

**Jan Theron, Shane
Godfrey and
Margareet Visser**

**Globalization, the impact of
trade liberalization, and labour
law: The case of South Africa**

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International Institute for Labour Studies
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Preface

This Discussion Paper forms part of a set of studies prepared in the framework of the ILS project “Labour law and decent work in low-income settings”, which is examining the effectiveness of labour law in protecting workers in the developing world.

A significant number of workers fall outside the scope of labour law either *de jure* or *de facto* throughout the world. Changing patterns of production and work, a weakening regulatory role of the national state over the socio-economic sphere and diminishing capacity of trade unions for collective representation have been identified as major challenges to the protective function of labour law today. Globalization, in its socio-economic, political and ideological dimensions, is considered as a key determinant of these challenges. The implications of these developments for labour law are the subject of a lively debate in the scholarly community.

The intention of the project is to contribute to this ongoing reflection from the perspective of developing countries. The above analysis appears to be relevant to their realities. However, in the developing world the limited scope and application of labour law is of course not new. The papers prepared in the framework of this project map and examine both the “old” and persistent factors and the more “recent” factors underlying the limited coverage and problems of compliance and enforcement in the South. They consider the legal, social, economic, political, ideological and cultural context in which labour law develops and operates in different regions of the developing world, taking into account global, regional, national and local dimensions. The papers also critically review some of the responses developed to enhance the application of labour law and broaden the scope of protection.

The present paper is one of six Discussion Papers which treat different aspects of this question.

The paper by Rachid Filali Meknassi: *L’effectivité du droit du travail et l’aspiration au travail décent dans les pays en développement: une grille d’analyse*, proposes an analytical framework for understanding the persistent reasons for workers’ limited access to legal protection in the developing world and examines the impact that globalization is having.

Three papers examine old and new challenges facing labour law as a tool to promote social goals from specific regional perspectives. They also look at the approaches developed to address these challenges. Moreover, special attention is given to the effectiveness of labour law in promoting one specific social goal, namely gender equality. These papers were prepared by Graciela Bensusán: *La efectividad de la legislación laboral en América Latina*, Colin Fenwick, Evance Kalula and Ingrid Landau: *Labour law: A Southern African perspective*, and Kamala Sankaran: *Labour laws in South Asia: The need for an inclusive approach*.

The paper by Adelle Blackett: *Trade liberalization, labour law, and development: A contextualization*, deepens the analysis of the impact of globalization by focusing on the relationship between trade liberalization and labour law.

The present paper by Jan Theron, Shane Godfrey and Margareet Visser: *Globalization, the impact of trade liberalization, and labour law: The case of South Africa* presents South Africa as a case study and adopts a more sociological perspective. The object of this paper is, firstly, to assess the impact of trade liberalization on employment and wages in South Africa. Secondly, it is to analyse the implications of trade liberalization for labour law as a system of rules that seeks to regulate the employment relationship and the determination of wages. Attention is specifically focused on labour law’s quest to reduce inequalities in society.

South Africa represents an interesting case study, in that the transition to democracy coincided with the country’s integration into the global economy, and the advent of

liberalization. The authors discuss the form that trade liberalization has taken, and the debates there have been regarding its impact on the country. The authors then analyse the data on what they characterize as the ‘jobs crisis’ in South Africa, as it has evolved in the period of trade liberalization. They also discuss the evolution of labour law over the same period and the extent to which labour regulations, rather than trade liberalization, can be blamed for the jobs crisis. There is an aspect of the jobs crisis that the statistical data do not disclose, namely how the structure of employment has changed. They analyze the implications of these changes for labour law and the protection of worker rights. In the final sections, they explore these themes in more detail through two case studies of sectors that have been deeply affected by trade liberalization: agriculture and clothing.

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1. Introduction

The object of this paper is to explore a series of interrelated questions. First, it is to assess the impact of trade liberalization on employment and wages in South Africa. Second, to the extent that a positive or negative impact is discernable, to assess the implications for labour law, as a system of rules that seeks to regulate the employment relationship, and the way in which wages are determined. There is an associated question that arises in considering these matters: What are the implications of trade liberalization for any endeavour to reduce inequalities in society as a whole? Some would regard this as implicit in labour law's mission.

One has only to frame these questions to realize that one is venturing onto ideologically contested terrain. At a technical level trade liberalization refers to the lowering and eventual removal of tariffs and other impediments to global trade by nation states. At the same time it is part of a package of policy prescriptions, including the privatization of services and deregulation, which are promoted by those who emphasize the role of the private sector in stimulating economic growth.

