade laws (unilateral trade arrangements). Initial approaches focused on prison and forced labour, which had been an issue of domestic anti-competitiveness for nearly a century. As global trade became especially prominent towards the latter part of the 19th century, foreign nations exporting goods made by prisoners threatened the profitability of domestic manufacturers in importing nations. In order to stave off the risk of foreign nations “dumping” or undercutting domestic prices in a predatory manner, a number of English-speaking countries signed treaties that outlawed the import of products made using prison labour, starting with the United States in 1890.<sup>15</sup> The countries that followed were the United Kingdom (1897), Australia (1901), Canada (1907), New Zealand (1908), and South Africa (1913). After the adoption of the ILO Forced Labour Convention in 1930, the United States extended these laws more generally to forced labour, by integrating a ban of goods produced with forced labour into their national trade legislation (19 USC 1307):

«All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision.»

<sup>15</sup> For a brief historical example of the issue of American prison labour, see Howell, G.R (1886).

Meanwhile, other countries, such as Argentina and Spain, included forced labour-related provisions in their national anti-dumping legislation.<sup>16</sup>

A more comprehensive approach was adopted in 1984 by the United States preferential trade arrangements for specific developing regions.<sup>17</sup> Under these arrangements, non-compliance with labour standards<sup>18</sup> could lead to the withdrawal of trade preferences (Amato, 1990; Pérez-López, 1990). Similarly, in 1995, the European Union adopted an approach involving both a withdrawal mechanism and an incentive mechanism for additional preferences, linking trade preferences and labour standards (Tsogas, 2000; Orbie and de Ville, 2010).

Early attempts to include such provisions in the multilateral trade framework – such as the Havana Charter of 1947, which recognized workers’ rights and fair labour standards – were not successful, and a heated debate ensued on whether to include more comprehensive labour provisions in the WTO framework (commonly referred to as a “social clause”).<sup>19</sup> The United States, certain European countries, and a number of trade unions, among others, contended that a labour dimension to trade agreements would help to avoid globalization at the cost of workers’ rights and aid in enforcing international labour standards. Others, in particular a broad alliance of developing countries, criticized such provisions as protectionism in disguise that might hamper economic development, and argued that trade and labour issues should be kept separate (see further Bhagwati, 1995; Staiger, 2003; McCrudden and Davies, 2005, p. 46). The compromise reached at the Singapore Ministerial Conference of 1996, however, named the ILO as the competent body for resolving international labour disputes,

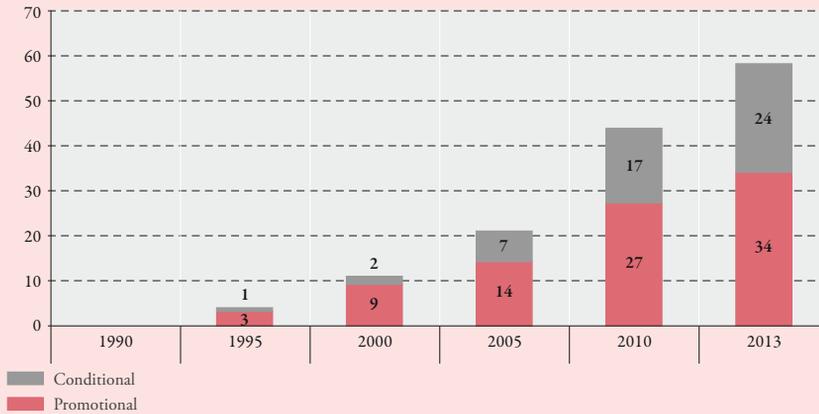
<sup>16</sup> See further on this, Charnovitz (1987).

<sup>17</sup> Specific regional trade preference arrangements were adopted by the United States; see the Caribbean Basin Recovery Act (1990), the Andean Trade Preference Act (1991) and the African Growth and Opportunity Act (2000) (Greven, 2005).

<sup>18</sup> The relevant rights are: “(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children, and a prohibition on the worst forms of child labor [...] (6); and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.” See 19 United States Code § 2467.

<sup>19</sup> The General Agreement on Tariffs and Trade (GATT) of 1947 and the WTO Agreement of 1994 referred to labour issues only in the form of an exception to the GATT obligations relating to prison labour. See Art. XX (c) of the GATT.

**Figure 1.3 Increase in number of labour provisions in bilateral and regional trade agreements, 1990-2013\***



\* The data on 2013 refer to the period from 1 January 2009 to 30 June 2013.

Source: ILS estimates based on the WTO Regional Trade Agreements Information System and information from national governments and treaty bodies.

rather than the WTO, which typically has general oversight of most trade agreements.<sup>20</sup>

### *The rise of labour provisions in bilateral agreements*

Since the adoption of the North American Agreement on Labour Cooperation (NAALC), which is attached to the North American Free Trade Agreement (NAFTA), trade agreements with labour provisions have increased significantly, from three in 1995, to 21 in 2005 (Figure 1.3).

By June 2013, of the 248 trade agreements that were in force and notified to the WTO,<sup>21</sup> 58 contained labour provisions. There is also a modest

<sup>20</sup> See Singapore Ministerial Declaration adopted on 13 December 1996 WT/MIN(96)/DEC, available at: [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey5\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm)

<sup>21</sup> See the WTO Regional Trade Agreements Information System at <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>

For the purpose of this analysis, the Treaty on the Functioning of the European Union, the EU accession treaties and the EU's trade agreement with the EU Member States Overseas Territories and Departments have not been considered.

Figure 1.4 ILO member countries with trade agreements including labour provisions by region\*



\* The data are current as of 30 June 2013.

Source: ILS estimates based on the WTO Regional Trade Agreements Information System and information from national governments and treaty bodies.

but increasing trend to integrate labour provisions into trade agreements between developing and emerging countries ('South-South' trade agreements). Sixteen South-South agreements have been concluded since 2005, compared to half that number prior to that date.

In addition, the significance of labour provisions in trade agreements has risen significantly in relative terms. While only four per cent of trade agreements that entered into force between 1995 and 1999 included labour provisions, this rose to 11 per cent between 2000 and 2004.<sup>22</sup> Between 2005 and 2013 about one third of all trade agreements that came into force included labour provisions.<sup>23</sup>

<sup>22</sup> For further information, see Ebert and Posthuma (2011).

<sup>23</sup> Refers to "integrated" trade agreements (see above) excluding the accession agreements and preceding agreements with States that meanwhile became EU member states. Where the labour provisions were added to the trade agreement after the agreement's entry into force, the figure refers to the date of entry into force of the trade agreement.

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Of the 185 ILO member countries with trade agreements notified to the WTO, about 60 per cent are covered by at least one trade agreement with labour provisions. For example, in the Americas, almost all countries are covered by at least one trade agreement with labour provisions, while in the Asian Pacific region, roughly half of the countries have one or more trade agreements with labour provisions (Figure 1.4).

**Box 1.1 Distinguishing conditional and promotional elements of labour provisions**

Labour provisions in trade arrangements can contain conditional and promotional elements. In the case of conditional elements, labour standards requirements are linked to economic consequences, in the form of sanctions or, less frequently, incentives, which concern trade or other benefits, including development and technical cooperation. Promotional elements combine (binding or non-binding) commitments relating to labour standards with cooperative activities, dialogue, and monitoring.

For the purpose of this study, a labour provision is considered to be of conditional character if it makes labour standards-related obligations to either economic sanctions or economic incentives. A labour provision is considered to be of promotional character if it does not provide for economic sanctions or incentives as an implementation mechanism for labour provisions but instead relies on cooperative activities, dialogue, and monitoring. Promotional labour provisions can contain legally binding obligations and sometimes foresee, as is the case of recent EU agreements, a comprehensive institutional and procedural framework to ensure implementation.

## **D PRACTICAL IMPLICATIONS**

In light of the increasing number of labour provisions in trade agreements and the variety of approaches, the question arises as to the practical implications of these provisions; in particular, whether labour provisions have created more space for improving labour standards and whether the ability to implement existing labour standards has improved. Conversely, the question also arises as to whether there is evidence that substantiates concerns that such provisions could be used for protectionist purposes.

It goes beyond the scope of this publication to examine these issues in detail. However preliminary assessments have been carried out concerning a) the impact of the conditional dimensions of labour provisions during the pre-ratification period and the issue of complaints and dispute settlement mechanisms (Chapter 2); and b) how promotional dimensions of labour provisions have operated (Chapter 3). Based on this preliminary analysis, Chapter 4 draws conclusions from available evidence and reflects on options for improving current arrangements.

## APPENDIX A

### TRADE LIBERALIZATION AND LABOUR MARKET OUTCOMES: SOME CROSS-COUNTRY ANALYSIS

Table 1.3 Members, Years of Accession, and Coverage of Customs Unions in Force

Customs Union	Members (year of accession)	Coverage
Andean Community of Nations (CAN)	Bolivia (1988), Colombia (1988), Ecuador (1988), and Peru (1988).	Goods
East African Community (EAC)	Burundi (2007), Kenya (2005), Rwanda (2007), Tanzania (2005), and Uganda (2005).	Goods and Services
European Union' Customs Unions <sup>24</sup>	Andorra (1991), Monaco (1958), San Marino (1991), and Turkey (1995).	Goods and Services
Eurasian Economic Community (EAEC)	Belarus (1997), Kazakhstan (1997), Russian Federation (1997), Kyrgyz Republic (1997), and Tajikistan (1997).	Goods
Southern Common Market (MERCOSUR)	Argentina (1991), Brazil (1991), Paraguay (1991), Uruguay (1991), and Venezuela (2012).	Goods and Services
Southern African Customs Union (SACU)	Botswana (1910), Lesotho (1910), Namibia (1990), South Africa (1910), and Swaziland (1910).	Goods
Switzerland-Liechtenstein Customs Union (SLCU)	Switzerland and Liechtenstein (1924).	Goods and Services
Economic and Monetary Community of Central Africa (CEMAC)	Cameroon (1999), Central African Republic (1999), Chad (1999), Congo (1999), Equatorial Guinea (1999), and Gabon (1999).	Goods
West African Economic and Monetary Union (WAEMU)	Benin (1994), Burkina Faso (1994), Cote d'Ivoire (1994), Mali (1994), Niger (1994), Senegal (1994), and Togo (1994).	Goods
Central American Common Market (MCCA)	Guatemala (1993), Honduras (1993), El Salvador (1993), Nicaragua (1993), and Costa Rica (1993).	Goods
Caribbean Community and Common Market (CARICOM)	Antigua & Barbuda (1974), Barbados (1973), Belize (1974), Dominica (1974), Grenada (1974), Guyana (1973), Haiti (2002), Jamaica (1973), Montserrat (1974), St. Kitts & Nevis (1974), St. Lucia (1974), St. Vincent & the Grenadines (1974), Suriname (1995), and Trinidad & Tobago (1973).	Goods and Services

<sup>24</sup> The EU itself includes a custom union for its 28 members but goes well beyond this providing for economic and political integration in a number of areas.

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## CHAPTER 2

# CONDITIONAL LABOUR PROVISIONS OF TRADE AGREEMENTS AND THEIR POSSIBLE IMPACT

### KEY FINDINGS

- The chapter examines two types of conditional labour provisions: i) cases where the conclusion of a trade agreement is made conditional on respect for certain labour provisions –so-called “pre-ratification conditionality”; and ii) cases where the trade agreement has already been concluded and includes conditional labour provisions –so-called “post-ratification conditionality”.
- The main finding is that pre-ratification conditionality often leads to significant changes in labour legislation. Major changes in labour standards seem to have occurred in the context of pre-ratification conditionality, leading to improvements in workers’ rights or the adoption of new legal protections, especially in the area of freedom of association. One example is legislation adopted by Oman in 2006, which accorded workers the right to form and join trade unions.
- By contrast, once the trade agreement has been concluded, conditional labour provisions tend to play a role with respect to compliance of existing labour laws. It therefore appears that certain complementarities exist between pre- and post-ratification conditionality.
- The effectiveness of both pre- and post-ratification types of labour provisions depends crucially on the political will of partner countries. Civil society, and in particular, worker organizations have also been instrumental in activating the different dimensions of labour conditionality in trade agreements.

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## INTRODUCTION

Conditionality has been the most prominent and controversial feature of labour provisions in trade agreements. There are two main dimensions of conditionality: the first, pre-ratification conditionality, addresses deficiencies in domestic labour standards prior to the ratification of the agreement; while the second is a mechanism for complaints and dispute settlement after ratification, which can lead to the withdrawal of trade benefits or to monetary sanctions in the event of non-compliance. Pre-ratification conditionality has thus far mainly been a characteristic of US trade agreements, and, so far, the US seems to be the only country officially to require the improvement of labour standards prior to ratification.<sup>25</sup>

Pre-ratification conditionality has mainly concerned legislative issues, while post-ratification complaints have mainly dealt with the application of existing domestic labour law. The latter may in part be due to the fact that the labour provisions in early US trade agreements mostly focused on enforcement of domestic labour law, which has been identified as a key challenge in numerous developing countries. So far, it appears that the more comprehensive effects on labour standards issues have emerged from pre-ratification conditionality, but in both cases the effects depend considerably on the accompanying advocacy action of the social partners and civil society actors.

<sup>25</sup> There is, however, anecdotal evidence suggesting that trade negotiations with the European Union have influenced partner countries to reform domestic labour standards (e.g. Bodemer, 2010). Furthermore, the European Parliament has, in the context of the ratification process of the EU-Peru and Colombia Trade Agreement, called for a roadmap in order to address the challenges regarding labour standards in the two partner countries. See in this regard Para. 15 of the European Parliament resolution of 13 June 2012 on the EU trade agreement with Colombia and Peru (P7\_TA-PROV(2012)0249).

## A LABOUR PROVISIONS COMBINING CONDITIONAL AND PROMOTIONAL ASPECTS

Trade agreements using a conditional approach typically link commitments on labour standards to a sanction-based enforcement mechanism, but also provide for cooperative activities.<sup>26</sup> This approach, employed notably by the United States and Canada as well as one EU trade agreement,<sup>27</sup> aims to increase the countries' capacity, while also providing economic disincentives for breaches of labour standards.<sup>28</sup>

A common feature of this dual approach has been the obligation effectively to enforce national labour law in specific areas (table 1). Furthermore, such provisions also include standards with which the domestic labour law itself must comply. While the NAALC only contained a commitment to work towards the improvement of domestic labour standards, the most recent agreements concluded by the United States and Canada require adherence to certain minimum labour standards, notably those set out in the ILO Declaration on Fundamental Principles and Rights at Work.<sup>29</sup> Furthermore, all United States trade agreements subsequent to NAFTA/NAALC contain an obligation not to weaken national labour standards with a view to fostering trade or investment.<sup>30</sup>

<sup>26</sup> Only a few trade agreements provide for conditional labour provisions without any promotional dimension. See, for example, the Japan-Philippines Trade Agreement.

<sup>27</sup> This approach has also been replicated in the Taiwan, China-Nicaragua Trade Agreement which entered into force in 2008.

<sup>28</sup> See, for example, Canada's trade agreements with Chile, Costa Rica, Peru, and Colombia. On the United States and Canada's approach, see Doumbia-Henry and Gravel (2006).

<sup>29</sup> See notably the US-Peru Trade Agreement; the US-Republic of Korea Trade Agreement; the US-Colombia Trade Agreement; the Canada-Peru Trade Agreement; and the Canada-Colombia Trade Agreement.

<sup>30</sup> Under many earlier United States trade agreements this commitment was not subject to sanctions (see table).

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The implementation of these commitments is facilitated through an institutional framework of a joint body and national contact points, which rests on two main pillars:

- *Cooperative activities:* In this regard, the agreements typically define a number of areas and means of cooperation, including research, exchange of policies, and technical assistance in the area of labour standards. The cooperative activities can be carried out by specific bodies, e.g. labour committees and national contact points, or the committee in charge of the overall administration of the agreement (Table 2.1).<sup>31</sup> These mechanisms are rather flexible in that the list of the activities mentioned is only indicative and does not preclude cooperation in other areas.
- *Enforcement mechanism:* The core of this mechanism is a dispute settlement process consisting of formal consultations and the establishment of a panel, which can make a binding determination on allegations. If a breach is found and not remedied under the agreed terms, sanctions ranging from monetary fines to the application of regular trade sanctions can be imposed on the non-complying State. Some agreements require fines to be gathered into a pool to support activities that enhance labour rights in the country concerned.<sup>32</sup> While this mechanism only applies to disputes between States, most of the provisions also provide for a complaints mechanism whereby third parties, such as individuals, trade unions and NGOs, can present allegations to the national contact points regarding non-compliance with labour provisions by the other States parties, which typically carry out an investigation into the matters and may also convene public hearings on the matter of the complaint (see Table 2.1).

<sup>31</sup> An exception is the Commission on Labour Cooperation of the NAALC which has a trinational secretariat to carry out promotional activities. See Articles 12-14 of the NAALC.

<sup>32</sup> In a few cases, the only sanction available is the modification of development cooperation. This is the case of the Canada-Costa Rica Trade Agreement and, to some extent, of the EU-Cariforum Trade Agreement.

Table 2.1 Examples of the conditional-promotional approach to labour provisions

Name and date of entry into force of the trade agreement	Content regarding labour provisions			Implementation mechanisms		
	Minimum standards	Enforce national labour law***	Not to encourage trade or investment through weakening labour laws	Cooperation mechanism	Mechanism for third-party petitions	Dispute settlement mechanism
NAFTA/NAALC (1994) *	“Strive to improve” standards in the area of fundamental principles and rights at work (FPRW), <sup>33</sup> minimum working conditions, and migrant rights	Yes, but not exclusively	–	Trinational labour commission and through national contact points	Yes	Labour-specific mechanism allowing for fines up to 0.07 per cent of total trade volume (goods) (only in the case of non-application of national labour law in the areas of child labour, occupational safety and health and minimum wage)
United States-Jordan Trade Agreement (2001)	“Strive to ensure” the rights contained in the ILO 1998 Declaration (except non-discrimination) and minimum working conditions	Yes	Yes, in the areas mentioned	Joint Committee responsible for the overall administration of the agreement	No	Regular dispute settlement mechanism of the agreement allowing for trade sanctions
United States Trade Agreements with Chile (2004), Singapore (2004), Australia (2005), Morocco (2006), Bahrain (2006), Central America - Dominican Republic (CAFTA-DR) (2006), Oman (2009)	“Strive to ensure” the rights contained in the ILO 1998 Declaration (except non-discrimination) and minimum working conditions	Yes	Yes (in the areas mentioned)	Bilateral labour body and national contact points	Yes	Modified dispute settlement mechanism applicable, allowing for fines up to US\$ 15 million in the case of non-application of national labour law in these areas (to be paid into a special labour rights fund)

<sup>33</sup> These are the rights and principles set out in the ILO Declaration on Fundamental Principles and Rights at Work of 1998, which need to be respected by any member, regardless of whether or not it has ratified the relevant ILO conventions. They comprise, more specifically, freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of compulsory or forced labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

Name and date of entry into force of the trade agreement	Content regarding labour provisions			Implementation mechanisms		
	Minimum standards	Enforce national labour law***	Not to encourage trade or investment through weakening labour laws	Cooperation mechanism	Mechanism for third-party petitions	Dispute settlement mechanism
United States Trade Agreements with Peru (2009), the Republic of Korea (2012), Colombia (2012), and Panama (2012)	Ensure respect of the rights contained in the ILO 1998 Declaration	Yes	Yes (in the areas mentioned)	Bilateral labour body and national contact points	Yes	Regular trade sanctions or monetary assessment under the regular dispute settlement mechanism of the agreement
Canada-Chile Agreement on Labour Cooperation (1997) *	“Strive to improve” standards in the area of FPRW, as well as minimum working conditions** and migrant rights	Yes, but not exclusively	–	Bilateral labour body and national contact points	Yes	Labour-specific dispute settlement mechanism allowing for fines up to US\$ 10 million (only in the case of the non-application of national labour law in the area of child labour, occupational safety and health and minimum wages)
Canada-Costa Rica Agreement on Labour Cooperation (2002)*	“strive to improve” standards in the area of FPRW as referred to in the ILO 1998 Declaration, as well as minimum working conditions** and migrant rights	Yes, but not exclusively	–	Bilateral labour body and national contact points	Yes	Labour-specific dispute settlement mechanism allowing for the modification of labour cooperation activities (in the case of the non-application of national labour law in the said areas)
Canadian Agreement on Labour Cooperation with Peru (2009), Colombia (2011), Jordan, and Panama (not yet in force)*	Respect standards in the area of FPRW as referred to in the ILO 1998 Declaration, as well as minimum working conditions** and migrant rights	Yes, but not exclusively	Yes (in the areas mentioned)	Bilateral labour body and national contact points	Yes	Labour-specific dispute settlement mechanism allowing for fines up to US\$ 15 million (in the case of Jordan: unlimited) for violations relating to issues covered by the ILO 1998 Declaration; to be paid into a special labour rights fund

Table 2.1 Examples of the conditional-promotional approach to labour provisions

Name and date of entry into force of the trade agreement	Content regarding labour provisions			Implementation mechanisms		
	Minimum standards	Enforce national labour law***	Not to encourage trade or investment through weakening labour laws	Cooperation mechanism	Mechanism for third-party petitions	Dispute settlement mechanism
EU-Cariforum Trade Agreement (2008)	Reaffirms the obligations under the 1998 Declaration and the ILO's	Yes, but not exclusive	Yes	Bilateral cooperation and consultation framework with stakeholder participation	–	Regular dispute settlement mechanism of the agreement applicable allowing for measures, such as the modification of labour cooperation activities
Taiwan, China-Nicaragua Trade Agreement (2008)	Fundamental Conventions "Strive to ensure" FPRW (except non-discrimination) and minimum working conditions	Yes	Yes (in the areas mentioned)	Bilateral labour body and national contact points	–	Regular dispute settlement mechanism of the agreement allowing for trade sanctions
Chile-Turkey Trade Agreement (2011)	"Strive to ensure" the rights contained in the ILO 1998 Declaration	Yes, but not exclusive	Yes	Joint Committee under the agreement	–	Regular dispute settlement mechanism of the agreement allowing for trade sanctions

Source: ILS, based on information collected on various trade agreements.

Notes:

\* These labour provisions are contained in side agreements to the trade agreement.

\*\* The term "minimum working conditions" is used to describe minimum standards regarding hours of work, minimum wages and occupational safety and health.

\*\*\* In the area of minimum labour standards to the extent that it "affects trade" or is "trade-related".

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## B THE EFFECTS OF PRE-RATIFICATION CONDITIONALITY

Pre-ratification conditionality has been shaped by US trade agreements, in which conditions on domestic labour standards have, with one exception, been made a requirement for ratification since 2006.<sup>34</sup> A key driving force in this regard has been the increasing demands of civil society actors, including the United States Labor Advisory Council, which is composed of worker representatives.<sup>35</sup>

In the last six of seven trade agreements (Morocco, Bahrain, Oman, Peru, Colombia, and Panama), some improvements in labour standards were made prior to ratification (see Table 2.2). In addition, in the case of the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), a plan was adopted that included commitments to progressively strengthen the application of labour standards, starting in but not limited to the pre-ratification phase.<sup>36</sup> This approach was based on the assumption that the key problem was enforcement, rather than the labour law itself, and that solving it would require a long-term approach.

It is difficult to assess the degree to which a particular change in domestic labour standards has been undertaken in order to ensure the ratification of a trade agreement. This is because usually a number of additional factors, both at the domestic and the international level, influence decisions on labour law reforms.<sup>37</sup>

Two groups of countries emerge from the analysis: those that undertook fundamental labour law reforms, and those that undertook more specific labour law reforms. The first group is composed of countries in the Arab and Maghreb region, e.g. Morocco, Bahrain and Oman. All three of these countries had significant statutory restrictions on trade union rights, including a lack of basic guarantees for freedom of association. Although there was

<sup>34</sup> Since 2006, a total of six agreements (Luce and Turner, forthcoming).

<sup>35</sup> See the Charter of the Labor Advisory Committee for Trade Negotiations and Trade Policy, available at: <http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/labor-advisory-committee-lac>.

<sup>36</sup> See Working Group of the Vice Ministers Responsible for Trade and Labour in the Countries of Central America and the Dominican Republic, and the Inter-American Development Bank (2005).

<sup>37</sup> An example is Chile, where comprehensive labour law reforms, especially on labour inspection and labour disputes, took place at the same time as trade negotiations with the United States. While it has been suggested that this was a consequence of US trade negotiations (e.g. Hafner Burton, 2009), the main driving force in this regard may have been domestic pressure.

Table 2.2 Pre-ratification effects on labour issues in United States trade agreements

Agreement and entry into force	Improvements in domestic labour standards prior to ratification demanded by civil society	United States publicly demanded changes in domestic labour standards as condition of ratification	Labour standards improved in relation to the trade agreement
Morocco (2006); Bahrain (2006); Oman (2009); Peru (2009); Colombia (2012); Panama (2013)	Yes	Yes	Yes
CAFTA-DR (2004)	Yes	No, but joint commitments for CAFTA-DR countries to gradually modify labour laws and practice	–
Jordan (2001); Chile (2004); Australia (2005); Korea (2012)	Yes	No	–
Israel (1985); Canada (1989); NAFTA (1994); Singapore (2004)	Not apparent	No	–

Source: ILS, based on Luce and Turner (forthcoming).

increasing domestic pressure for labour reforms, trade negotiations with the United States may have been the catalyst for reforming the law:

- **Morocco:** Trade negotiations with the United States were a key driving factor in initiating some of the reform of the Labour Code,<sup>38</sup> while at the same time providing political cover for domestic actors interested in improving labour standards.<sup>39</sup> The reform addressed, in particular, protection against anti-union discrimination, including, for the first time, a legal basis for reinstatement and back pay. Other changes included an increase in the minimum working age from 12 to 15 years, a reduction of the maximum weekly hours of work from 48 to 44 and periodic review of the minimum wage level.<sup>40</sup>

<sup>38</sup> See Haji (2009); Cammet and Pripstein Posusney (2010).

<sup>39</sup> See Aaronson and Zimmerman (2008).

<sup>40</sup> See Luce and Turner (forthcoming); ICFTU (2006).

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- **Bahrain:** Prior to ratification, concerns were raised by United States Congress about trade union freedoms, the right to strike, and migrant workers' rights.<sup>41</sup> The Bahraini government committed itself to making various legislative improvements that were subject to periodic review within the labour consultations mechanism of the trade agreement.<sup>42</sup> Additionally, prior to ratification, a decree was enacted that, among other things, rendered illegal any dismissals of workers for union activities, and provided for reinstatement and compensation in the event of anti-union discrimination.<sup>43</sup>
  - **Oman:** The United States Congress and trade unions raised issues regarding Omani labour standards, most notably the absence of the workers' right to form trade unions under the labour law.<sup>44</sup> The Omani Government subsequently adopted reforms regarding the right to organize, the right to bargain collectively, forced labour, and child labour (see Table 2.3 and annex). In particular, workers were granted the right to form and join trade unions, albeit subject to a minimum membership of 25 members and excluding public services. While there was a confluence of domestic and international factors driving the reforms, by addressing the concerns of the US Congress, the trade agreement was a key factor in their advancement.<sup>45</sup>

The second group of countries consists of those where more specific labour law reforms were undertaken, e.g. refining specific aspects of workers' rights and strengthening the enforcement framework. This was the case most notably in Latin America. With regard to two of the countries, Peru and Panama, the labour standards concerns focused on legislation and led, especially in the case of Panama, to a number of legislative amendments. Also, given particular problems in terms of labour standards in Colombia, a specific bilateral action plan was adopted in order to strengthen the State's enforcement capacity vis-à-vis labour law and address certain legislative issues:

<sup>41</sup> Inside US Trade (2006).

<sup>42</sup> See the United States-Bahrain Free Trade Agreement Implementation Act. Report Filed under Authority of the Order of the Senate of November 18, 2005. 109th Congress, p. 5.

<sup>43</sup> See Luce and Turner (forthcoming).

<sup>44</sup> Workers had at that time only the right to be members of "representation committees".

<sup>45</sup> See Hafner Burton (2009); Cammett and Pripstein Posusney (2010); Luce and Turner (forthcoming).

**Table 2.3 Improvements of Omani Labour Standards related to the US-Oman Trade Agreement<sup>46</sup>**

Issues raised by the United States Congress	Addressed	Partially	Not
General right to organize into unions		•	
Reforms to reduce government interference in union activity		•	
Protection against anti-union discrimination	•		
Guarantee of the right to be re-instated if unfairly dismissed for union activity			•
Allow for multiple unions per workplace	•		
Allow for multiple federations	•		
Allow the right to strike		•	
Establish clear procedures for strikes		•	
Allow workers the right to collective bargaining		•	
Prohibit forced labour		•	
Increase penalties for forced labour	•		
Prohibit employers from withholding foreign workers' passports		•	
Increase in penalty for worst forms of child labour	•		

Source: ILLS, based on Luce and Turner (forthcoming)

- **Peru:** During the ratification and negotiation of the trade agreement, several concerns were raised (by the United States Labor Advisory Committee and the United States' Congress) concerning domestic labour legislation, notably the use of temporary employment and outsourcing arrangements for anti-union purposes, strike law issues, and protection against anti-union activities.<sup>47</sup> In some cases, existing legislation turned out to be sufficient to address these concerns, but in others presidential decrees were issued. Also, a number of amendments to the strike law were enacted lowering the legal requirements of the right to strike.<sup>48</sup>

<sup>46</sup> For this assessment, the authors conducted an in-depth review of primary and secondary sources with a view to establishing a relation between the issues raised by the United States Congress and the changes in domestic labour law and practice observed.

<sup>47</sup> See Inside U.S. Trade (2007).

<sup>48</sup> Levin (2007), Toyama (2011).

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- **Panama:** Labour standards issues raised by the United States Congress and subsequently the United States Trade Representative concerned a variety of aspects of freedom of association, the abuse of temporary contracts, and the enforcement of child labour legislation. In several steps between 2009 and 2011, the majority of these issues were addressed through decrees (five) ministerial resolution (one) and new labour laws (two). In addition, a specific bureau was established to combat child labour and protect young workers (see table 3) and legislation was adopted to remove exemptions from workers' rights in a new special economic zone.<sup>49</sup>
  - **Colombia:** The US-Colombia trade agreement gave rise to concerns with regard to the enforcement of labour law, in particular serious instances of trade union rights violations, particularly regarding violence against trade unions.<sup>50</sup> The United States Congress refused to ratify the agreement until these labour issues had been addressed, which led to several years of deadlock.<sup>51</sup> In April 2011 a bilateral labour-related action plan was adopted.<sup>52</sup> The plan contained ten commitments, dealing particularly with anti-union violence, labour law enforcement, and limiting the evasion of labour law. While some parts of the commitments had to be implemented prior to ratification of the agreement, others had post-ratification deadlines. The Colombian Government has taken various steps to meet the requirements of the agreement, including recruiting 100 labour inspectors, and increasing the resources of the trade union protection programme.<sup>53</sup>

Although the concerns raised by the United States prior to ratification of agreements have, in the cases mentioned above, contributed to labour standards improvements, these improvements are subject to certain limitations. For example, critics, especially from the trade unions, have pointed out that the requirements of the United States-Colombia Labour Action Plan have not been fully implemented within the agreed timeframe and

<sup>49</sup> Sullivan (2011); Hornbeck (2012). See also Luce and Turner (forthcoming).

<sup>50</sup> See e.g. Campell (2011).

<sup>51</sup> Villareal (2011).

<sup>52</sup> For the full text of the Colombian Action Plan Related to Labour Rights see at: [http://www.ustr.gov/webfm\\_send/2787](http://www.ustr.gov/webfm_send/2787).

<sup>53</sup> USTR (2011a); Luce and Turner (forthcoming).

**Table 2.4 Improvements in Panama's labour standards linked to the US-Panama Trade Agreement**

Issues raised by the US Government	Panama's response
Evasion of labour laws through short-term contracting of workers	2009: Executive Decree 17 reinforces the rights of subcontracted workers; Executive Decrees 19 and 24 regulate the use of subcontractors and the hiring of contract employees; and an inspection and enforcement system to address the use of temporary workers as a substitute for permanent workers is created
Restriction of the right to strike in the public sector	2009: Executive Decree 25 limits strike restrictions in the transportation sector
Employer interference in union activity	2009: Executive Decree 27 seeks to improve the process for filing and inspecting complaints of employer interference in union matters
Employers used "collective agreements" with non-union workers	2009: Executive Decree 18 states that the Labour Code bans the negotiation of agreements with non-organized workers when a duly constituted union exists in a workplace
Maritime workers have restricted labour rights	2010: Ministerial Resolution DH 126-2010 strengthens maritime workers' rights to organize and bargain
Unenforced minimum age legislation, child labour problems	2010: A National Bureau against Child Labour and for the Protection of Adolescent Workers within the labour department was established
Workers' rights in free trade zones	2011: Law 32 of 2011 provides for the right to unionize and to engage in collective bargaining in export processing zones; repeals a 36-day conciliation period before workers can strike.
Workers in a domestic company that is less than two years old have limited opportunities to strike and are precluded from collective bargaining	2011: Law 32 eliminates restrictions on collective bargaining in companies that are less than two years old
Minimum of 40 workers required to unionize	Not addressed by the time of ratification
Workers may not belong to more than one union	
Difficulties getting unions registered	
Foreign nationals are banned from union leadership	
Public sector workers are not covered by the Labour Code and are subject to several limitations of their freedom of association	
Additional law passed to address problems posed by recently enacted legislation	
Law 29 of 2010 created the Barú special economic zone where collective bargaining is banned for 6 years and employers may hire workers on short-term contracts for the first 3 years of employment	2011: Law 30 of 2011 repeals the exemptions. The Labour Code applies fully to workers in Barú

Source: Luce and Turner (forthcoming)

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are, by themselves, not sufficient to address labour rights deficits.<sup>54</sup> In other cases, such as Peru, improvements in labour standards were accompanied by deregulation in other areas of labour law. In particular, the definition of “small and medium enterprises” was significantly widened and, as a result, the percentage of workers falling outside the regular labour law increased.<sup>55</sup>

In spite of these limitations, the available evidence suggests that addressing labour standards at the pre-ratification stage can contribute to significant improvements, ranging from triggering legislative action to speeding up ongoing legislative proposals in the country concerned. Further discussion on how this can be achieved within an integrated development approach is provided in Chapter 4.

<sup>54</sup> AFL-CIO (2011); Vogt (2011).

<sup>55</sup> See Luce and Turner (forthcoming). One of the presidential decrees aiming to facilitate the implementation of the US-Peru trade agreement changed the definition of “small and medium enterprises” from enterprises with fewer than ten employees to enterprises with fewer than 100.

## C THE EFFECTS OF COMPLAINT AND DISPUTE SETTLEMENT MECHANISMS

Experience of post-ratification conditionality, i.e. the complaint and dispute settlement dimension, is as yet rather limited. Of the 15 conditional labour provisions with institutional complaint mechanisms, only four have so far been activated, with none leading to sanctions. This is in part due to the recent nature of the phenomenon: 15 of the 19 agreements with complaint mechanisms have been in force for less than ten years and seven are less than three years old. Cases have been filed under the mechanisms of the North American Agreement on Labour Cooperation attached to NAFTA (NAALC), CAFTA-DR, US-Peru Trade Agreement, and the US-Bahrain Agreement, involving a total of 47 complaints, most of which (41 out of 47) were filed under NAALC (see Table 2.5). Nevertheless, some of these complaint mechanisms have had effects on labour standards in the countries concerned, most notably in the area of freedom of association.