In its 'Doing Business' report the World Bank states:

A vibrant private sector – with firms making investments, creating jobs and improving productivity – promotes growth and expands opportunities for poor people. To create one, governments around the world have implemented wide ranging reforms, including macro-stabilization programs, price liberalization, privatization and trade barrier reductions (World Bank, 2003).

This view of trade liberalization is consistent with an increasingly contested view of globalization, often depicted as an inevitable process, in terms of which 'a truly global economy is claimed to have emerged or to be in the process of emerging, in which distinct national economies and, therefore, domestic strategies of national economic management are increasingly irrelevant' (Hirst and Thompson, 1999). However this notion of the diminution of the nation-state is increasingly difficult to reconcile with a resurgent China, India, Brazil or Iran, let alone the states of Eastern Europe.

Moreover, as another sceptic puts it 'the one promise of Globalization, which caused many to forgive its weaknesses, was that it would produce widely shared prosperityA critical mass of people around the world now seem to believe that poverty is growing'(Saul, 2005). In debating the kind of trade agreements that would help alleviate poverty and bring about development, another commentator argues that history is the most reliable guide.

Contrary to what developed countries would have us believe, there is a respectable theoretical and empirical case for tariff protection for industries that are not yet profitable, especially in developing countries ... Virtually all of today's developed countries built up their economies using tariffs and subsidies (and many other measures of government intervention) throughout the 19th century and most of the 20th century (in particular, until the early 1970s). Therefore a big "double standard" is involved when these countries preach the virtues of free trade...(Chang, 2005, p. 101).¹

Undoubtedly the recent failure of the drawn-out Doha Round of negotiations to fulfil its so-called 'developmental' objectives will have reinforced a belief on the part of developing countries of the South in the existence of such a double standard.

¹ The argument for tariffs is advanced in the context of the Non Agricultural Market Access (NAMA) negotiations.

There are indications that the South African government has recently begun to assert the role of government spending, and the public sector, in promoting economic growth. It has also begun adopting a more independent position towards the package of policy prescriptions which the World Bank and others have been advocating. These policy shifts take place amidst an extraordinarily vituperative debate about who will succeed President Mbeki in 2009, in which there has been much anger directed at the economic policies with which he is associated: the policy known as GEAR (Growth, Employment and Redistribution), including policies to promote privatization of services (which the government is no longer actively pursuing) and trade liberalization. The perception that trade liberalization has fuelled job losses in manufacturing is widespread.

The basis for this perception is evident. The most tangible failure of the economy is a jobs crisis, both in that unemployment levels are dire and that the jobs which are on offer are increasingly insecure. At the same time there is a flood of cheap imports visible in flea markets, at taxi ranks and in 'China' shops located even in small rural towns. It is therefore not surprising that the public makes a causal connection between these phenomena. However, any objective determination of the impact of trade liberalization is beset with difficulties. On the one hand, it is difficult to disentangle the actual impact of trade liberalization from the other policy prescriptions with which it is associated. On the other hand, it is difficult to disentangle the technical core of trade liberalization from an ideologically determined belief in its benefits, which for some assumes the status of an article of faith.

This paper is organized as follows: in section 2 we discuss the form that trade liberalization has taken, in the context of the evolving economic policy environment. It follows from what we have said that trade liberalization cannot be considered apart from economic policy. In section 3 we consider the debates in the economic literature about the impact of trade liberalization and the economic restructuring that is posited as one of its effects. In section 4, we analyse the data regarding the jobs crisis, as it has evolved during the period of trade liberalization in South Africa, together with increasing inequality and poverty. In section 5 we consider the evolution of labour law over the same period, and the extent to which the jobs crisis is explained by labour regulations affecting employment and wages, rather than trade liberalization. We also analyse an aspect of the jobs crisis that the statistical data do not disclose, namely how the structure of employment has changed, and the implications of these changes for labour law and the protection of worker rights. In sections 6 and 7 we consider in more detail some of the themes raised in the previous sections, through case studies of two sectors affected by trade liberalization, namely agriculture and, in the manufacturing sector, clothing. The conclusions are in section 8.