### *Complaints filed under the NAALC*

Close to 90 per cent of the submissions filed under the dispute settlement mechanism have concerned the NAALC, therefore this section will focus more closely on cases brought under this agreement. Although the majority of submissions under the NAALC concerned the labour law situation in Mexico, about one third of the cases were filed against the United States, while two cases were filed against Canada.

The NAALC requires every state party to create a national administrative office (NAO) to rule on cases involving a breach of NAALC labour provisions. For cases concerning occupational safety and health, child labour and technical minimum wage there is a comprehensive follow-up procedure. Such cases can initially be submitted through minister-to-minister consultations with an intent to resolve the issue. If this is not successful, an evaluation committee of experts can be convened to examine the case and provide recommendations.<sup>56</sup> Finally, if this is to no avail, an arbitral panel

<sup>56</sup> It should be noted that it concerns only cases related to child labour, occupational safety and health and minimum wage.

**Table 2.5 Complaints filed under US Trade Agreements**

Trade agreement	Number of complaints filed	Ratification year	Main Issues dealt with
NAALC	41	1994	Freedom of association, occupational safety and health, migrant workers' rights
CAFTA-DR	4	2006	Freedom of association
US-Peru Trade Agreement	1	2009	Freedom of association
US-Bahrain Trade Agreement	1	2006	Freedom of association/ Non-discrimination

Source: IILS, based on information extracted from complaint documents.

may be convened, the decision of which is legally binding.<sup>57</sup> If the decision of the panel is not observed and implemented, a monetary fine may be imposed; if that is not paid, it can be enforced through proportionate trade sanctions (see Figure 2.1).

The main grievances against the different countries vary significantly. With regard to the submissions against Mexico, the dominant issue has been freedom of association, followed by occupational safety and health, and minimum working conditions. There have been only a small number of cases concerning discrimination and child labour.<sup>58</sup> Cases filed against the United States have focused on the situation of Mexican migrant workers, dealing with a wide range of issues, particularly freedom of association, discrimination and specific migrant rights. The two cases filed against Canada concerned freedom of association, and health and safety.

<sup>57</sup> The evaluation committee of experts may consider any information provided to it by the NAALC institutions, experts, and the wider public and may also request information in writing from the parties to the complaint and the public. The panel may invite expert opinions from any individual or body it considers appropriate, subject to the agreement of the parties to the dispute, and shall hold at least on hearing on the matters of the case. See Articles 24 and 33 of the NAALC.

<sup>58</sup> While matters relating to freedom of association dominated the early submissions against Mexico, later submissions included broader issues, notably occupational safety and health. Nolan García (2011b) attributes the shift to the filing organizations' increasing awareness of the NAALC procedure in terms of addressing the systemic and highly politicized issue of trade union rights, leading to a partial shift to issues which, while serious, were less politically sensitive and thus likely to be resolved more easily.

**Table 2.6** Number of Petitions Filed under NAALC between 1994 and 2011

Party	Number of Submissions to NAO	Number of Submissions Against Party
Canada	6	2
Etats-Unis	25	13
Mexique	10	26
Total	41	41

Source: ILS, based on information extracted from complaint documents.

About half of the cases were filed in the first five years after the NAALC's entry into force, culminating in 1998 with ten cases filed. After 1998, the number of cases filed declined significantly, remaining at a low level, with an uptick of five cases in 2005 (Figure 2.2).

Several observers attribute the decline in the number of submissions to a gradual decline in the attention given to submissions by the NAOs and a lack of overall results.<sup>59</sup> Furthermore, the length of the submission process has increased over time. This is particularly the case with United States National Administrative Office (US NAO) proceedings: while the process from the date of filing to the signing of the ministerial agreement took less than a year in 1994, the duration of the proceedings increased to more than two years for the period of 1998-1999 and more than four years in 2003.

This is due, in particular, to the increase in duration of ministerial consultations. Similarly, the length of the acceptance period almost sextupled between 1994-95 and 2006-07. The review phase – the part of the procedure where the merits of submissions are examined – increased the least.

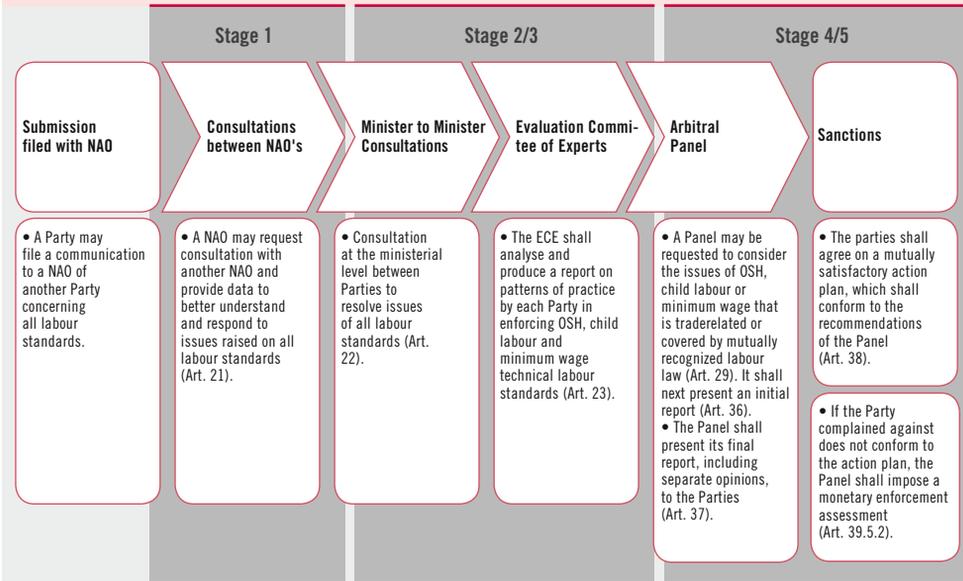
### *Effects of the complaint mechanism*

As of June 2013, no case had ever reached stage 3, the creation of an evaluation committee of experts (see figure 1). One explanation for this may be that NAALC States parties prefer to settle complaints on an amicable basis rather than through the dispute settlement mechanism.<sup>60</sup>

<sup>59</sup> See e.g. Delp et al. (2004); Ayres (2004).

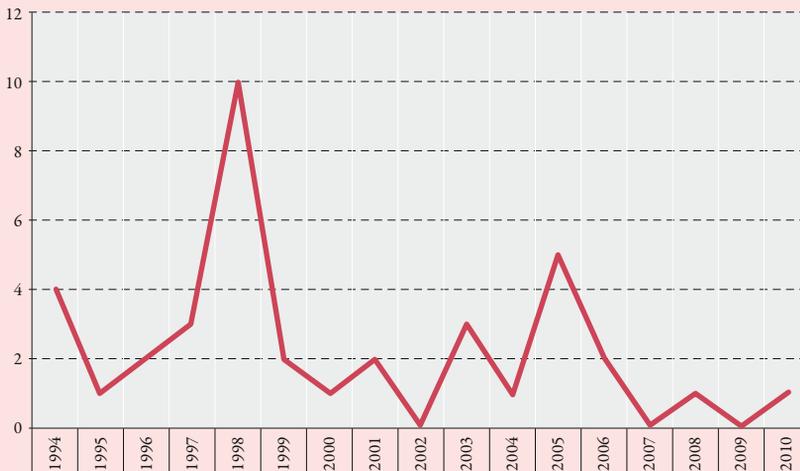
<sup>60</sup> See Perez-Lopez (1995); Englehart (1997).

Figure 2.1 NAFTA public submission process



Source: ILS, based on the legal provisions of the NAALC.

Figure 2.2 Public communications filed under the NAALC between 1994 and 2010



Source: ILS, based on information extracted from complaint documents.

There is evidence of the positive effects of complaints in the first years after the NAALC entered into force, although it seems that such effects decreased significantly in later cases, notably those filed after 2000. While more than half of the cases filed with the US NAO between 1994 and 1997 reached the level of ministerial consultations and were concluded by a ministerial agreement, less than one third of cases filed between 1998 and 2001, and less than one fifth of cases filed between 2002 and 2006 reached the level of ministerial consultations. At the same time, the number of cases that have been declared inadmissible or that have not been terminated in a public report has been increasing in the case of the United States and Mexico (see Figure 2.3.)

In certain early cases dealing with specific labour law violations, the NAALC complaint mechanism was useful in addressing the problem at stake. The cases concerned, for example the freedom of association of certain independent trade unions in Mexico, notably registration issues. Moreover, in some cases dealing with broader labour standards issues, such as gender discrimination in the Mexican sector and migrant rights in the United States agricultural sector, certain effects can be discerned (see Table 2.7).

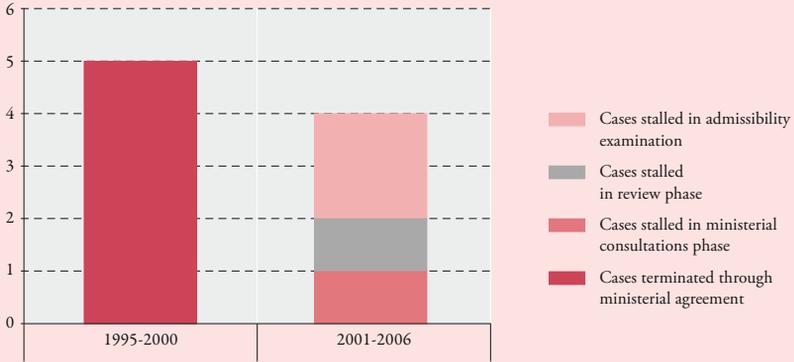
It should be noted that even where complaints have led to positive effects on labour standards, the issue has not always been fully resolved. For example, in the “Maxi-Switch” case, Finbow (2006) reports that the authorities did not enforce the rights of the trade union (in spite of the union’s certification) and did not reinstate the workers laid off for anti-union reasons. This, in combination with a lack of support from the trade union network, led to the eventual dismantling of the trade union. Similarly, in the “Han Young” case, the union was unable to represent the workers, despite registration, due to continued resistance and anti-union practices by the company.<sup>61</sup> This can to some extent be attributed to weak monitoring of the case by the NAO concerned.<sup>62</sup>

<sup>61</sup> Graubart (2008).

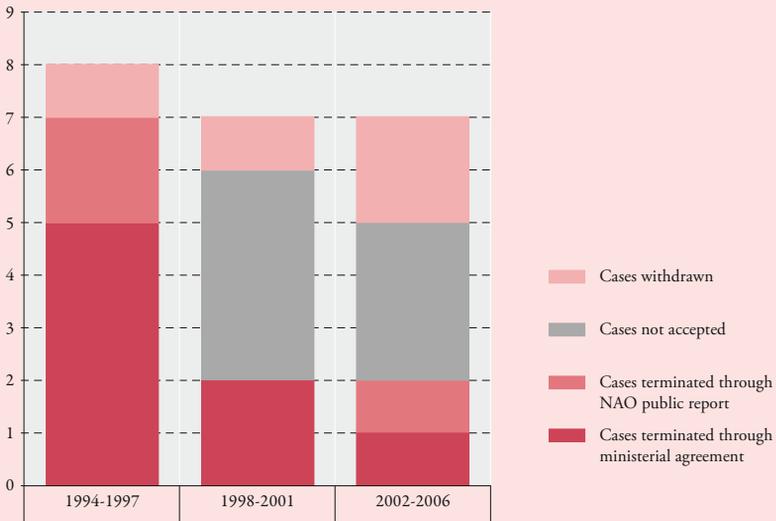
<sup>62</sup> Williams (2003).

**Figure 2.3 Procedural outcomes of submissions to the NAO of the United States and Mexico**

**Panel A: Procedural Outcomes of Submissions to Mexican NAO**



**Panel B: Procedural Outcomes of Submissions to US NAO**



Source: IILS, based on information extracted from complaint documents.

Table 2.7 Examples of cases addressed under NAALC complaint mechanism

Issue	Case	Complaint	Outcome
Freedom of Association	Maxi-Switch, 1996	An independent trade union in Mexico was denied registration by the local labour board.	The trade union was granted registration just before the public hearings and withdrew their complaint.
	Han Young, 1997	A trade union's request for registration in the Mexican maquila sector was rejected.	Registration was granted to the union after significant international pressure.
	SUTSP/Pesca, 1996	An independent Mexican ministry trade union in the public sector was dissolved and lost the right to represent fishery employees when the ministry merged with another.	The trade union obtained registration.
Gender Discrimination	Gender, 1997	Pre- and post-hiring pregnancy tests were being administered to women in the Mexican maquiladora sector.	A revised policy was adopted after the publication of the NAO's public report on the complaint clarifying that pre-hire pregnancy testing was not compatible with Mexico's international commitments and should be abandoned (among others effects).
Migrant workers' rights	Washington Apples, 1998	The alleged lack of enforcement of labour law related to a broad number of issues, including freedom of association, occupational safety and health, and minimum working conditions.	The Washington State authorities established a complaints hotline in Spanish, produced Spanish-language information materials, and recruited additional Spanish-speaking staff for the agriculture sector (among others effects).

Source: Singh and Adams (2001); Bolle (2002); Compa (2001); Madueno, and Binsse-Masse (2003). Compa and Brooks (2009); Weiss (2003); Finbow (2006); Nolan Garcia (2011b). See Appendix for more detailed information.

The effects of the complaints are influenced by a number of factors, the most significant of which seems to be the political attention accorded to the complaint by the recipient government.<sup>63</sup> Additionally, in cases where advocacy campaigns accompanied the complaints, more positive change occurred for workers.<sup>64</sup> Similarly, the involvement of transnational cooperation appears significant for the outcome of the cases. According to Nolan García (2011a) cases filed by transnational organizations and

<sup>63</sup> In Mexico, the likelihood of positive change regarding freedom of association was higher in cases concerning the federal Government than in those concerning local government. This may be explained by the fact that the pressure emanating from the NAALC primarily affected the federal Government rather than the local authorities, which not only have significant autonomy from the central authorities but often diverging policy agendas as well (see Nolan García, 2009).

<sup>64</sup> At in the initial decade after the entry into force of the NAALC (Graubart, 2008).

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coalitions were three times more likely to be accepted for review by the relevant NAO, which may in part be due to the fact that it is easier for transnational groups to gather relevant information in the field. Finally, the quality of the legal arguments put forward by the complaint also seems to be important.

### *Broader effects of complaints*

The NAALC complaints mechanism also had a number of broader effects such as the creation of transnational alliances of labour organizations and awareness raising.

Through the transnational nature of the NAALC complaints, stronger and more long-term relationships between the unions of the different countries have emerged.<sup>65</sup> This is illustrated by the increase in the number of organizations involved in the complaint, from a few trade unions in the early complaints to upwards of 55 in a 2006 complaint filed with the Mexican NAO.<sup>66</sup> The most recent submission filed with the US NAO had over 90 submitters.<sup>67</sup> This has also led to cooperation beyond the NAALC and has increased the political weight of the Mexican trade unions at the domestic level.<sup>68</sup>

Complaint mechanisms have also raised awareness about labour standards in the NAALC countries as part of a larger advocacy campaign. Furthermore, the NAALC has also helped to promote transparency regarding labour law enforcement in the three States parties.<sup>69</sup> The related institutional follow-up activities have also led to intensified dialogue between the governments concerned, leading in some cases to joint cooperative activities and “a substantial increase of knowledge and understanding of each other’s labour law systems”.<sup>70</sup>

<sup>65</sup> See on this Kay (2005).

<sup>66</sup> See further Buchanan and Chaparro (2008).

<sup>67</sup> See Public Communication to the U.S. Office of Trade and Labor Affairs (OTLA) of 14 November 2011 on behalf of the Sindicato Mexicano de Electricistas (Mexican Union of Electrical Workers) et al.

<sup>68</sup> Interview with Kimberly Nolan García, 21 July 2012; Dombois et al., (2003).

<sup>69</sup> Lee (1998).

<sup>70</sup> (Compa and Brooks (2009); for further information see Delp et al. (2004).

## D COMPLAINTS FILED UNDER NON-NAALC TRADE AGREEMENTS

### *Overview of the complaints*

Complaints filed under trade agreements other than NAFTA/NAALC have only been activated since 2008, leading to six cases filed up to June 2012.<sup>71</sup> One case, concerning Costa Rica was withdrawn, while another, concerning Peru, was closed after the issues raised were addressed.<sup>72</sup> The four remaining cases (Guatemala, Bahrain, Dominican Republic and Honduras) have yet to be resolved. In August 2011, the United States Trade Representative requested the establishment of an arbitral panel as the issues raised by the complaint in the Guatemalan case had not been sufficiently addressed by the Guatemalan Government.<sup>73</sup> The case before the panel is currently suspended due to the adoption of an “Action Plan” (see below). Furthermore, in December 2012, after reviewing the complaint relating to Bahrain, the Office of Trade and Labor Affairs (OTLA) recommended formal consultations with a view to resolving the issues relating to freedom of association and discrimination.<sup>74</sup> The cases regarding Honduras and the Dominican Republic were still under review at the time of writing.

All six complaints deal, at least in part, with trade union rights (see Table 2.8). Three of these complaints, namely those against Guatemala, the Dominican Republic and Honduras, allege systematic failures to enforce domestic labour standards.<sup>75</sup> The three complaints against Costa Rica and Peru focus on more specific labour rights issues of individual cases, all relating to trade union rights, while the Bahrain complaint raises issues relating to trade union rights, as well as to non-discrimination.<sup>76</sup>

<sup>71</sup> AFL-CIO (2008).