2. Trade liberalization in the context of South Africa's evolving economic policies

South Africa was party to the Uruguay Round of multilateral trade negotiations that commenced in 1986 and was finalized in Marrakech in January 1994.² Accordingly, when the new government came to power in 1994, South Africa had already committed itself to extensive tariff reductions, agreed on the basis that South Africa was a 'developed' rather than a developing country.³ The transition to a democratic government thus roughly coincides with the period in which trade liberalization began to take effect.

² South Africa likewise committed itself to the Agreement on Trade Related Investment Measures (TRIMs) and the Agreement on Trade Related Intellectual Property Rights (TRIPS).

³ The number of tariff lines dropped from 12 500 to 8 250, the maximum tariff fell from 1 389 per cent to 61 per cent, and the number of tariff bands was reduced from 200 to 55 (McCord, 2003, pp. 44 and 61).

The new government's Reconstruction and Development Programme (RDP) emphasized worker rights and growth through redistribution. Yet in retrospect it seems obvious that these objectives would be difficult to reconcile with its commitment to trade liberalization, at least in the short term. Government was unwavering in this commitment, even though it had been made by the previous regime.⁴ This was not so much because it was regarded as legally binding, as out of a desire to break decisively with the protectionist policies of the past (Altman and Meyer, 2003) and, as government saw it, a desire to integrate South Africa into the global economy (Keet, 2002, p. 6).

GEAR (Growth, Employment and Redistribution) was the government's macroeconomic strategy, adopted in 1996. From the standpoint of its critics, GEAR supplanted the Reconstruction and Development Programme (RDP), although it must be conceded that certain GEAR prescriptions were also to be found in the RDP. From the standpoint of government, GEAR was necessary to fund the redistributive programmes of the RDP. In many respects it represented an orthodox structural adjustment programme (McCord, 2003, p. 34). Economic growth would be achieved, on the one hand, by conservative fiscal and monetary policies. On the other hand, trade and financial liberalization and privatization would create a more efficient economy. Its specific objectives included further reductions of tariffs and measures to promote flexibility in the labour market.

Although in certain respects GEAR achieved its objectives it did not produce the levels of investment, domestic savings and economic growth that policy makers anticipated. The employment crisis and poverty have worsened. In 2006 GEAR was supplanted by the Accelerated and Shared Growth Initiative of South Africa (Asgisa) which aims at boosting the country onto a higher growth path (6 per cent annual growth is the key target). While it is too early to gauge the effect of Asgisa, it is noteworthy that it targets specific sectors, and envisages a promotional role for the state in stimulating growth.

The process of trade liberalization was given further impetus by the various trade agreements South Africa entered during the interim. Each of these agreements has a differential impact, illustrating how difficult any overall assessment of the impact of trade liberalization in the case of South Africa must be. Perhaps the most important are the free trade agreements with the European Union and with the Southern African Development Community (SADC).⁵ Both agreements are asymmetrical, recognizing the greater economic power of respectively the European Union vis-à-vis South Africa and South Africa vis-à-vis the other member states of the SADC.⁶

This illustrates the particular difficulties a middle-income country like South Africa faces (Edwards, 2001, p. 40-41). Thus on the regional stage South Africa is the major industrial power, and dominates the Southern Africa Customs Union (SACU), also comprising Namibia, Botswana, Lesotho and Swaziland, through whose porous borders with South Africa an unknown quantity of illicit goods is routed. But on the global stage, it has to compete both with highly productive developed countries of the North and low-wage countries like India and China.

No doubt it is partly because of its middle-income status that South Africa has sought to assume the role of intermediary in trade negotiations between the major industrial powers of the North and the various groupings of least developed and developing countries, including the

⁴ In the RDP White Paper, for example, it is said: 'With regard to protection, this would mean continuing the firm commitment to gradual but steady liberalisation in all sectors of the economy, as espoused in the GATT agreement. The government will nevertheless make use of socially responsible supply side measures to assist sensitive industries in adapting, in order to overcome the stronger international competition...'. See paragraph 3.7.4, RDP White Paper.

⁵ United States' African Growth and Opportunities Act (AGOA) also gives South Africa (and other African countries) preferential access to the US market until September 2008. A further trade agreement is the Framework Free Trade Agreement between SADC and Mercosur (formed by Argentina, Brazil, Uruguay and Paraguay), which was signed by South Africa in 2000.

⁶ The EU free trade agreement was ratified in 1999 but has yet to be implemented.

African group of countries. In this regard it has been sharply criticized for its promotion of a liberalized global trade system as the basis for sustainable development, particularly in respect of the Doha Round (Keet, 2002). Given the current political climate, and with no end to the employment crisis in sight, it is likely that civil society and dissidents within the ruling party will become increasingly more vocal in raising such criticisms.

3. Debates about the impact of trade liberalization

The protectionist policies put in place in the apartheid era were underpinned by a complex array of tariffs, set at relatively high levels. Undoubtedly tariffs have been substantially reduced, and the tariff structure considerably simplified. There is nevertheless some debate amongst economists as to whether effective rates of protection have fallen sufficiently or are to be regarded as still high within certain sectors (Edwards, 2005, p. 4-6). There is also some debate among economists about the real impact of trade liberalization, as distinct from the impact of technological change.

There are a number of studies in the economic literature that compare changes in patterns of employment 'within sector(s)' and 'between sectors'. The underlying assumption is that such changes within sector(s) can most probably be attributed to technological changes, whereas changes in employment between sectors can most probably be attributed to trade liberalization. The weight of opinion appears to favour technological change as the most probable cause of changes in the structure of employment (Edwards, 2005; Jennings, 2005; Borhat, 2000).

What is not disputed is that the structure of employment both within sectors and between sectors has changed since the 1990s, in the period since trade liberalization took effect. The most significant change between sectors is a decline in employment in the primary sector, with most new jobs being created in the tertiary sector. In the secondary sector employment has at best grown moderately (Oosthuizen, 2006). However there was much variation within these sectors. In the secondary sector, construction accounts for a large part of the employment growth, while the contribution of manufacturing is relatively modest.⁷

The decline in employment in the primary sector can be traced back to the 1970s, long before trade liberalization became a factor: by 1985 employment in mining and agriculture as a percentage of total employment had been in steady decline since the 1960s. Over the same period significant numbers of jobs were also shed amongst unskilled workers in the manufacturing sector, even though its share as a percentage of total employment had increased (Hindson and Cranshaw, 1990, p. 28).

It is nevertheless clear that whatever the impact of trade liberalization may have been, it has not reversed, or contributed to reversing, this loss of unskilled jobs in the formal economy. Nor has it reversed a consequent trend whereby proportionally more formal employment (that is to say standard employment) is in skilled or semi-skilled jobs. Indeed there are a number of studies that suggest that the clearest trend to emerge is the continuing decline in the relative proportion of lesser skilled to more skilled workers (Edwards, 2005; Jennings, 2005; Borhat, 2000).

⁷ In the period 1995 to 2004 the agriculture, forestry and fishing sector lost 173 000 jobs over this period and the mining and quarrying sector lost 188 000. In the tertiary sector, employment growth in the internal trade, transport and communication, finance, community and personal services, and private household sectors together accounted for 1.8 million new jobs. Three sectors – internal trade, finance and private households – account for much of this growth. Employment in internal trade rose by 870 000 jobs and in finance by 570 000, with the growth in private households amounting to about 300 000 jobs. The latter sector comprises mainly domestic workers. On the other hand, the secondary sector grew by almost 32 per cent over the same period. The construction sector drove this growth, almost doubling employment from 446 000 to 824 000. Employment in manufacturing also expanded, gaining 277 000 jobs, with much of the growth seeming to happen after 2000. The rate of growth of manufacturing, however, is slightly lower than the overall employment growth rate across the period (Oosthuizen, 2006, p. 26).

However, recent research indicates that the bias in favour of skilled employment may not be as pronounced as these studies suggest, or that it moderated in the 1995 to 2004 period (Oosthuizen, 2006). Moreover there is a marked variation between sectors. For example in agriculture, in the primary sector, there have been big losses in unskilled jobs and gains in semi-skilled and skilled jobs. On the other hand in construction, in the secondary sector, and in transport and communication, internal trade, and finance there has been an increase in unskilled jobs, in some cases accompanied by a decline in skilled jobs.

This contrary trend can be explained at least in part by the role of informal employment growth. For example, employment has grown rapidly in the internal trade sector, with a rise in the number of unskilled employees and a decline in the number of skilled and semi-skilled workers. This is explained by the extent to which informal employment has grown in the sector, with most informal jobs being at the unskilled end of the spectrum. As a result, the skills profile of the sector is changing significantly (Oosthuizen, 2006, pp. 30-32).