<sup>72</sup> The case was closed in August 2012 after the US Office of Trade and Labor Affairs (OTLA) determined that the issues raised by the complaint had been sufficiently addressed and did not require further consultations (see OTLA, 2012a).

<sup>73</sup> USTR (2011b).

<sup>74</sup> OTLA (2012b).

<sup>75</sup> While the original complaint only contained allegations regarding six specific cases, the complaint was later informally extended by US OTLA to take into account a number of additional cases of alleged violations. Interview with Jeffrey Vogt, formerly AFL-CIO, now ITUC, 8 June 2012.

<sup>76</sup> See International Longshore and Warehouse Union, 2010; SINAUT-SUNAT, 2010; AFL-CIO, 2011.

**Table 2.8 Complaints filed under labour provisions of US trade agreements other than NAFTA/NAALC**

Name of trade agreement	Defendant party and year of filing	Main issue alleged	State of the complaint
CAFTA-DR	Guatemala (2008)	State's failure to address anti-union actions and violations of right to collective bargaining by employers, as well as violence against trade unions	Establishment of arbitral panel requested under Dispute Settlement Chapter, currently suspended
	Costa Rica (2010)	State intervention in internal union affairs, leading to the dissolution of a local union board	Withdrawn
	Dominican Republic (2011)	Incidence of forced labour and child labour, poor occupational health and safety standards, and wage conditions, anti-union actions in the sugarcane sector	Accepted, under examination by OTLA
	Honduras (2012)	State's failure to enforce domestic labour laws regarding workers' freedom of association, the right to collective bargaining, child labour, and minimum working conditions	Accepted, under examination by OTLA
US-Peru Trade Agreement	Peru (2010)	State's failure to enforce domestic law regarding collective bargaining vis-à-vis the national customs and tax authorities (SUNAT)	Accepted, report issued, closed by OTLA
US-Bahrain Trade Agreement	Bahrain (2011)	Anti-union actions, including dismissals of union leaders, following anti-government protests	Accepted, report issued, request for consultations recommended by OTLA

Source: ILS, based on information extracted from complaint documents.

### *Effects of the complaints*

Despite the fact that most of the complaints filed under these agreements are still pending, some – albeit preliminary – effects can be detected. In particular, the complaint mechanism has in certain cases contributed to motivating domestic authorities to address some labour standards issues.

In the case against Guatemala, which mainly concerns failures to enforce labour rights, a three-fold effect is, so far, apparent:

- *Carrying out inspections:* Further to the OTLA report on the complaint, the Guatemalan authorities have carried out inspections in two cases concerning the dismissal of workers for anti-union reasons and have required the companies to reinstate the workers and provide back pay,<sup>77</sup> although in at least one of the cases the improvement in the situation was only temporary.<sup>78</sup>
- *Company commitment to compliance:* The complaint has prompted various companies, mainly those exporting to the United States, to request that the Government address the issues in the complaint.<sup>79</sup> This may be due to concerns regarding possible adverse effects of the dispute on products originating from Guatemala.
- *Enforcement:* In April 2013, the Guatemalan and United States Governments signed an “Enforcement Plan” which contains 18 commitments aimed at addressing the structural weakness of labour law protection in Guatemala. The Plan aims, in particular, to strengthen the enforcement capacity of labour inspection, protect workers against sudden closure of companies, ensure labour law compliance by export companies, and to enforce decisions of the labour judiciary (see Appendix B). During negotiation of the plan, the Guatemalan Government took certain steps, including recruiting and training 100 additional labour inspectors as well as other additional staff.<sup>80</sup>

The complaint under the United States-Peru Trade Agreement seems to have motivated state authorities to address the alleged failure of the Customs and Tax authorities (SUNAT) to engage in good faith collective bargaining with

<sup>77</sup> See also US DOL (2012).

<sup>78</sup> In one case there was retaliation against the reinstated workers who were again sacked; in the other case the company closed and re-opened under another name without opposition from the labour authorities (Vogt, forthcoming).

<sup>79</sup> The organization representing Guatemalan agricultural companies wrote a letter to the Guatemalan Government encouraging it to solve the case of murder of members of the trade union SINTRABI as that case was part of the complaint under CAFTA-DR. Letter of 16 May 2012 by Otto Kuhsiek Mendoza (President Cámara del Agro, Guatemala) to the public attorney's office, trade union and journalist crimes unit. Similarly, in a letter directed to the Guatemalan President, a group of US companies operating in Guatemala expressed their hope that the complaint under CAFTA-DR would be resolved soon. Letter of 30 April 2012 to President Otto Perez Molina by Guy D. Bradford, Vice President, Corporate Responsibility and Customs Compliance Officer, American Eagle Outfitters, Inc.; Gregg Nebel, Head of Social and Environmental Affairs, Adidas Group; Jorge Perez-Lopez, Executive Director, Fair Labor Association; Kindley Walsh Lawlor, VP Social & Environmental Responsibility, Gap Inc.; Daryl Brown, VP Global Ethics and Compliance, Liz Claiborne.

<sup>80</sup> See in particular para. 3 of the Mutually Agreed Enforcement Action Plan between the Government of the United States and the Government of Guatemala.

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the relevant union. While the Peruvian Constitutional Court had already ordered compulsory arbitration for public sector unions, it had not specified when and how this was to be conducted in cases of bad-faith bargaining. However, during the case review, a resolution was adopted clarifying when a party could compel such arbitration and the role of the Government of Peru in the process. This eventually resulted in an arbitration award in March 2012 endorsing several of the trade union positions. A number of trade unionists and lawyers agree that the attention the United States Government gave to the complaint fostered the adoption of the resolution on compulsory arbitration.<sup>81</sup> The substance of the complaint remains, however, as the arbitration award has been challenged in the Peruvian courts.

The complaint filed under the US-Bahrain Trade Agreement appears to have helped to put the issue of anti-union discrimination on the agenda of the Bahrain Government. As several actions on this matter were taken in parallel at the international level, including the filing of a representation with the ILO Committee on Freedom of Association and a complaint leading to an ILO Commission of Inquiry,<sup>82</sup> the specific effects of the complaint itself are difficult to determine. That said, the complaint has already triggered several political reactions by the Bahrain Government and is considered by trade unions to have increased the Government's willingness to address the issues.<sup>83</sup> The action taken at the international level led to the adoption of a tripartite agreement under the auspices of the ILO committing the parties to ensuring the timely reinstatement of the workers concerned.<sup>84</sup> While some of the workers have been reinstated, a number of issues remain open in this regard.<sup>85</sup>

<sup>81</sup> Interview with María Covarrubia (SINAUT SUNAT), 23 November 2011, and with Paola Aliaga (Secretary General, SINAUT SUNAT), 25 November 2011; interview via mail with Paúl Paredes (Lawyer of the SINAUT SUNAT), 1 June 2012.

<sup>82</sup> See CFA Case No 2882 (Bahrain), filed 16 June 2011 by the International Trade Union Confederation (ITUC), and Complaint concerning the non-observance by Bahrain of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), made by delegates to the 100th Session (2011) of the International Labour Conference under article 26 of the ILO Constitution (GB.312/INS/16/1).

<sup>83</sup> Interview with Jeffrey Vogt (formerly AFL-CIO, now ITUC), 8 June 2012.

<sup>84</sup> Tripartite Agreement concerning the issues raised in the framework of the Complaint concerning the non-observance by Bahrain of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), made by delegates to the 100th Session (2011) of the International Labour Conference under article 26 of the ILO Constitution.

<sup>85</sup> ITUC (2012) and ILO Committee on Freedom of Association (2012).

By contrast, no clear effect of the complaint against Costa Rica is apparent. While the main issue of the complaint was resolved, it seems that this was mainly the result of domestic factors. More specifically, a judgment handed down by the Costa Rican Constitutional Court ordered the reinstatement of the union board which had been ousted and dissolved by local authorities.<sup>86</sup> It appears that the Constitutional Court took its decision independently of the proceedings under CAFTA-DR, although it is possible that the judges took it into account as part of the context of the case. As the review is in its early stages, it is too soon to assess the effects of the other complaints filed under CAFTA-DR.

<sup>86</sup> Inside U.S. Trade (2010).

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## **E THE EFFECTS OF THE CONDITIONAL DIMENSION**

The conditional dimension of labour provisions in trade agreements has had various effects with regard to the improvement of labour standards. In particular, a number of differences can be identified between pre-ratification conditionality – requiring improvements in labour standards in order for the agreement to enter into force – and post-ratification enforcement through complaint and dispute settlement mechanisms.

While pre-ratification conditionality has so far mainly had effects on labour legislation itself rather than its application, the complaints received after ratification have mainly focused on compliance with national labour law. There have been some recent shifts, for example in the case of the United States-Colombia Trade Agreement, where enforcement issues were addressed during the ratification process, and the complaints against Guatemala and Bahrain under trade agreements with the United States, which also raised issues related to legislation.

It appears that the more fundamental changes in terms of labour standards have been triggered by pre-ratification conditionality, leading to improvements or the adoption of legal guarantees of workers' rights that had not existed before, especially in the area of freedom of association. By contrast, the effects of the complaint mechanisms on labour standards, where they have occurred, have so far been more limited, even though in some cases the complaints did contribute to addressing the issue at stake. Nevertheless, the continuous use of the NAALC complaint mechanism has also led to certain broader effects, in particular the creation of transnational alliances, and a greater awareness of labour standards issues in the different countries. Both dimensions have crucially depended on the political will of the country concerned, in view of the high level of discretion, not only at the pre-ratification stage but also in relation to the complaint mechanisms. The role of accompanying advocacy measures by civil society, in particular workers' organizations, has thus proved instrumental in activating the different dimensions of labour conditionality in trade agreements.

While the effects of the different dimensions of conditionality in trade agreements have varied, none of them show signs of a protectionist application by the governments concerned. This is illustrated by the fact that in all cases the government with which a complaint had been filed made a significant effort to avoid the dispute settlement stage. This finding is in line with earlier studies on possible protectionist effects of trade-related labour provisions.<sup>87</sup>

Finally, even where the sanctions foreseen by labour provisions are applied, their effects on workers vary and depend on a number of factors. It is therefore important not to overstate the potential of a sanctions dimension to labour provisions for improving labour standards. This highlights the importance of other dimensions of trade agreement labour provisions.

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<sup>87</sup> See e.g. Elliott and Freeman (2003); DiCaprio (2004); Polaski and Vyborny (2006).

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## APPENDIX A

### CASES ADDRESSED UNDER NAALC COMPLAINT MECHANISM

- “*Maxi-Switch*” case of 1996. An independent trade union in Mexico filed a complaint because it had been denied registration by the local labour board. However, two days before the public hearings in the case, the trade union was granted registration (after reapplication) and withdrew the complaint.<sup>88</sup> The NAALC complaint was instrumental in the labour board’s decision to reconsider its earlier decision, as it gave rise to political pressure at the domestic level to grant the union registration in order to avoid a public hearing.<sup>89</sup>
- “*Han Young*” case of 1997. This case concerned a trade union in the Mexican maquila sector whose request for registration had previously been rejected.<sup>90</sup> In this case, the international pressure that mounted, in particular, through the NAALC proceedings has been seen as a key factor in registration being granted.<sup>91</sup> In addition, one day after the public hearing in the case, the Mexican authorities imposed a fine of US\$ 9000 on the company for domestic health and safety violations, partly as a reaction to allegations contained in the NAALC complaint.<sup>92</sup>
- “*SUTSP/Pesca*” case of 1996. This case concerned an independent Mexican ministry trade union in the public sector that was dissolved and lost the right to represent fishery employees when the ministry merged with another.<sup>93</sup> Further to a complaint filed with the US NAO and the public hearing, and after a series of Mexican court decisions, the trade union obtained registration.<sup>94</sup> There is evidence that the complaint increased political attention to the labour standards problems in this case, which encouraged trade unions and eventually led to a positive outcome.<sup>95</sup>

<sup>88</sup> Singh and Adams (2001); Bolle (2002).

<sup>89</sup> Compa (1997); Graubart (2008).

<sup>90</sup> Compa (2001); Madueno, and Binsse-Masse (2003).

<sup>91</sup> Singh and Adams (2001).

<sup>92</sup> Graubart (2008); Compa (2001); McFayden (1998).

<sup>93</sup> Compa (1997).

<sup>94</sup> Compa and Brooks (2009); Finbow (2006); Compa (2001).

<sup>95</sup> HRW (2001).

- *The “Gender” case of 1997.* The case dealt with pre- and post-recruitment pregnancy tests in the Mexican maquiladora sector. A revised policy was adopted after the publication of the NAO’s public report on the complaint stating that pre-recruitment pregnancy testing was not compatible with Mexico’s international commitments and should be abandoned.<sup>96</sup> The Mexican Government also prohibited pregnancy testing of women applicants for posts in the Federal Government.<sup>97</sup> Furthermore, several United States multinational enterprises also declared that they would stop the pregnancy testing practice.<sup>98</sup>
- *The “Washington Apples” case of 1998.* The case filed with the Mexican NAO contributed to several improvements in migrant workers’ labour standards in the American apple industry. The alleged lack of enforcement of labour law concerned a broad range of issues, including freedom of association, occupational safety and health, and minimum working conditions. As a result of public outreach forums, the Washington State authorities established a complaints hotline in Spanish, produced Spanish-language information materials, and recruited additional Spanish-speaking staff for the agriculture sector.<sup>99</sup> Furthermore, two major companies in the sector allowed for a secret election procedure rather than public union elections, which resulted in recognition of the union.<sup>100</sup>

<sup>96</sup> Weiss (2003); Finbow (2006).

<sup>97</sup> Compa and Brooks (2009); Polaski (2004).

<sup>98</sup> Compa and Brooks (2009); Graubart (2008); Adams (1999).

<sup>99</sup> Nolan Garcia (2011b).

<sup>100</sup> See Compa (2001).

## APPENDIX B

### UNITED STATES-GUATEMALA ENFORCEMENT PLAN

**Table 2.9 Key commitments under the United States-Guatemala Enforcement Plan**

Areas	Commitments
Reinforcing the general enforcement capacity of the Ministry of Labour (MoL)	Guarantee police assistance to ensure labour inspectors' access to workplaces through an inter-agency agreement.
	Ensure resources for appropriate labour inspections, including costs for vehicles.
	Implement standardized timeframes for inspections, the remediation of violations, and the monitoring of remedial measures.
	Adopt legislation to accelerate the process for fining employers in breach of labour law, including shorter deadlines for submitting cases to the courts, adjudication of cases, and possible appeals.
Ensuring payment of wages in the event of closure of companies	Implement a system for immediate information-sharing between the MoL and other Government agencies in the event of a possible company closure.
	Adopt procedures and mechanisms for an immediate reaction to ensure the payment of outstanding wages, including the possibility of seizing company assets.
	Develop a contingency mechanism for the sudden closure of export companies having recourse to international assistance.
Strengthening enforcement vis-à-vis export companies	Strengthening the enforcement of the provision under which export companies must comply with Guatemalan labour laws to be eligible for tax and tariff benefits.
	Adopt procedures requiring that the Ministry of Economic Affairs withdraw, within five days, the tax and tariff benefits of an export company upon notice of a labour court that the company is not complying with the court's decision.
	Adopt procedures to ensure that companies applying for tax and tariff benefits are in compliance with relevant labour laws and conduct an annual labour inspection in those companies.
Enhancing the enforcement of decisions of the labour judiciary	Strengthen and maintain the electronic case management system for verifying compliance with court orders.
	Establish procedures for and provide resources to the newly created Verification Unit within the judiciary to monitor compliance with court orders.
	Adopt a programme to systematically monitor compliance with court orders and apply disciplinary measures to judges failing to enforce court orders.
	Improve protection against anti-union practices, including by ensuring criminal prosecution of non-complying employers through the adoption of necessary procedures and the training of relevant officials.

Source: Mutually Agreed Enforcement Action Plan between the Government of the United States and the Government of Guatemala of 26 April 2013; USTR (2013).

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## CHAPTER 3

# PROMOTIONAL DIMENSIONS OF LABOUR PROVISIONS AND THEIR IMPACT

### KEY FINDINGS

- Promotional provisions are common in North-South agreements (all of these agreements, with the exception of two, include promotional provisions). Additionally, all South-South trade agreements, especially regional integration agreements concluded among developing countries, include promotional provisions. (16 as of 2013). Examples of promotional provisions include the EU-Republic of Korea Trade Agreement, the Chile-Colombia Trade Agreement, and the Memorandum of Understanding on Labour Cooperation attached to the New Zealand-Hong Kong, China Trade Agreement.
- In 34 out of the 58 existing trade agreements with labour provisions, the provisions are exclusively promotional –i.e. they do not entail any direct consequences in case of non-respect of the labour provisions. In most cases, promotional provisions take the form of cooperative activities between partner countries.
- Cooperative activities have taken place under both North-South and, increasingly, South-South trade agreements. Under North-South trade agreements, cooperative activities have tended to prioritize technical cooperation activities and institutional capacity building. Activities under South-South agreements have mainly consisted of dialogue and policy development, in some cases with the active involvement of the social partners or with the technical assistance of the ILO. But, continuing activities under those mechanisms remains a challenge.
- Promotional dimension of labour provisions have been activated more frequently than is the case with conditional dimensions. However, the effects of the promotional activities on workers' rights on the ground have

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proven difficult to assess. The limited evidence available suggests that the effects of promotional provisions depend on both the political context of partner countries and the existence of a comprehensive framework to the various activities. More field research on specific activities conducted under the different trade agreements is required in order to reach a better understanding of their effects.

## INTRODUCTION

Although just about all labour provisions in trade agreements contain some promotional dimension, around 60 per cent of existing labour provisions are of an exclusively promotional nature. The promotional approach has been particularly prominent in the trade agreements of the European Union, New Zealand, Chile, and certain South-South regional integration agreements, while those of the United States and Canada tend to combine promotional and conditional aspects. In general, the promotional aspects of labour provisions have been activated more frequently than their conditional counterparts but have received far less academic scrutiny. This chapter therefore provides some insight into the effects of promotional labour provisions, particularly promotional monitoring and cooperative activities.