As to whether, on balance, trade liberalization has had a beneficial impact, it is clear that there has been a steady increase in exports, which may be ascribed to trade liberalization. Equally it is clear that there has been a steady increase in imports.⁸ By the beginning of 2004 the rate of increase in imports had exceeded the rate of increase in exports, resulting in a growing current account deficit (www.dti.gov.za). In the first quarter of 2006 the deficit stood at 6.4 per cent of gross domestic product. This deficit was placing pressure on the South African currency and threatening to increase inflation.⁹

4. The jobs crisis and rising inequality

In the meantime, in the period between 1995 and 2004, the jobs crisis worsened. The number of unemployed individuals (using the expanded definition of unemployment)¹⁰ rose from 4.2 million to 8.1 million (90.7 per cent). Using the narrow or official definition of unemployment gives a rise from 2 million to 4.1 million over the same period. The respective unemployment rates in 2004 were 41 per cent and 26.2 per cent, up from 30.8 per cent and 17.6 per cent in 1995 (Oosthuizen, 2006, p. 2-4).

Women workers and Africans were the hardest hit. Using the broad definition of unemployment, the rate of female unemployment rose from 39.9 per cent in 1995 to 48.6 per cent in 2004. Over the same period, the rate of unemployment among Africans rose from 37.8 per cent to 47.8 per cent. Not surprisingly, given these figures, the unemployment rate for African women rose the highest, from 47.6 per cent in 1995 to a remarkable 55.9 per cent in 2004. By contrast, unemployment among Whites rose from 5.8 per cent to 8.3 per cent over this period (Oosthuizen, 2006, p. 38).¹¹

Consistent with the changes in employment structure discussed above, unemployment shows a strong skills bias. Using the level of education as a proxy for skills, one finds that higher than average levels of unemployment were experienced in all education categories below

⁸ According to Altman and Mayer, exports grew at an average of 5.5 per cent per year in the period 1991 to 2000; growth that was driven entirely by an increase in manufacturing and service sector exports (there was a decline in primary sector exports over the period). (Altman and Mayer, 2003, p. 71).

⁹ 'Warning for consumers on spending rates', Business Day, 08.09.2006.

¹⁰ The expanded definition of unemployment includes so-called discouraged jobseekers; the narrow or official definition excludes this category and hence gives a lower figure for the unemployed.

¹¹ Unemployment in rural areas is higher than in urban areas. In 2002 the unemployment rate in rural areas was almost 50 per cent as against an urban rate of 37 per cent. This gap had widened since 1995. The differing urban and rural rates of unemployment are reflected in differing rates across provinces, with a larger rural population impacting negatively on provincial unemployment levels. Another factor that contributes to higher provincial unemployment rates is whether provinces include areas that under apartheid were designated as 'homelands' or 'independent states'. Such areas continue to display very high rates of unemployment (Oosthuizen, 2006, pp. 38-39).

matriculation level in both 1995 and 2004. By 2004 just over 50 per cent of those people in the labour force with incomplete secondary education were unemployed (Oosthuizen, 2006, p. 40-41).

There is a general perception in South Africa that the country has experienced 'jobless growth'. Oosthuizen (2006), and McCord and Borhat (2003) contend that this is incorrect: employment has increased since 1995, growing from about 9.5 million to almost 11.6 million employees (22.4 per cent) in 2004 (Oosthuizen, 2006, p. 4). However, employment growth has not kept pace with the increase in the economically active population, so it has gone along with rising unemployment. Employment has, furthermore, grown at quite different rates if one disaggregates the data into formal and informal employment.

Although the measurement of informal employment is fraught with problems, the data on formal and informal employment growth probably give a reasonably accurate indication of the trends, if not of the actual numbers. From 1994 onwards, the data indicate that most new jobs created were in the informal economy (McCord and Borhat, 2003).¹² This growth in informal employment is thought to have slowed down from about 2000 onwards (McCord and Borhat, 2003, p. 117), or even to have declined (Oosthuizen, 2006).

However there are no indications that this results from a process of formalization, in which the formal economy draws in employment from the informal economy. The more likely explanation is that it is simply a case of the economy being unable to create more informal jobs. Estimates of the number of persons in informal employment range from approximately 1.9 million (McCord and Borhat, 2003, p. 34) to 2.4 million in 2004 (Oosthuizen, 2006). This represents about 20 per cent of total employment.

Given slow economic growth, the rise in unemployment, and the predominance of informal employment in the new jobs that have been created, it is not surprising that poverty has increased in the post-apartheid period. Using a \$2 a day poverty line one finds an increase in poverty from 32 per cent to 34 per cent in the period 1995 to 2000. Poverty in South Africa still has a racial dimension. Between 1995 and 2000 absolute and relative poverty levels amongst African-headed households increased, while for all other households the poverty level stayed the same or declined (Bhorat and Kanbur, 2005, p. 4).¹³ At the same time, measures of income inequality show that the deeply unequal society the new government inherited in 1994 has become even more unequal (Bhorat and Kanbur, p. 6).¹⁴

5. The changing structure of employment and its implications for labour law and the protection of worker rights

The growth of services relative to manufacturing is an example of 'between sector' shift, as opposed to changing patterns of employment 'within sector(s)', as referred to in the economic literature. This literature also acknowledges that any separation between trade and productivity, or technological change, is to some extent arbitrary, because it implies that there is no

¹² They estimate that informal employment grew by almost a million jobs between 1996 and 1999 (McCord and Borhat, 2003, p. 117).

¹³ It is however necessary to bear in mind the gains made by the poor as a consequence of fiscal redistribution and access to public services. As Borhat and Kanbur state, "the post-1994 era is notable for the rapid reallocation of resources through the fiscus, from rich, White households to poor, African households" (2005, p. 7).

¹⁴ Between 1995 and 2000 the Gini coefficient rose from 0.565 to 0.577 (or, comparing for the 1996 to 2001 period, the rise was from 0.68 to 0.73). Inequality has risen across all race groups, and urban and rural inequality has also increased. Importantly, between-race group inequality has declined and is being replaced by growing within-group inequality. Borhat and Kanbur note that "the overall driver of income inequality in post-apartheid South Africa continues to be the rising inequality amongst African households" (2005, p. 6).

relationship between trade and technological change, whereas technological change may be a response to import competition, or the need to access export markets (Jenkins, 2005, p. 12; Edwards, 2005; Borhat, 2000, p. 480).¹⁵ Yet this is surely a considerable understatement.

If technological change is understood to include management techniques, including the way the employment relationship is structured, and the kind of controls over workers that are instituted in the workplace, entailing a reconstitution of traditional notions of the workplace, then it would seem idle to attempt such a separation. In this regard it is noteworthy that what one of the studies characterizes as 'outsourcing' is described as 'another form of within-sector shifts that may result in changing labour preferences'. On the contrary, one of the significant outcomes of outsourcing, which in our analysis is a variant of externalization, is the transfer of workers employed in productive sectors of the economy to services.¹⁶

Thus the employment of workers in industrial cleaning, transport and other ancillary positions that were regarded as an essential component of the sector concerned, have been externalized since the late 1980s, as firms increasingly focus on what is conceived as their core business. In this regard the increase in unskilled employment in the tertiary sector (see section 3 above) assumes additional significance. If, as seems probable, a sizeable proportion of this increase comprised workers in ancillary, non-core functions which were previously 'counted' in the primary or secondary sector, it would not represent an increase in employment at all.

The corollary of the trend whereby proportionally more formal employment is in skilled or semi-skilled jobs, we would argue, is that proportionally more unskilled jobs are taken by workers in informal employment. There are of course workers in the informal economy who are not in an employment relationship at all (the self-employed, for example), or whose employer operates entirely in the informal economy. At the same time there are also workers employed by intermediaries such as temporary employment agencies, working under conditions of informality in the formal economy, in a triangular employment relationship. While there are no authoritative data regarding the extent of such employment, there is abundant evidence of a proliferation of such intermediaries (Theron et al., 2005).

This development must be related to the suite of labour laws adopted by the new government, as it happens in the period when trade liberalization started taking effect. In 1996 the Labour Relations Act, which regulated collective bargaining and the establishment of bargaining councils, came into effect.¹⁷ The following year legislation regulating basic conditions of work was adopted.¹⁸ Thereafter there was legislation to give effect to a new skills development strategy, and employment equity in the workplace.¹⁹ The latter law was aimed to achieve a more equitable representation of the different racial groups in the workplace, as well as of gender and the disabled, and to promote a form of self-imposed affirmative action.

Of course this legislation contained a number of innovations. Notable amongst them was the establishment of a new dispute resolution body, the Commission for Conciliation, Mediation and Arbitration (CCMA), tasked with the determination of cases of unfair dismissal. However, it cannot be said to have radically affected either wage levels or worker rights, or even to have significantly changed the industrial relations landscape. The system of collective bargaining

¹⁵ The limits of a 'decomposition analysis' methodology utilized in all the studies referred to is also acknowledged by the authors concerned.