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## A LABOUR PROVISIONS WITH EXCLUSIVELY PROMOTIONAL ELEMENTS

The promotional approach combines binding or non-binding commitments to labour standards, domestic or international, with provisions on cooperation, dialogue, and monitoring. This allows countries to show commitment to labour concerns and also enables capacity building. It is the approach taken in most trade agreements concluded by the European Union, the agreements concluded by New Zealand and Chile and certain other South-South trade agreements. Also, EFTA has inserted promotional labour provisions in its trade agreements with Hong Kong, China and Montenegro.

The commitments of these labour provisions vary significantly across agreements. While some agreements only reaffirm existing international obligations,<sup>101</sup> others, including a number of South-South trade agreements (see Table 3.1), contain substantial commitments on labour standards similar to those of conditional labour provisions.

In terms of implementation, trade agreements using this approach typically involve both knowledge-sharing and technical assistance. These arrangements often also include the possibility of consultations between the parties as well as regular dialogue in the framework of specialized committees. A number of agreements also provide for the involvement of civil society actors in the form of optional consultations<sup>102</sup> or regular dialogue.<sup>103</sup> The most comprehensive approach in this regard has been included in recent agreements concluded by the EU in the so-called sustainable development chapters (Table 3.2).<sup>104</sup>

<sup>101</sup> Examples are the EU-Chile Association Agreement and the EU-South Africa Trade Agreement.

<sup>102</sup> See, for example, Article 4(3) of the Memorandum of Understanding on Labour Cooperation among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement.

<sup>103</sup> See Article 13.13 of the EU-Republic of Korea Trade Agreement.

<sup>104</sup> These chapters also contain requirements for the protection of the environment. See further Bartels (2012).

**Table 3.1 Examples of promotional labour provisions in South-South bilateral trade agreements**

Name and date of entry into force of the trade agreement	Reference to international minimum labour standards	Commitment not to encourage trade or investment through weakening labour laws	Cooperation on labour issues	Institutional framework	Consultation mechanisms in case of differences
Chile–China Trade Agreement* (2006)	ILO Decent Work Agenda	No	Yes	National coordinators meetings	No
Chile–Panama Trade Agreement* (2008); Chile–Colombia Trade Agreement (2009)	ILO 1998 Declaration	Yes	Yes	National Contact Point; Joint Labour Cooperation Committee	Yes
Peru–Chile Trade Agreement* (2009)	ILO 1998 Declaration, UN Migrant Convention	Yes	Yes	Joint Labour and Migration Cooperation Committee	No

Notes:

\* The labour provisions are contained in a labour side arrangement or memorandum of understanding.

Source: ILLS, based on information collected on trade agreements.

This approach combines commitments to fundamental and other ILO conventions<sup>105</sup> with an institutional framework involving cooperative activities as well as several monitoring and dialogue mechanisms, including considerable civil society involvement. This involves the creation of domestic advisory groups composed of social partners and other civil society representatives as well as dialogue meetings with the parties to the agreements. Furthermore, the parties may refer disputes over the implementation of the relevant labour commitments to an expert panel, which may make recommendations as to how to remedy the problem at issue. The recommendations of the panel are then to be followed up by the relevant subcommittee of the agreement as well as by the civil society mechanisms.

Promotional labour provisions have also been integrated into several regional integration agreements (RIA), mainly concluded among developing countries.<sup>106</sup> These agreements differ from normal trade agreements in that they typically encompass a broader policy agenda aiming at sociopolitical and economic integration and also serve as law-making frameworks.<sup>107</sup> While the implementation mechanisms of RIA labour provisions mainly

<sup>105</sup> See on this Chapter 4.

<sup>106</sup> Given its specific state of integration and status as a political and economic community, the EU is not considered in this analysis.

<sup>107</sup> Mattis (1999).

**Table 3.2 Types of promotional labour provisions in EU trade agreements**

Name and date of entry into force of the trade agreements	Reference to ILO instruments	Commitments relating to labour standards	Implementation mechanism
EU Trade Agreements with the Palestinian Authority (1997), Morocco (2000), Israel (2000), Algeria (2005), Cameroon (2009)	No	–	Cooperation and/or dialogue on selected issues related to labour standards
EU-South Africa Trade Agreement (2000) and EU-Chile Association Agreement (2003)	Fundamental Conventions	Reaffirms the parties' commitment to the ILO's core labour standards*	Cooperation on various labour and social issues
EU- Republic of Korea Trade Agreement (2011)	1998 Declaration, fundamental conventions, priority and up-to-date conventions	<ul style="list-style-type: none"> <li>• Implementation of ILO fundamental conventions</li> <li>• Implementation of ratified ILO conventions</li> <li>• Not to weaken or fail to apply national labour legislation in order to encourage trade or investment</li> <li>• Ratification of ILO Fundamental and Up-To-Date Conventions</li> </ul>	Cooperation and dialogue framework with shareholder participation; Consultation mechanism; Optional ILO consultation;
EU-Peru/Colombia Trade Agreement (2013); EU-Central America Trade Agreement (partly in force since 2013)	Fundamental conventions	<ul style="list-style-type: none"> <li>• Implementation of ILO fundamental conventions</li> <li>• Not to weaken or fail to apply national labour legislation in order to encourage trade or investment</li> </ul>	Cooperation and dialogue framework with shareholder participation; Consultation mechanism; Optional ILO consultation;

\* The EU-Chile Association Agreement also contains a political commitment to give priority to the respect for basic social rights, including through the promotion of ILO fundamental conventions and social dialogue.  
Source: ILLS, based on EU trade agreements.

consists of cooperative activities and dialogue, interesting approaches have been taken in the context of the Latin American regional integration agreements, and involve a notably tripartite element (Table 3.3). The Business Advisory Council and the Labour Advisory Council, whose members are elected by national workers' and employers' organizations, respectively, are consulted by the Andean institutions on labour issues and carry out promotional activities at the regional level.<sup>108</sup> In the Mercosur framework, the tripartite Social Labour Commission is entrusted with the monitoring and fostering of the Social-Labour Declaration.

<sup>108</sup> Tello Vidal (2009).

Table 3.3 Examples of labour provisions in regional integration agreements

Name and date of entry into force of the trade agreement	Specific legal instruments adopted	Commitments to certain minimum labour standards	Ability to adopt secondary legal instruments on labour standards	Implementation framework
Cartagena Agreement on the Andean Community (1988) <sup>109</sup>	Agreement	–	Yes	Tripartite consultation framework consisting of the Council of Labour Ministers, the Business Advisory Council and the Labour Advisory Council
	Andean Social Charter	Yes (covering numerous areas of labour law, including FPRW)	–	–
	Andean Instruments on Occupational Safety and Health (1999, 2004) and Migrant Workers (2003)	Yes (in the area of occupational safety and health)	–	Technical assistance and follow-up through special committees
MERCOSUR (1991) <sup>110</sup>	Agreement	–	Yes	Special subgroup on labour and employment issues
	Social-Labour Declaration (1998)	Yes (covering numerous areas of labour law, including FPRW)	–	Dialogue, cooperation and review of progress by the Social-Labour Commission
Treaty of the Economic Community of West African States (ECOWAS) (1993, as revised in 2005) <sup>111</sup>	Agreement	–	–	Cooperation regarding labour law harmonization and improvement of working conditions in the rural sector

<sup>109</sup> Member states are Bolivia, Colombia, Ecuador, and Peru.

<sup>110</sup> Members are currently Argentina, Brazil, Uruguay, and Venezuela, the last of which joined Mercosur in 2012. Bolivia obtained the status of accession member in 2012. The membership of Paraguay is currently suspended due to a violation of the democracy-related requirements of the Mercosur legal framework.

<sup>111</sup> Members are Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

**Table 3.3 Examples of labour provisions in regional integration agreements**

Name and date of entry into force of the trade agreement	Specific legal instruments adopted	Commitments to certain minimum labour standards	Ability to adopt secondary legal instruments on labour standards	Implementation framework
Agreement Establishing the Common Market for Eastern and Southern Africa (COMESA) (1994) <sup>112</sup>	Agreement	–	Yes (in the area of elimination of discriminatory legislation against women)	Cooperation regarding employment conditions, labour law and gender issues
Revised Treaty on the Caribbean Community and Common Market (1997) <sup>113</sup>	Agreement	–	–	Cooperation and dialogue within the Council for Human and Social Development
	Charter of Civil Society for the Caribbean Community of 1995	Yes	–	Review of progress by the Secretary-General foreseen
	Declaration of Labour and Industrial Relations Principles of 1998	Yes	–	–
Treaty for the Establishment of the East African Community (EAC) (2000) <sup>114</sup>	Agreement	–	Yes	Cooperation on working conditions and gender equality

Source: ILS, based on Latin American and African regional integration agreements.

<sup>112</sup> The COMESA Agreement provides for the establishment of a Committee on Labour, Human Resources and Social and Cultural Affairs. Members are: Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

<sup>113</sup> Members are Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

<sup>114</sup> Members are Burundi, Kenya, Rwanda, Tanzania, and Uganda.

## B PROMOTIONAL MONITORING ACTIVITIES

Promotional monitoring mechanisms can take the form of oversight arrangements (that are not sanction-based), which are either monitored centrally or through bilateral committees and consultations.

### *Monitoring mechanisms at the regional level*

When the monitoring process is overseen by a centralized process, it generally consists of a body that periodically assesses and reports on labour standards (according to the requirements of the labour provisions) in the country concerned. The central body may be established by the trade agreement itself or an outside institution, as in the case of the CAFTA-DR and Mercosur agreement.

In the CAFTA-DR agreement, an external Verification Project has been established to monitor progress on labour standards in the countries concerned. The Project, carried out by the ILO Subregional Office in San José, Costa Rica, was developed on the basis of a White Paper adopted by the vice trade and labour ministers of the CAFTA-DR countries, and the Inter-American Development Bank. This policy document contains a number of commitments with regard to strengthening labour ministries and labour courts and more effective policies and laws to address problems related to fundamental rights at work.<sup>115</sup> Progress in these areas (and as outlined in the CAFTA-DR labour chapter) has been reported biannually to the United States Congress.<sup>116</sup> The respective verification rounds have identified improvement as well as challenges in the labour standards situation in the country concerned.<sup>117</sup>

<sup>115</sup> White Paper (2005); Argueta (2008).

<sup>116</sup> This takes the form of a written report and is required under the United States implementing legislation regarding CAFTA-DR. See Section 403(a) of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act.

<sup>117</sup> USDOL (2012).

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In the framework of the Mercosur Social-Labour Declaration, a special monitoring body has been created consisting of regional representatives from government, employers and workers.<sup>118</sup> The Social-Labour Commission is entrusted with the development, implementation and monitoring of programmes under the Declaration.<sup>119</sup> In general, the reporting activities have been sluggish and rather limited. While the Commission adopted a number of reports in its early years, including on gender equality, vocational training, and employment creation, hardly any reports have been produced since 2005. This is in part owing to the current revision of the Social-Labour Declaration, but other factors, such as financial constraints and the breakdown in social dialogue, are also relevant. The Commission reports have led to a legal instrument on vocational training by the Mercosur Common Market Council, as well as to a major regional conference on employment,<sup>120</sup> but have given rise to less follow-up in other areas.<sup>121</sup>

### *Monitoring through bilateral mechanisms*

A number of promotional labour provisions contain mechanisms for bilateral consultations. These consultations may take the form of ad hoc meetings of bilateral committees or councils responsible for administering the agreements at which concerns regarding labour standards can be raised. The issues can then, for example, be resolved informally or through a joint declaration. Under recent EU agreements, such as those with Republic of Korea, Peru and Colombia, and the Central American countries, a dispute between governments relating to the labour provisions can be submitted to an expert body, which examines the case and issues findings and recommendations. These are then subject to follow-up under the agreement's institutional framework. A number of promotional labour provisions also provide for a contact point where civil society actors and social partners can raise issues regarding implementation of the labour provisions.

<sup>118</sup> See further Tokman (2006).

<sup>119</sup> See von Potobsky (1999); Corres (2001). The monitoring is based on annual reports prepared by the MERCOSUR Member States, and initially examined by national tripartite commissions. On the basis of this analysis the Commission issues reports containing recommendations to the Member States on how to improve their implementation of the Declaration principles (Godio, 2004). The Commission can also be consulted with respect to clarification of specific provisions of the Declaration.

<sup>120</sup> Resolución 59/01 del GMC (Grupo Mercado Común) sobre Formación Profesional del 5 de diciembre 2012.

<sup>121</sup> See further Ebert (forthcoming).

A particularly comprehensive mechanism for civil society involvement is contained in the EU trade agreements with the Cariforum countries and the Republic of Korea. These agreements provide for consultative bodies composed of civil society representatives from both trade parties, including trade unions and employers' organizations, whose task it is to monitor implementation of the labour provisions.<sup>122</sup> Furthermore, under the EU-Korea Trade Agreement the European Commission has to present an annual report on implementation of the agreement, including a summary of the work of the monitoring bodies established by the trade and sustainable development chapter. The implementation of these mechanisms is still in a very early phase. While the first meeting of the EU-Korea Civil Society Forum took place in 2012, followed by a second meeting in 2013, the Caribbean part of the Consultative Committee under the EC-Cariforum Agreement is expected in 2013.<sup>123</sup> Similar mechanisms have been envisaged under recent EU trade agreements, such as those with Peru and Colombia and the Central American countries, respectively.

So far, no formalized State-to-State consultations on specific disputes under the promotional labour provisions have been made public. It appears, however, that these mechanisms have, in certain cases, been used as a platform for informally addressing labour-related issues, including the Agreement on Labour Cooperation of the Canada-Chile Trade Agreement (see Box 3.1).

<sup>122</sup> For a list of the members of the domestic advisory groups under the EU-Republic of Korea Trade Agreement see at: <http://portal.cecsc.europa.eu/eu-korea-dag/About-DAG/Pages/Members-of-DAG.aspx>

<sup>123</sup> See European Economic and Social Committee (2012a) and (2012b).

**Box 3.1**    **Canada-Chile Trade Agreement as a forum  
for solving labour disputes**

In 2000, a company that was registered and operating in Chile went bankrupt and laid off a number of workers without prior notice or compensation. The Chilean company was partly owned by Canadian companies and organizations, including the Quebec Solidarity Fund, a fund controlled by Canadian trade unions. The lack of assets of the Chilean company meant that it was unable to provide the statutory severance pay to its workers, despite the fact that a number of them had accumulated considerable amounts of severance entitlements. Therefore, the workers turned to the Canadian minority owners, which declined responsibility for their severance pay.

The Chilean Labour Minister requested the intervention of the Chilean contact point under the Canada-Chile Agreement on Labour Cooperation. After discussions between the Canadian and Chilean contact points, and the administrators of the Solidarity Fund, meetings in Chile were organized, including with Chilean trade unions and the former employees of the company in question. Ultimately, an out-of-court settlement was reached that fixed compensation payments for the workers concerned (Canada-Chile Ministerial Council, 2002, p.12). According to observers, such agreement could hardly have been obtained without the basis for dialogue created by the Agreement on Labour Cooperation (Lazo Grandi, forthcoming).

## C COOPERATIVE ACTIVITIES

Cooperative activities in relation to labour provisions have taken a variety of forms, such as assistance for capacity building, dialogue and exchange of information. While these activities vary significantly, one apparent trend is the focus on implementation of domestic labour law, especially by strengthening domestic labour institutions. In this regard, technical cooperation projects have been carried out under United States and Canadian labour provisions, which have often involved significant financial resources. Additionally, New Zealand and EU labour provisions have given rise to cooperative activities in the form of institutional dialogue, and, to a lesser extent, technical cooperation. Finally, as far as South-South trade agreements are concerned, particular regional integration agreements have led to cooperative activities, often combined with policy dialogue activities in the area of labour standards.

### *Cooperative activities under United States and Canadian trade agreements*

United States and Canadian trade agreements have given rise to various labour-related cooperative activities. The activities under the first of these agreements, the labour side agreement attached to NAFTA (NAALC), have mainly consisted of Government-to-Government seminars, training courses, and public conferences.<sup>124</sup> While the majority of these projects focused initially on occupational safety and health, the scope of the activities has progressively extended to other issues, including other labour standards and employment issues.<sup>125</sup> Most of these activities did not adopt a systematic approach to improving labour standards, however, which is why many activities may have had limited effects in terms of capacity building.<sup>126</sup>

<sup>124</sup> In addition to this, the Commission on Labour Cooperation secretariat has carried out a number of research activities, including comparative studies on labour law and employment issues in Member States.

<sup>125</sup> Since 2000 an increasing number have dealt with migrant workers' rights issues.

<sup>126</sup> See, for example, Polaski (2004). Activities that were considered more successful were often related to specific complaints. Notably, a standing working group on occupational safety and health was set up further to various NAALC submissions; its task is to discuss common enforcement problems in this area (Compa and Brooks, 2009).

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These activities have also wound down significantly over the past 20 years. While more than 15 activities were undertaken in the year when NAFTA/NAALC entered into force (1994), the number fell to between two and eight per year between 2000 and 2004, and only one activity in 2005 (Figure 3.1). The Secretariat of the Commission for Labour Cooperation was closed in 2010.<sup>127</sup> The way forward for cooperative activities is still under consideration, with the possibility of a further shift to cooperation through national administrative offices.<sup>128</sup>

Subsequent United States trade agreements have also given rise to labour-related cooperative activities.<sup>129</sup> These projects have focused mainly on improving the implementation of national labour law, particularly by strengthening labour inspection, industrial relations, and the labour judiciary (Table 3.4).