¹⁶ Externalization refers to a process whereby the employment relationship is being restructured, so that it is in effect or actually regulated by a commercial contract, rather than a contract of employment. This occurs when someone is engaged as a contractor rather than an employee, and labour legislation is by definition excluded, or where workers are employed by an intermediary to work for someone else, usually regarded as the client, and labour legislation is in effect excluded, because the terms of employment of those workers are in effect determined by the commercial contract between the client and the nominal employer.

¹⁷ Act 66 of 1995.

¹⁸ Basic Conditions of Employment Act, 75 of 1997.

¹⁹ Skill Development Act, 97 of 1998, the Skills Development Levies Act, 9 of 1999, and the Employment Equity Act, 55 of 1998.

adopted was in essence a continuation of the pre-1994 system, except that a right to bargain had been recognized under the previous dispensation.²⁰ Currently collective bargaining is entirely voluntary.²¹ Moreover trade unions have had little success in centralizing collective bargaining.

As regards basic conditions of employment, the legislation introduced some significant improvements. It also provided for a process of determining minimum wages by means of sectoral determinations. However the principle of determining minimum wages in unorganized sectors was not new. The difference between the old and new systems primarily concerns the sectors on which they focused their attention, and the procedures by which they are arrived at. In this regard the previous system was arguably more transparent.²²

The skills development legislation imposes a cost on both employers and employees, in the form of a skills development levy. But since the amount of the levy is relatively modest, and it entitles employers to a rebate for participating in training calculated to benefit the enterprise, it is generally not perceived as imposing a financial burden on employers. So far as compliance with employment equity legislation is concerned, the only 'costs' entailed are of an indirect kind, with regard to management time and the costs of compliance with its reporting requirements and other prescriptions. Government would argue that these prescriptions represent the kind of best practice employers in any event should aspire to. It is an argument many employers accept.

Essentially the same argument can be made for the entire suite of post-1994 labour legislation. While, in theory, a claim can be made that aspects of the legislation have increased labour costs, there is no compelling empirical evidence that the labour cost increases are significant or that they have hampered job creation. It does not even appear that employers consider the costs of compliance with labour legislation significant. The most significant increased cost, it has been suggested, is entirely of a contingent kind. This is the cost entailed by proceedings in the CCMA, when a dismissal is disputed on grounds of fairness: in other words, the perceived cost of terminating employment.

Therefore, the contingent costs of terminating employment, or (to formulate it differently) the risk associated with termination of employment, is an aspect of post-1994 labour legislation which is likely to have stimulated a trend to externalise employment. However there is no reason to suppose there would be a single cause, given the sea-change that externalization has effected on contemporary labour relations.

Contemporary labour law has tended to regard employment as a status rather than a contract, precisely to counter the imbalance of power inherent in the employment relationship. The effect of externalization is to restore the primacy of contract, with a twist. The twist is that the contract which in effect determines the conditions of employment of the workers is an ordinary commercial contract.

A similar situation arises in the case of a triangular employment relationship. The Labour Relations Act and Basic Conditions of Employment Act regulate what are termed 'temporary employment services'.²³ Both provide that the temporary employment service (TES) is the

²⁰ The Industrial Court recognized a right to bargain in terms of a jurisprudence developed on the basis of the concept of an 'unfair labour practice.'

²¹ The Labour Relations Act provides for two other forums in which employers could be obliged to consult with workers on certain matters, namely statutory councils and workplace forums (a concept inspired by the European system of works councils). However, negligible use has been made of these forums.

²² In terms of the Wage Act, a wage board was constituted to investigate wages and conditions of work in industries. The board would conduct public hearings in various centres, which were used by emergent trade unions in the 1960s to highlight the low wages of predominantly African, unskilled workers. The board also produced reports of its findings. The procedure followed by the Employment Conditions Commission under the current system is illustrated by the determination for farm workers, discussed below. As regards the focus of determinations, the wage board investigated wages in a number of sectors in which there were no industrial councils, excluding the agricultural and domestic sectors. On the other hand, minimum wages of agricultural and domestic workers, as well as other vulnerable categories, are now determined for the first time under the new system.

²³ Respectively sections 198 and 82.

employer of the worker placed at the client firm. This means that it is the contract between the TES (or intermediary) and the client that in reality determines the conditions of employment of the worker rather than the contract of employment between the worker and the TES.