In some cases, notably regarding Morocco, Bahrain, and Oman, the capacity-building activities focused on implementation of legal changes agreed upon during trade negotiations, especially concerning freedom of association. The financial scope of the projects has varied significantly, ranging from less than half a million US dollars to upwards of US\$85 million.

The most extensive cooperative activities have so far been carried out under the CAFTA-DR (based on recommendations in the White Paper). While the United States had already financed a number of capacity-building activities before the agreements entered into force, the labour cooperation mechanism resulted in a considerable increase in the number and scope of such activities.<sup>130</sup> The projects, which are carried out by the United States Department of Labour, the United States Agency for International Development and the State Department, have focused on increasing workers' awareness of their labour rights, increasing the budget and equipment of labour ministries and labour judiciaries, training labour officials, and

<sup>127</sup> Observers have attributed this to a change in political priorities in the US administration after 2000 and a decline in interest in this institution on the part of the other countries, exacerbated, among others, by internal irregularities in the Commission Secretariat (Nolan García, 2011). All posts at the Secretariat of the Commission for Labour Cooperation are currently vacant. See <http://www.naalc.org/commission/secretariat/EmployeesStaff.htm>

<sup>128</sup> Interview with Paula Albertson (deputy director of the Trade Agreement Administration and Technical Cooperation Unit, Office on Trade and Labour Affairs), 1 June 2011.

<sup>129</sup> The United States Department of Labour has set up the National Advisory Committee for Labour Provisions of United States Free Trade Agreements to advise on improved implementation of these labour provisions. See: <http://www.dol.gov/ilab/programs/otla/nac.htm>

<sup>130</sup> Delpech (forthcoming).

Figure 3.1 Number of cooperative activities under the NAALC (1994-2005)



Source: ILS based on information compiled by the United States Government and the NAALC Secretariat.

setting up centres providing legal assistance to workers.<sup>131</sup> Although some improvements have been noted, particularly in terms of strengthening labour inspectorates and the judiciary, it appears that these activities have not substantially changed working conditions in the countries concerned (see Box 3.2).<sup>132</sup>

The agreements on labour cooperation (ALC) attached to Canada's trade agreements have given rise to various cooperative activities involving both dialogue and technical assistance. In the case of the Canada-Chile ALC, a series of seminars, conferences, and workshops have been held. The focus of the activities has varied significantly over time, moving from a variety of labour standards issues in the first years to an emphasis on occupational safety and health in 1999 and 2000, and settlement and mediation of labour disputes between 2004 and 2006 (see annex). Since 2007, cooperative activities have been less frequent, comprising mainly conferences and tripartite meetings on various issues.

<sup>131</sup> US Department of Labor (2009).

<sup>132</sup> WOLA (2009); Delpech (forthcoming).

### Box 3.2 The effects of cooperative activities under CAFTA-DR

Insights into the effects of CAFTA-DR cooperative activities can be obtained from the independent evaluation report of the CAFTA-DR labour capacity building activities. The report cites a number of “small victories and seeds of success” regarding the promotion of labour standards (González Arroyo and O’Brien, 2011:30). These relate, in particular, to strengthening domestic labour institutions, notably labour inspectorates and the judiciary, through the introduction of electronic case management and other technologies that have increased efficiency. Labour capacity building also appears to have increased awareness of labour rights problems and directed the interest of NGOs and academic institutions to these issues (ibid, p. 31).

However, in terms of overall effects, the evaluation concludes that “there was little impact on improving overall labour conditions” (ibid, p. 30). The evaluation report mentions a number of factors that may explain the limited effects of the activities, particularly the low budgets of local labour ministries and the lack of political will to enforce domestic labour law in certain countries (ibid, p. 32). There were cross-country differences in effects. For example, a project involving joint workers-employers training at the factory level was significantly hampered by the reluctance of the employers’ organizations in Guatemala and Salvador, which led to significantly lower improvement than in the other CAFTA-DR countries (DAI, 2008). The evaluators also noted certain deficits inherent in the design of the projects themselves. This concerned, in particular, the lack of a coherent approach because the implementing agencies did not use the White Paper effectively to place the projects within a comprehensive strategy. Flaws were also noted in the White Paper itself as a guiding document, particularly the vagueness of many of its recommendations (González Arroyo and O’Brien, 2011).

While activities under the Canada-Chile ALC only gradually included technical assistance, this has been the focus of cooperative activities in subsequent agreements, such as the Canada-Costa Rica ALC. A technical assistance programme of about 2.5 million Canadian dollars (CND) has been implemented, the core element of which concerns enhancing the Costa Rican labour administration. The focus is mainly on modernizing domestic labour inspection and enhancing alternative mechanisms for solving labour disputes. Additional elements include building awareness on occupational safety and health issues and fostering social dialogue in relation to labour law reform.<sup>133</sup> In the case of both Chile and Costa Rica there

<sup>133</sup> HRSD (2011).

Table 3.4 Labour-related cooperative activities in US trade agreements

Name of trade agreement	Cooperative activities	Financial volume (US\$ in mills)
US-Jordan (2001)*; US-Singapore (2004); US-Australia (2005); US-Republic of Korea (2011)	Unclear	–
US-Chile (2004)	Strengthen Chilean labour inspection; enhance implementation of occupational safety and health legislation; support reform of the labour justice system.	1,4
US-Morocco (2006)	Strengthen labour law enforcement capacity, and bargaining and mediation techniques; train government servants and social partners in the new labour law; promote employment-related equality.	3,1
US-Bahrain (2006); US-Oman (2009)	Improve industrial relations by strengthening communication between government and the social partners; enhance labour law enforcement capacity.	0,4 (each)
US-Peru (2009)	Strengthen labour ministry capacity, particularly with respect to key labour rights, labour inspection and labour statistics; training judges, in particular on the new labour procedural law; training labour dispute conciliators.	n.a.
CAFTA-DR (2006)	Improve the implementation of labour law; enhance the budget and personnel of the labour ministries; enhance the capacity of labour-related judicial systems; increase protection against workplace-related discrimination; promote a compliance culture regarding labour standards; monitor labour standards in the CAFTA-DR countries through a project carried out by the ILO.	85,1
US-Colombia (2012)	Comprehensive project on labour standards implementation foreseen, in cooperation with the ILO.	n.a.

## Notes:

\*While apparently no technical cooperation projects were adopted under the US-Jordan Trade Agreement, this Agreement seems to have served as a platform for related cooperative activities (Sibbel, 2010).

\*\* The component on child labour was excluded from the calculation of the amount since they do not seem to have a direct link with the trade agreement (see Delpech, forthcoming).

Source: ILS based on information provided by the United States Government.

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were no cooperative activities on labour issues before the respective trade agreements entered into force. Cooperative activities have also been carried out under the Canada-Peru ALC and included the design of a comprehensive six-month training course for labour inspectors, as well as a project aimed at promoting social dialogue.<sup>134</sup>

### *Cooperative activities under EU and New Zealand trade agreements*

Both the scope and the extent of the cooperative activities under EU trade agreements have varied considerably, in part as a result of the significant changes in the design of relevant labour provisions. Under the Cotonou Agreement between the EU and the African, Caribbean and Pacific (ACP) countries, a regular policy and cooperation dialogue is held between the European Commission and the Brussels Office of the ACP-Group to agree upon development projects to be implemented. Such projects have involved the elimination of child labour and strengthening of creative industries. In both cases, the ILO was entrusted with the execution of the projects (Table 3.5).

Development cooperation activities with ACP countries have tended to be carried out independently of trade agreements, which makes it difficult to establish whether or not the labour provisions have had any direct effects on these activities.<sup>135</sup> However, it is notable that the agreements have, in some cases, been used as a forum for bilateral dialogue.

For example, under the EU-Chile Association Agreement<sup>136</sup> a policy dialogue on labour and employment was initiated in 2005 and has since taken place in 2007, 2008, and 2010. While the first three dialogue rounds focused on employment policy and social security issues such as employment

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<sup>134</sup> Interview with Edgardo Balbín (Director Fundamental Rights at Work Department), 21 November 2011; Interview with Aurelio Soto Barba (Regional Director, Peruvian Labour Ministry), 23 November 2011.

<sup>135</sup> For further information see (Ebert, forthcoming).

<sup>136</sup> This refers, more specifically, to the Association Agreement between the EU and Chile and its cooperation chapter.

**Table 3.5 Cooperation activities under the Cotonou Agreement**

Subject of project	Duration of project	Countries concerned	Financial contribution of the European Commission
Elimination of child labour through education programmes	March 2008-February 2012	Kenya, Zambia, Sudan, Madagascar, Mali, Angola, Jamaica, Papua New Guinea, Fiji, Guyana and Sierra Leone	15 000 000 €
Strengthening creative industries, including employment creation	Mid-2007-Mid-2011	Five selected ACP-countries	2 468 755 €

Sources: ILS based on New Frontier Services (2011); project information from the European Union.

promotion strategies (2005), pension systems reform and public employment services (2007), and vocational training and labour intermediation (2008), a more labour standard-related issue was chosen in 2010, focusing on occupational safety and health (see Box 3.3). A fifth meeting under this framework took place in 2012 and focused on skill development. While the first two dialogue rounds consisted of Government-to-Government meetings, the subsequent activities also involved employers' and workers' representatives.<sup>137</sup> In the context of the EU-South Africa Trade Agreement, an employment dialogue is being discussed which is to be framed through a Memorandum of Understanding currently under negotiation.<sup>138</sup>

Furthermore, first dialogue rounds have also been held under some of the more recent trade agreements concluded by the EU. The first meeting of the Civil Society Forum to be established under the EU-Korea Free Trade Agreement took place in June 2012 and focused on the issue of ratification

<sup>137</sup> See also (Lazo Grandi, forthcoming).

<sup>138</sup> According to an EU Commission official, DG Employment, 26 July 2011.

The focus of this dialogue round arose from concerns on the part of the Chilean Government, which had been criticized after the mine collapse that trapped miners for weeks in 2010 and was the subject of intense international media attention. The purpose of the dialogue, for which a tripartite delegation of Chilean Government officials<sup>139</sup> and social partner representatives visited Europe in October 2010, was the sharing of EU experiences and best practices in this area, and to gather input for the forthcoming reform of Chilean occupational safety and health (OSH) legislation. The three-day dialogue was divided into: (1) high-level working meetings with the DG for Employment Unit on Health, Safety, and Hygiene at Work in Luxembourg and Brussels; and (2) workshops at the European Agency for Safety and Health at Work in Bilbao.<sup>140</sup>

In this context, in-depth presentations were given on a wide range of issues. Subjects included the role of social partners in OSH implementation, OSH campaigns in enterprises, and the economic dimension of OSH. In addition, various European OSH instruments and programmes were presented, including the European OSH risk management tool, the European Survey of Enterprises on new and Emerging Risks (ESENER), which explores the views of managers and workers' representatives on how health and safety risks are managed at their workplace, as well as other European risk assessment instruments.<sup>141</sup> This was complemented by a Spanish Government presentation on OSH risk management in Spain.<sup>142</sup> The dialogue activities resulted in a report that informed the work of the Chilean Workplace Safety Commission, which is tasked with proposing legislative amendments. A follow-up to these activities took place in March 2011 in Bilbao, when there was another round of seminars on EU OSH tools and their relevance for the Chilean situation, including one on EU OSH tools for self-evaluation of small and medium enterprises.<sup>143</sup>

<sup>139</sup> Participating Chilean agencies included the Dirección del Trabajo, Superintendencia de Pensiones, and the Superintendencia de Seguridad Social.

<sup>140</sup> See the Programme of the 4th EU – Chile Employment Dialogue: Health and Safety at Work 25 – 27 October 2010, Luxembourg – Brussels – Bilbao.

<sup>141</sup> See the Programme of the Meeting of the Tripartite Chilean Delegation at the European Agency for Safety and Health at Work, 27 October 2010.

<sup>142</sup> See Presentation prepared by the Ministry of Labour. Vision General del Sistema de Prevención de Riesgos Laborales en España, Brussels, 26 October.

<sup>143</sup> Interview via mail with an EU Commission official, DG Employment, 12 July 2011. See also Programa de la visita de trabajo del Subsecretario de Previsión Social Augusto Iglesias Bilbao – Bruselas. See 28 February and 1 March 2011.

and implementation of the ILO fundamental conventions.<sup>144</sup> Additional meetings, including a workshop on labour standards took place in 2013. Cooperative activities relating to labour standards issues have also been carried out in the framework of the labour side arrangement attached to New Zealand's trade agreements (see Table 3.6). The New Zealand-Thailand Arrangement on Labour involves mainly technical cooperation activities, including capacity building related to OSH, labour inspection, and a more long-term project on the mediation of labour disputes.<sup>145</sup>

In contrast, the implementation activities taken under the Memorandum of Understanding on Labour Cooperation attached to the Trans-Pacific Partnership Agreement have prioritized policy dialogue and policy-related workshops, including a regular tripartite meeting of country representatives on selected labour issues during the International Labour Conference in Geneva.<sup>146</sup> Moreover, the Memorandum of Understanding on Labour Cooperation attached to the New Zealand-China Trade Agreement has given rise to ensuing labour activities, mainly in the form of workshops.<sup>147</sup> Discussions with partner countries under other trade agreements on future labour cooperation are on-going.<sup>148</sup>

<sup>144</sup> For further information on this meeting see: <http://www.cesc.europa.eu/?i=portal.en.events-and-activities-1st-eu-korea-forum>.

<sup>145</sup> The nature of these projects has largely been driven by the specific issues and priorities of the parties. To date they have focused on practical matters of labour capacity and labour administration. New Zealand Department of Labour (2012).

<sup>146</sup> See Lazo Grandis (2009).

<sup>147</sup> New Zealand Department of Labour (2012).

<sup>148</sup> New Zealand Department of Labour (2012).

**Table 3.6 Overview of New-Zealand's labour cooperation activities under its trade agreements, 2005-2011**

Name of agreement	Year	Summary of institutional dialogue activities	Summary of capacity-building projects and workshops	
New Zealand-Thailand Arrangement on Labour	2005	Creation of Labour Committee		
	2006	First meeting of the Labour Committee, mainly establishing terms of reference	Project aimed at capacity building of the health and safety-related labour inspectorate through a study tour to New Zealand by Thai officials	Seminar in Thailand aimed at providing information on Thai and New Zealand labour markets as a basis for further cooperation
	2007	Meeting to evaluate previous activities, identify current labour market challenges and agree on new activities	Information-sharing on labour inspection through a study tour to New Zealand by 14 Thai officials that included presentations of information systems and meetings with labour inspectors	5-day workshop in Thailand to review labour market issues, increase mutual understanding of the national labour systems and as a basis for further cooperation
	2008		Project to strengthen Thai capacity in good faith mediation regarding labour disputes	
	2009		Workshop on OSH held in New Zealand to share and discuss good practices	
	2011	Meeting to discuss future labour cooperation activities		
MoU on Labour Cooperation Attached to the Trans-Pacific Partnership Agreement	2006	Senior Labour Officials Meeting identified common areas of interest		
	2007	Senior Labour Officials Meeting explored research proposals on up-skilling and training of vulnerable groups.	A two-day workshop was held in New Zealand to identify and share best practices for tripartite relationships and to develop a knowledge base on the tripartite relationship among the parties.	
	2008	Meeting to discuss measures for youth employment & training issues, with tripartite participation, held during the International Labour Conference.	Further to the priorities set in 2007, a research project on the subject of up-skilling and training was conducted by the ILO on behalf of the P4 countries and was later presented to the Senior Labour Officials Meeting.	
	2009	Tripartite meeting to discuss responses to the global economic crisis.	New Zealand proposed a project for good practices and policies for young people's work in Asia-Pacific Economic Cooperation (APEC) economies, describing the situation of young workers in the African, Caribbean and Pacific (ACP) economies and the effect of the global economic crisis on young people, and identifying policy responses.	
	2010	Discussion of the APEC Young People in Work Project, 2009.		
	2011	Discussion of green jobs issues, including ILO participation.		
New Zealand-China MoU on Labour Cooperation	2009	First formal meeting in New Zealand, presenting institutional arrangements and identifying current labour market issues and common areas of interest.		
	2010		New Zealand hosted a workshop for policy-makers on the challenges, barriers and experiences of young people in work.	
	2011		A workshop was held in China on labour market information and capacity building. The workshop covered experiences in labour market information collection and analysis, the main methods and techniques, and feasible solutions to improve the quality of labour market information collection and analysis.	

Source: New Zealand Department of Labour (2012).

### *Cooperative activities under “South-South” bilateral trade agreements*

Many South-South trade agreements are relatively recent so implementation activities under their labour provisions have yet to develop. Nevertheless, some initial cooperative activities have emerged under the bilateral trade agreements concluded by Chile.

Under the MoU on Labour Issues of the Chile-China Trade Agreement, an exchange of information took place in 2006 to obtain insights into the functioning of the Chilean social security system. The interest in this appears to be due to the social security challenges China faces.<sup>149</sup>

In the context of the Chile-Peru Trade Agreement, a dialogue on labour issues ensued. Given the geographic proximity of the two countries and the considerable migration between them, notably from Peru to Chile, special attention was paid to migrant worker issues.<sup>150</sup>

### *Cooperative activities under regional integration agreements*

More comprehensive cooperative activities have taken place under certain South-South regional integration agreements. A number of cooperative activities have, for example, been carried out in the framework of Mercosur. They have included a campaign against child labour in the Mercosur border regions in 2004<sup>151</sup> whereby a Mercosur Declaration on the Prevention and Eradication of Child Labour was adopted.<sup>152</sup> Other activities include the preparation of a second campaign against child labour in common border regions and the development of common indicators on child labour. In addition, a Regional Plan on Labour

<sup>149</sup> In the run-up to the conclusion of the MoU, Chinese labour specialists visited Chile to learn about certain aspects of the local industrial relations system that were relevant for certain policy changes the country wished to implement (Lazo Grandi, forthcoming).

<sup>150</sup> Lazo Grandi (forthcoming).

<sup>151</sup> This campaign was carried out with financial cooperation by the ILO, particularly the Department on Workers' Activities, and is being implemented by a tripartite "executing unit".

<sup>152</sup> MERCOSUR/GMC EXT./RES. N° 36/06. Plan Regional para la Prevención y Erradicación del Trabajo Infantil en el Mercosur.

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Inspections has been adopted under which joint labour inspections of the Mercosur members have been carried out in border regions. According to some of the actors involved, this has led to increased mutual understanding of the parties' labour inspection practices, as well as an exchange of best practices in this area.<sup>153</sup>

In the framework of the Andean Community, several bodies have been established for the purposes of cooperative activities. For example, an Integrated Plan on Social Development was adopted in the framework of the Andean Community in 2004,<sup>154</sup> and foresees, among other things, the development of cooperation projects in the area of child labour.<sup>155</sup> Furthermore, the Andean Labour Observatory, a tripartite research institution, was set up in 2005 to compile and systematize statistical, legal and other information on social and labour-related subjects within the common Andean market, including fundamental rights at work, with an emphasis on child labour, OSH, and labour migration.<sup>156</sup> In addition, an Andean Officials' Committee on OSH has been set up to support the implementation of the Andean OSH Instrument.<sup>157</sup>

The implementation of ECOWAS labour provisions has revolved around policy development and cooperative initiatives on labour issues. The key framework in this regard is the annual forum of labour ministers created in 2005 whose task is to discuss labour and employment issues at the regional level.<sup>158</sup> One outcome of this was the ECOWAS Labour and Employment Policy of 2009,<sup>159</sup> which included, among others, labour standards and social

<sup>153</sup> Interview with Veronica López, Paraguayan Ministry of Labour, 28 November 2011.

<sup>154</sup> See Andean Decision No. 601 on the Integrated Plan on Social Development.

<sup>155</sup> See Secretariat of the Andean Community (2004).

<sup>156</sup> For more information, see the website of the Andean Labour Observatory at: <http://www.comunidadandina.org/camrandinos/OLA/Ejes.asp?MnuSup=3&NCA=1>

<sup>157</sup> The original Spanish term is "Comité Andino de Autoridades en Seguridad y Salud en el Trabajo (CAASST)".

<sup>158</sup> Robert (2004).

<sup>159</sup> Based on 17 guiding principles, the Policy focuses on five areas of intervention which are partly inspired by the ILO's Decent Work Framework, namely (1) Labour Standards, (2) Employment, (3) Social Protection, (4) Social Dialogue, and (5) Regional Integration. A key element on labour standards is the support to the ECOWAS Member States regarding the ratification of the ILO fundamental conventions, the priority conventions and conventions dealing with labour administration and employment. In addition, this area focuses on the eradication of child labour, combating trafficking of migrant workers, and promoting "equal opportunities in labour matters" (ECOWAS, 2009). In the area of Social Protection, the emphasis is, among other things, on "promoting equitable working and living conditions", providing "healthy and safe workplaces" and the promotion of a workplace-related HIV/AIDS-policy (ECOWAS, 2009). Other issues are dealt with under the Social Dialogue area of intervention.

protection issues.<sup>160</sup> ECOWAS had already cooperated with the ILO, notably on the drafting of certain policy documents, including the aforementioned ECOWAS Labour and Employment Policy. Furthermore, the ILO/IPEC ECOWAS-II child labour programme includes knowledge-sharing with and the training of the ECOWAS Secretariat on child labour issues to strengthen regional capacity in this regard (ILO/IPEC, 2010).

The framework of the Southern African Development Community (SADC) has also given rise to a combination of policy and capacity-development activities. Labour issues within SADC are discussed at the Employment and Labour Sector (ELS) Meeting of the Ministers of Labour of the SADC Member States. Within this framework, a number of activities were decided upon, including the development of tools to evaluate the incidence of child labour at the national level and collecting data on occupational accidents. It was also decided to convene a tripartite meeting to facilitate the ratification of ILO conventions on OSH.<sup>161</sup> Furthermore, since 2009 the SADC Secretariat has had specialized staff dealing with labour issues.<sup>162</sup> The ELS Committee noted, however, that the implementation of the framework adopted had been subject to certain constraints, such as “poor attendance by members [of the Sub-Committees]” and capacity constraints at the ELS Desk in the SADC Secretariat.<sup>163</sup> Within the framework of the East African Community, labour-related issues are gradually gaining space.<sup>164</sup> In 2011 the Social Development Framework was amended to provide for the establish-

<sup>160</sup> The implementation of the policy focuses on three main areas: (1) the regional harmonization of labour policies through guidelines to be implemented at the national level, supported by indicators and benchmarks as well as “periodic monitoring and peer review organized as mutual learning process” (ECOWAS, 2009); (2) the “coordination and monitoring of the labour policies”, in particular through a tripartite social dialogue at the regional and the national level; and (3) the establishment of an “ECOWAS Labour and Employment Fund” which, like the European Social Fund, would finance projects aiming to strengthen working conditions, gender equality and other goals relating to social cohesion, in consultation with workers’ and employers’ organizations (ECOWAS, 2009).

<sup>161</sup> The ELS Meeting also established two tripartite technical subcommittees, one of which deals with social protection and the other with employment and labour. While the former deals with issues such as social dialogue, employment activities and harmonization of labour law, the activities of the latter include occupational safety and health and labour migration issues (SADC, 2010).

<sup>162</sup> Masemene (2009). In 2009, there was one senior official dealing with labour issues in the Secretariat.

<sup>163</sup> SADC (2010). In this context, SADC has also engaged in comprehensive cooperation with the ILO on the basis of a MoU signed in 2007, replacing an earlier MoU of 1998 (ILO Harare Country Office, 2011). Among others, the ILO takes part as an observer at Employment and Labour Sector Meetings. In addition, SADC has, with assistance from the ILO, defined priorities for the Subregional Decent Work Programme, implementation of which was subsequently supported by the SADC Tripartite Technical Sub-Committee on Social Protection. Since 2010, the ILO has also provided input to ELS Meetings, which were also attended by the social partners (ILO Harare Country Office, 2011).

<sup>164</sup> The first unit established that is relevant to this area is the Labour and Employment Unit. While mainly entrusted with labour migration issues, this unit also became involved in other labour issues, as well as youth and health concerns.

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ment of a Social Sectors Department, including new units and increasing the staff from two to around ten.<sup>165</sup>

Finally, in the framework of the Caribbean Community (CARICOM), a Council for Human and Social Development, consisting of delegated ministers of the member states, has been created and holds meetings on labour and other social issues.<sup>166</sup> In the past, CARICOM has also been used as a framework for the harmonization of the labour law of Member States, and this has led, among other things, to the adoption of various model laws although its effects in recent years are less clear.<sup>167</sup>

<sup>165</sup> Interview with Perpetué Miganda, EAC Gender Officer, 24 March 2011. At the request of the EAC Council of Ministers, studies were conducted on “Harmonization of employment policies in East Africa” and “Harmonization of labour legislation in East Africa” and then discussed with stakeholders. These studies are intended to provide the basis for the development of “Model EAC Labour Legislation” as well as an “EAC Labour Policy” (African Union Commission, 2009). In addition, the EAC Social Development Framework adopted in July 2011 stresses tackling child labour, in particular under hazardous conditions.

<sup>166</sup> For further information see: [http://www.caricom.org/jsp/community\\_organs/cohsod.jsp?menu=cob](http://www.caricom.org/jsp/community_organs/cohsod.jsp?menu=cob)

<sup>167</sup> Blackett (2007).

## APPENDIX A

### CANADA – CHILE COOPERATIVE ACTIVITIES 1998 - 2009

Year	Date /Location	Subject	Summary of Activity
1998	7-8 January, Santiago, Chile	Introduction to the labour law systems of the parties	Government workshop, followed by a public seminar and meetings, allowing relations to be established between the relevant actors.
	28-30 April, Ottawa, Canada	Industrial relations	Government seminar, followed by a public conference.
	22-23 October, Santiago, Chile	Labour relations	Government-to-Government seminar, followed by a public conference on the changing nature of work and employment.
1999	18-19 May, Ottawa and Montreal, Canada	(1) Income security programmes; (2) occupational safety and health	Experience-sharing through a seminar and a public conference on (1), and through the visit by a Chilean delegation to the Montreal centre for compensation for workplace accidents and occupational disease on (2).
	1-3 September, Santiago, Chile	Gender equality	Seminar, workshop, and public conference on best practices for integration of woman in the workplace.
2000	16-18 May, Hamilton and Toronto, Canada	Occupational safety and health	Exchange of best practices through a government seminar, a visit to a specialized centre, and a special session with business and labour representatives.
	4-6 December, Santiago, Chile	Occupational safety and health	Exchange of best practices through a government seminar, with specific reference to the situation in the mining sector.
2001	15-17 November, Santiago, Chile	Child labour and its gender dimensions	Public seminar to examine and discuss the international legal framework and best practices.
2002	23-25 April, Ottawa, Canada	Use of new technologies by the labour ministry	Exchange of experiences and best practices through government seminars.
	27-29 November, Santiago, Chile	Small and medium enterprises	Tripartite forums to exchange information on selected issues, health and safety, social dialogue and training.
2003	10-13 November, Montreal, Canada	Labour disputes and mediation	Tripartite forum to compare challenges and best practices and determine needs regarding mediation and dispute settlement in Chile.
2004-2006	Activities in both countries	Labour disputes and mediation	A series of seminars and training workshops to increase the capacity of Chilean labour officials and of social partners.
2007	November, Santiago, Chile	Labour provisions in trade agreements	Tripartite seminars to discuss different approaches in this regard, also involving participants from the United States, the EU and New Zealand.
2008	March, Santiago, Chile	Public services regarding vocational training	Tripartite seminar to discuss the best practices of both countries.
	April, Santiago, Chile	Labour market policy	Government seminar to discuss best practices regarding the integration of disadvantaged groups into the labour market.
2009	Ottawa, Canada	Vocational training	Internship of two officials of the Chilean Vocational Training and Employment Service in the Canadian labour ministry.
	27-29 April, Montreal, Canada	Labour provisions in trade arrangements	Public conference, followed by governmental meetings to discuss possible next steps regarding labour cooperation.

Source: Lazo Grandi (forthcoming).

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## **CHAPTER 4**

### **IMPROVING THE EFFECTIVENESS OF LABOUR PROVISIONS IN TRADE AGREEMENTS: A REVIEW OF AVAILABLE OPTIONS**

#### **KEY FINDINGS**

- This chapter reviews possible policy options for improving the effectiveness of existing labour provisions. First, some authors have argued that there is scope for ensuring that labour provisions not only address cases of non-respect of worker rights but also aim at concrete improvements in labour standards. For example, labour-related development objectives could be added to the trade agreements. Where applicable, such “labour development plans” would be linked to economic incentives, rather than sanctions, thereby placing the regulatory focus of labour provisions on positive rather than negative conditionality. In addition, synergies could be created between the labour provisions of different trade agreements.
- A second option involves greater consultation of social partners and civil society in the negotiation and implementation of labour provisions. The expertise of social partners and civil society could, for example, be harnessed to design cooperative activities to improve compliance with labour standards. Furthermore, more extensive use of social partners’ inputs could be made regarding the monitoring of the implementation of the labour provisions.
- Finally, most labour provisions refer to ILO instruments, in particular the 1998 Declaration on Fundamental Principles and Rights at Work. However, the way ILO instruments are integrated differs across agreements and, in some cases, raises issues of coherence. There are

a number of ways of involving the ILO in the application of labour provisions, including providing information on the implementation of ILO standards and guidance on the application of the ILO instruments referred to in the labour provision in question.

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## **INTRODUCTION**

Chapters 2 and 3 provided examples of how labour provisions in trade agreements have been applied in practice. The chapters also discussed the potential effects of different types of labour provisions. In particular, they looked at complaint mechanisms in conditional provisions and the role of promotional provisions.

This chapter considers several policy avenues which have been put forward by several authors for enhancing current regulatory approaches to labour provisions. This includes devising a labour development plan with specific targets and objectives, more involvement by social partners and civil society, greater engagement with the private sector, and stronger coordination of labour provisions at the country level.

## A LABOUR DEVELOPMENT PLANS

One way of improving the effectiveness of labour provisions is to refocus objectives towards enhancing workers' rights and away from non-compliance. According to some studies, this could take the form of a labour development plan (LDP) with specific time-bound goals on labour standards.<sup>168</sup> While LDPs can be adopted as stand-alone instruments, trade negotiations may provide political momentum and leverage for comprehensive commitments, as well as an institutional framework. Suggested approaches along these lines cover the following issues:

***Time-bound commitments:*** Rather than requiring full compliance with labour standards from the outset, an LDP could instead propose their gradual improvement by containing specific targets to be reached either before or after the entry into force of the trade agreement. Such an approach would allow countries space to address certain issues over the medium term.

***Negotiated commitments specific to country contexts:*** An LDP could contain measurable goals which are specific to the country context. These goals would address both legislative issues, such as bringing domestic labour legislation into line with international standards, and the practical application of such standards. The social partners and other civil society actors, as well as relevant international organizations such as the ILO, could be involved in this process. Evidence suggests that countries may be more inclined to commit to labour improvements before ratification than afterwards. The White Paper adopted by the trade and labour vice-ministers of CAFTA-DR, which identified problems with labour standards and commitments to addressing them, may be seen as an precursor of such an LDP. Likewise, in the Labour Action Plan adopted under the United States-Colombia Trade

<sup>168</sup> See for example, Banks (2011) and Kolben (2007).

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Agreement, commitments are both country specific and time-bound. Such a framework could also shape the design of the capacity-building activities to be carried out by the parties.

***Linkage to the institutional and legal structure of the agreement:*** The LDP could be linked to the trade agreement by making it a binding part of the labour provisions and thus subject to the institutional framework of the agreement. Such a linkage would help to ensure more comprehensive follow-up of the commitments and also provide a framework for addressing disputes that may arise over the interpretation or implementation of the commitments in the plan.

***Incentives:*** Providing additional incentives to reach certain goals may be an appealing option to developing countries and may also help assuage concerns regarding disguised protectionism. Additional development assistance conditional upon gradual improvement of certain labour standards is a case in point. Indeed, evidence suggests that such mechanisms can induce both legislative and practical change, while at the same time supporting the development process. For example, the incentive-based labour provisions under the EU Generalized System of Preferences appear to have been a significant factor in El Salvador's ratification of ILO Conventions No. 87 and 98.<sup>169</sup> Similarly, a number of researchers consider the incentive-character of the labour provisions under the US-Cambodia Textile Agreement has contributed to improve labour conditions in the Cambodian textile sector.<sup>170</sup> There is an issue, however, as to whether the incentive approach of the Textile Agreement would be difficult to extend to other areas.<sup>171</sup> Some authors have also studied the role of additional development cooperation as well as improved labour migration opportunities for partner countries.<sup>172</sup> Lessons can also be learned from positive experiences with incentives in the form of development cooperation under certain international environmental agreements (see Box 4.1).

<sup>169</sup> Orbie and Tortell (2009).

<sup>170</sup> See for example, Wells (2006); Polaski (2009); Adler and Woolcock (2010). Under the US-Cambodia agreement, improved implementation in the apparel sector was rewarded with increased quotas for textile imports to the United States market (see also Chapter 2). For further reading, see Kolben (2004) and, for a critical perspective, Miller (2009).

<sup>171</sup> This is, among others, for reasons related to WTO law. The US-Cambodia Textile Agreement was a result of the Multi-Fibre Arrangement, which set quotas on garments and textiles from developing to developed countries. With the phasing-out of this Arrangement in 2004, such quotas are no longer possible. Furthermore, according to Article XXIV of the GATT, bilateral and regional trade agreements have to bring about a liberalization of "substantially all trade", which is generally understood to mean around 90 per cent of all trade between the parties (Bartels, 2012). This may reduce the scope for integrating trade incentives into bilateral trade agreements.

<sup>172</sup> Banks (2011).

***Sharing the costs of compliance:*** Costs are a crucial component of compliance with labour provisions, particularly in the case of ‘North-South’ agreements.<sup>173</sup> This could take the form of financial assistance or capacity building, particularly in cases where failure to comply with commitments is due to lack of financial resources.<sup>174</sup>

#### Box 4.1 Incentive based approaches in international agreements

***Using labour provisions to align public and private interests:  
the case of the US-Cambodia Textile Agreement***

A unique approach to labour provisions in trade-related agreements was taken in the context of the US–Cambodia Textile Agreement concluded in 1999. Labour provisions of this agreement are not based on sanctions. Instead, the aim is to encourage respect for labour standards through incentives. To achieve this, the special quota structure for access to the US apparel market was used.<sup>175</sup> In addition to the regular annual increase of the quota, a further increase was made subject to compliance with certain labour standards (Kolben, 2004).<sup>176</sup>

The ILO was, through the Better Factories Cambodia Programme, heavily involved in the application of this arrangement. More specifically, the Programme developed indicators for the evaluation of compliance with labour standards in the factories, and monitored the actual implementation of these standards at the factory level.<sup>177</sup> All exporting apparel factories were covered as the Cambodian government had made participation in this monitoring programme a condition for obtaining an export licence (Adler and Woolcock, 2010). In addition to the trade incentive, a business incentive was introduced.

<sup>173</sup> See also Aleo (2006); Barry and Seddy (2008).

<sup>174</sup> Elliott and Freeman (2003) suggest that lack of capacity may be the root cause of a number of compliance problems.

<sup>175</sup> As Cambodia was not at that time a member of the WTO, its access to the US apparel market was subject to significant quantitative restrictions.

<sup>176</sup> The experiences with this arrangement resulted in the prolongation of the monitoring regime even after the expiration of the US-Cambodia Textile Agreement and has led to the creation of similar programmes – not necessarily linked to a trade arrangement – under the name “Better Work” in cooperation with the International Finance Corporation (IFC).

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Reputation-sensitive buyers sourcing from Cambodian suppliers could access compliance reports online and choose business partners on the basis of their labour standards' record (Oka, 2010). A company identified as having labour problems would have several months to remedy the situation, and a follow-up report would be published indicating the factories that had failed to comply with the recommendations and specifying areas of non-compliance (Polaski, 2009). According to various studies, labour standards improved in the Cambodian textile companies during the life of the Agreement (Sibbel and Bormann, 2007; Robertson et al., 2011), although compliance problems still persist in a number of areas (Miller, 2009; Wells, 2006).<sup>178</sup>

***Combining compliance assistance, burden-sharing, and conditionality:  
the case of the Montreal Protocol***

The Montreal Protocol regulates the use of substances harmful to the stratospheric ozone and is generally considered one of the most innovative regulatory regimes in international environmental law. Although the Protocol does not deal with the labour standards it is a useful source of inspiration for the design of labour provisions. The Protocol recognizes the responsibility of developed countries to assist developing countries in the implementation of their obligations (Mintz, 1991). Such assistance includes the creation of a Multilateral Fund financed by developed country signatories with a view to sharing the costs involved in bringing the practices of developing countries into line with the Protocol requirements (Baratt-Brown, 1991; Boisson de Chazournes, 2006). Technical cooperation activities technical cooperation activities involving technology transfer, training, and research are also part of the agreement (Bryk, 1991).

Eligibility to these funds is conditional upon progressive compliance with the Protocol commitments (Baratt-Brown, 1991). Additional funding is provided by the Global Environmental Facility and is also dependent on specific requirements, serving as a further incentive for compliance (Boisson de Chazournes, 2006). In some cases, this has reportedly helped induce change in national practice towards implementation of the Protocol requirements (Raustiala, 2000).

<sup>178</sup> Improvements took place especially in the areas of occupational safety and health and overtime.

***Creating synergies among different labour provisions applying to the same country:*** The proliferation of trade agreements has led to situations where the same country is a partner in different agreements and is therefore subject to different types of labour provisions. For example, Peru has agreements with Canada, the EU and the United States. This raises the question of how synergies can be created in order to maximize the impact of the different labour provisions.

One possibility is to establish a coordination mechanism that would enable information about past and ongoing activities under the respective agreements to be shared. For example, the trade partners of a country with multiple trade agreements that have labour provisions could create an institutional forum to coordinate labour cooperation activities in light of the needs and interests of the country concerned.<sup>179</sup> Although in practice informal consultation among partner countries is common, formalization of such consultations could help reinforce synergies between different agreements. The cost of expensive projects could also be shared by a coalition of partner countries. In addition, coordination could be considered for clusters of countries from the same region (e.g. Peru and Colombia) for which interested trade agreement parties (e.g. the United States, Canada, and the EU) could develop joint cooperation projects.

Another possibility would be to take advantage of the multiplicity of labour provisions, including the proliferation of South-South agreements, by fostering South-South cooperation. For instance, a developing country with expertise in an area of relevance to another developing country (with which it has a trade agreement with labour provisions) could provide assistance to that country in that field. If the country benefiting from the cooperation had also concluded a trade agreement with a developed country, the latter could in turn financially support this South-South cooperative activity. This would allow the expertise that already exists in developing countries to be harnessed and might also make countries more inclined to accept cooperation.

<sup>179</sup> See further Polaski (2008).

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## B ENGAGING WITH NON-GOVERNMENTAL ACTORS

### *Strengthening social dialogue on the implementation of labour provisions*

Several options are available for enhanced engagement with trade unions and employers' representatives in relation to labour provisions, which could enhance the legitimacy and inclusiveness of the provisions, while at the same time drawing on the expertise of these actors for the purposes of implementation:

*Involving social partners in the negotiation process:* Trade unions, employers' representatives, NGOs and other civil society actors often express their views about ongoing trade negotiations, but in a rather ad hoc manner.<sup>180</sup> It has been suggested that a more formalized, institutional role could help to identify problems regarding labour standards as well as important areas of cooperation.<sup>181</sup>

*Support to monitoring and implementation of labour provisions:* The social partners and other civil society actors could also play a part in the monitoring mechanism of the trade agreement. Such organizations typically maintain a network of local actors with access to information on compliance, activation and practical follow-up of provisions.<sup>182</sup> Some recent EU trade agreements include social partners as members of domestic advisory groups which participate in monitoring the implementation of the agreement.<sup>183</sup>

<sup>180</sup> See for example, ITUC et al., (2012).

<sup>181</sup> In the context of EU practice on conducting sustainability impact assessments (SIA) on trade agreements under negotiation, the social partners and other civil society representatives are requested to give their views on the potential economic, social and environmental impacts of the future trade agreement (see European Commission, 2006). Another early example of such involvement can be found in the Labor Advisory Committee for Trade Negotiations and Trade Policy convened by the United States to provide advice on trade agreements, which is composed of representatives of trade unions and other workers' organizations. For the Charter of the Labor Advisory Committee for Trade Negotiations and Trade Policy see: <http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/labor-advisory-committee-lac>

<sup>182</sup> See also Greven (2005).

<sup>183</sup> See, in particular, Article 13.13 of the EU-Republic of Korea Trade Agreement. Similar mechanisms are foreseen by the EU-Peru/Colombia Trade Agreement and the EU-Central America Trade Agreement.

***Participation in cooperation activities:*** The expertise of social partners and civil society is also important in developing cooperative activities to improve compliance with labour standards. These organizations could monitor the implementation of the parties' commitments in terms of providing capacity building to their less advanced counterparts. Civil society forums along the lines of those established under recent EU trade agreements can provide a fertile institutional framework in this regard.

***Using trade agreements to promote compliance with labour standards among companies***

Labour provisions engage almost exclusively with governments that are partners to the trade agreements. Therefore, in countries with limited enforcement capacity, engaging private actors in efforts to comply with labour provisions is essential.<sup>184</sup> This can take the form of monitoring arrangements to supervise the application of labour standards in given sectors. In this regard, inspiration may be drawn from the experience with the US-Cambodia Textile Agreement, where company-level monitoring of labour standards was used to determine trade (see Box 4.1.).

Private sector incentives based on consumer preferences and buyer pressure could also be considered. Such initiatives would be particularly significant where States lack the capacity to ensure that private companies comply with domestic law. In this regard, monitoring activities could serve as an indicator to determine whether certain development goals have been reached, and could also be combined with capacity-building activities for the labour inspectorates.

<sup>184</sup> See for example Kolben (2010) and Posthuma (2010).

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## C ENSURING COHERENCE BETWEEN LABOUR PROVISIONS AND ILO INSTRUMENTS

ILO instruments are embedded in two-thirds of the labour provisions in trade agreements. The vast majority of references are to the ILO Declaration on Fundamental Principles and Rights at Work (1998 Declaration),<sup>185</sup> while only 15 per cent of all agreements with labour provisions refer to the ILO fundamental conventions (see Figure 4.1).<sup>186</sup> However, there are significant differences regarding both the nature of the ILO instruments which are referred to in the agreements and the purpose for which ILO instruments are used.

This has important implications. Where labour provisions refer to ILO conventions the parties can rely on the reports of the ILO supervisory bodies, which provide guidance on the interpretation of labour standards. By contrast, the 1998 Declaration is, as such, not subject to the supervision of the ILO's supervisory bodies although some guidance on the 1998 Declaration may be drawn from the comments of the ILO supervisory bodies on the respective fundamental conventions.<sup>187</sup> Also, the exact scope of the principles embodied in the 1998 Declaration is, according to some authors, not precisely defined.<sup>188</sup>

Lack of clarity concerning the scope of labour provisions can lead to legal uncertainty. Moreover, panels examining a dispute may interpret labour provisions that refer to the 1998 Declaration in isolation, and this may lead to fragmented interpretation of the Declaration, weakening its normative authority. The challenge is to avoid a decentralized interpretation of ILO instruments by trade agreement organs that could undermine the normative coherence of ILO standards.<sup>189</sup>

<sup>185</sup> Of these, about half also mention ILO Convention No. 182 on the worst forms of child labour, although only as far as technical cooperation is concerned.

<sup>186</sup> Some recent negotiated EU and EFTA agreements, e.g. the EU-Republic of Korea Trade Agreement and the Agreement on Labour attached to the EFTA-Hong Kong, China Trade Agreement, go further than simply referring to the 1998 ILO Declaration and also include commitment by the Parties to ratify the outstanding ILO fundamental conventions, to consider ratification of the other up-to-date ILO conventions or to implement effectively those already ratified.

<sup>187</sup> Recent cases submitted rely heavily on ILO reports, see Gravel and Delpéch (2013).

<sup>188</sup> See, e.g., La Hovary (2009).

<sup>189</sup> See on this also Gravel, Kohiyama, and Tsotroudi (2011). Similarly, Maupain (2012) raises the question of whether the labour provisions of certain trade agreements might entail the risk of a regression with regard to ILO supervisory mechanisms.

**Figure 4.1 Incidence of trade agreements with labour provisions that refer to ILO instruments**

ILO Conventions (with or without ILO Declaration)	9
No ILO References	18
ILO 1998 Declaration only	31

Source: ILS, based on information collected from bilateral and regional trade agreements.

ILO involvement in the complaint and dispute resolution process for labour provisions might help to address these problems. There are a number of possible ways of involving the ILO in labour provision dispute settlement, including providing information on the application of ILO instruments referred to in the labour provision in question. Even without an explicit reference in the agreement, parties to a dispute can often seek guidance from the ILO on the application of ILO instruments.<sup>190</sup> Indeed, dispute settlement procedures often allow the panel or the parties to request information on relevant issues from external bodies.<sup>191</sup>

The ILO body responsible for replying to consultation requests would of course have to be specified. In addition, some partners may find it helpful to involve the ILO in the design and implementation of cooperative activities.

<sup>190</sup> Some trade agreements, such as the EU-Cariforum Trade Agreement, expressly stipulate that the parties may consult the ILO on questions relating to the application of the labour provisions of the FTA that refer to the ILO fundamental conventions in the consultation phase of the dispute (see Article 195(4) of the EU-Cariforum Trade Agreement). Involvement of the ILO is also foreseen in the amiable dispute resolution procedure under the EU-Republic of Korea Trade Agreement (see Article 13.15 of the Agreement).

<sup>191</sup> See, for example, Article 20.12 of CAFTA-DR which provides that “[o]n request of a disputing Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate”.

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The ILO Social Justice Declaration of 2008 enables the ILO to provide such assistance as it calls upon the Organization to adapt its institutional practices with a view to, “upon request, providing assistance to Members who wish to promote strategic objectives jointly within the framework of bilateral or multilateral agreements, subject to their compatibility with ILO obligations”.<sup>192</sup> This, in combination with the broader constitutional mandate of the ILO, provides a sound basis on which the ILO could assist states regarding the implementation of labour provisions in trade agreements in a manner that enhances coherence with ILO instruments.<sup>193</sup>

<sup>192</sup> Section II.A (iv) of the ILO Declaration on Social Justice for a Fair Globalization adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008.

<sup>193</sup> The promotional potential of FTAs was also stressed by several governments in the context of the recent Recurrent Discussion on Fundamental Principles and Rights at Work at the 101st International Labour Conference (See ILC, 2012 Provisional Record No. 15).

## CONCLUSION

This chapter has proposed various policy options for enhancing the design of existing labour provisions in order to lead to better outcomes in terms of improved labour standards.

It should be emphasized that no one-size-fits-all approach is proposed. Rather the suggestions should be seen as elements that could inform the parties' negotiation agendas and be adjusted in accordance with the domestic labour standards situation. Differences as to the specific regulatory arrangement chosen will, in particular, depend on whether the agreement under negotiation is a 'North-South', 'North-North', or 'South-South' agreement and whether it is regional and/or cross-regional. Moreover, while some of the proposals could be taken up in the short term, others may require considerable domestic deliberation and therefore only be feasible in the longer term. This is, in particular, the case of the implementation of a more synergistic approach, for which political processes at the domestic and international level would be necessary.

With these caveats in mind, the experiences of innovative labour provisions, such as those adopted in the case of the US-Cambodia Agreement, provide an encouraging case for trade negotiations to be more experimental when considering regulatory approaches to labour provisions. Trade negotiators can take inspiration from approaches adopted and experiences under other international regimes with regard to facilitating and monitoring compliance with international commitments.

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## GLOSSARY

ACP Group	African, Caribbean, and Pacific countries, formed in 1975. The group consists of 79 countries, and operate in a forum that focuses on economic development and political stability. In 2000, the European Union concluded the so-called Cotonou Agreement with the ACP countries.
Agreement on labour cooperation	An agreement that establishes cooperative activities between trade partners to improve working conditions.
Andean Community of Nations	Free trade area between the countries of Colombia, Ecuador, Bolivia, and Peru.
Dominican Republic-Central America-United States Free Trade Agreement	Free trade agreement between the United States with five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic.
Canada-Costa Rica labour side agreement	Side agreement to the Canada-Costa Rica Free Trade Agreement that commits Costa Rica and Canada to international labour standards and provides for cooperation in this regard.
Caribbean Community and Common Market	Regional integration organisation consisting of 15 Caribbean nations.
Conditional elements of labour provisions	Elements of labour provisions which link the respect of labour standards with economic consequences.
Cooperative activities	Activities involving the parties to a trade agreement to encourage capacity building, institutional development, and knowledge-sharing.
Cotonou Agreement	An agreement between the European Union and its member states and 79 developing nations from the Caribbean, Sub-Saharan Africa, and the Pacific.

<b>Declaration on Fundamental Principles and Rights at Work</b>	ILO declaration adopted in 1998 that commits ILO members to respect, promote, and realise the principles concerning four rights whether or not they have ratified the relevant conventions: freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour, abolition of child labour, elimination of discrimination in respect of employment and occupation.
<b>Dispute settlement mechanism</b>	A formal process for resolving disputes relating to the provisions of a trade agreement, often involving the authority of an arbitral panel.
<b>Doha round</b>	The round of trade negotiations among World Trade Organization member nations that began in 2001 and stalled at its fourth iteration in 2008 over differences in interests between developed and developing nations in regards to tariffs and barriers for trade of agriculture, industry, and services, among others.
<b>Economic Community of West African States</b>	Regional integration organisation composed of Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.
<b>EU-Cariforum Trade Agreement</b>	Trade agreement between the European Union and 15 Caribbean countries concluded in 2008 for the purpose of facilitating investment and trade between the two blocs.
<b>European Free Trade Association</b>	Free trade association between Switzerland, Iceland, Norway, and Liechtenstein.
<b>European Survey of Enterprises on New and Emerging Risks</b>	A workplace survey that examines various components of management techniques with regard to organisational health and safety.
<b>Free trade agreement</b>	An agreement between two or more countries to eliminate tariffs and other trading barriers for the purpose of economic integration.
<b>Generalized System of Preferences</b>	Programme established usually by developed countries to extend special tariff privileges to developing nations.

<b>Labour provisions</b>	Any labour standard which establishes minimum working conditions, terms of employment or worker rights, any norm on the protection provided to workers under national labour law and its enforcement, as well as any framework for cooperation in and/or monitoring of these issues.
<b>Mercosur</b>	Regional integration organisation with member states of Bolivia, Uruguay, Paraguay, Argentina, Venezuela, and Brazil.
<b>Memorandum of understanding</b>	A document that formalizes mutual intent but does not necessarily legally bind any signing party to its terms.
<b>National Administrative Office</b>	A national office established in the context of the North American Agreement on Labour Cooperation for the purpose of handling, negotiating, and enforcing labour provisions.
<b>North American Free Trade Agreement</b>	In force since 1994, the Agreement creates a free trade zone between Canada, the United States, and Mexico. Labour provisions for NAFTA were included in a side agreement called the North American Agreement on Labor Cooperation, or NAALC.
<b>North American Agreement on Labor Cooperation</b>	A side agreement to the North America Free Trade Agreement providing for the effective enforcement of labour standards as well as cooperation in this regard between the three countries in the free trade agreement.
<b>North-North trade agreement</b>	Trade agreement between two or more developed countries.
<b>North-South trade agreement</b>	Trade agreement between at least one developed country and at least one developing country.
<b>Pre-ratification conditionality</b>	Conditions that must be met before mutual ratification of a trade agreement.
<b>Promotional elements</b>	Elements of labour provisions which provide for cooperation or monitoring in the area of labour standards.
<b>Promotional monitoring activities</b>	Monitoring of one state party in the framework of a trade agreement by another to ensure that the labour provisions are being upheld.

<b>Protectionism</b>	The act of a nation unilaterally protecting the interests of its domestic economy at the expense of international trade.
<b>Regional integration agreement</b>	An agreement to lower or eliminate trading barriers between nations typically situated geographically near or bordering each other. A common example is the Association of Southeast Asian Nations (ASEAN).
<b>South African Development Community</b>	Regional integration organisation composed of Angola, Botswana, DR Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.
<b>South-South trade agreement</b>	Trade agreement between two or more developing countries.
<b>Tariff preferences</b>	Decreased tariffs for the imports of an exporting nation at the discretion of the importing nation in comparison to the tariffs under the multilateral trader system.
<b>Transpacific Partnership Agreement</b>	An agreement to liberalise trade between the economies of Brunei Darussalam, Chile, New Zealand, Singapore.
<b>US Labor Advisory Committee for Trade Negotiations and Trade Policy</b>	An advisory council composed by worker representatives for the United States Trade Representative that provides information and advice on strategies for current and future trade agreements.
<b>US Office of Labor and Trade Affairs</b>	A United States government office that is responsible for implementing the labour provisions of US trade agreements.