The tendency of firms to focus on their core business, underpinned by a management doctrine premised on the notion of the 'flexible firm', has in the South African case served as a useful rationale for externalizing unskilled labour. Undoubtedly trade liberalization has stimulated this trend. It has done so by stimulating a drive to lower wages in sectors where there is increased competition. This in turn has stimulated a drive to lower wages in sectors where increased competition is not a factor, such as the public sector, or construction, as part of that package of policy prescriptions that sees the unregulated market as the ultimate arbiter of standards. Strategies to avoid risk and lower costs, along with trade liberalization, are thus not mutually exclusive explanations. Moreover, there is evidence that employers are able to achieve all this and more through externalization (Theron et al., 2005).

Apart from industries in which some form of collective bargaining takes place, such as transport, little is known about wages in the tertiary sector, and even less about the wages of workers whose employment has been externalized, and who are in a triangular employment relationship.²⁴ However, in the case of unskilled workers provided by temporary employment agencies, the indications are that wages are about fifty per cent or less than those earned by workers in standard employment doing equivalent work (Theron et al., 2005).

The existence of differentials of this magnitude in the formal workplace exposes the fallacy of supposing that because labour legislation acknowledges no distinction between workers in standard and non-standard employment, workers in non-standard employment enjoy the same rights. In truth, both the growth of non-standard work, and the particular form it has taken in South Africa, are exacerbating inequality. The term 'passive deregulation' appropriately describes the failure of labour law to address this problem.²⁵

This failure has not been mitigated by the adoption of a new 'presumption as to who is an employee', by way of a 2002 amendment to both the LRA and Basic Conditions of Employment Act (BCEA), 75 of 1997. This presumption provides a means to differentiate between an employee and 'independent contractor'. A person is deemed to be an employee "regardless of the form of the contract" where any one of seven factors or criteria are present.²⁶ However, the need to differentiate between an employee or independent contractor arises in the situation of the so-called dependent contractor, or of what the ILO now characterizes as 'disguised employment.'²⁷ These situations do exist. However they are not so prevalent, nor do they have such a far-reaching impact on labour regulation, as the triangular employment relationship.²⁸ Moreover to the extent that this relationship is not appropriately regulated, there is correspondingly less reason for employers to resort to such an intrinsically dubious expedient as disguising an employment relationship.

²⁴ The exception is again those industries, notably contract cleaning and security, in which there is collective bargaining, or rather a form of collective bargaining: for in both cases there is no union that has anything approaching a majority, and collective bargaining has been at the instance of employers, who are concerned to prevent undercutting in what would otherwise be a cut-throat industry. The agreement arrived at feeds into the process to make a sectoral determination. In the course of 1996 there were high-profile and protracted strikes in both industries, called by the SA Transport and Allied Workers Union, the COSATU affiliate organizing these industries. Although it is too soon to say what the longer-term effects of these strikes will be, it seems unlikely that they will result in significantly higher levels of organization.

²⁵ Kerry Rittich, 2004: Vulnerability at work: Legal and policy issues in the new economy, pp. 24-30, cited in Eric Tucker, 2005.

²⁶ See section 200A of the LRA, 1995. One of the factors is extremely wide-ranging, namely whether a person is economically dependent on the person for whom s/he works.

²⁷ For a discussion of these categories see in general ILO, 2006. Report V(1), 'The employment relationship.'

²⁸ For a critique of the provisions of the presumption see Theron, 2002. 'The erosion of workers' rights and the presumption as to who is an employee,' in Law, Democracy and Development, Vol. 6.

6. The case of agriculture

Agriculture is the sector, perhaps more than any other, most dramatically affected by the post-1994 government break with the protectionist past, and by trade liberalization. Also, because of a constellation of circumstances explained below, it offers a unique opportunity to compare the relative impact of trade liberalization and labour legislation.

Although the contribution of the agricultural sector to South Africa's GDP (about 4.5 per cent) is relatively small, it is estimated that approximately 40 per cent of the country's total population are primarily dependent on agriculture and related industries (Mather and Greenberg, 2003; CRLS, 2003; The Strategic Plan for Agriculture, 2001). The agricultural sector also has significant forward and backward linkages with the broader economy (Mather and Greenberg, 2003). It is also a sector that provides unskilled work. For this reason agriculture and agro-processing have been identified as priority sectors by Asgisa.

During the heyday of apartheid, state support for the sector included research, interest rate subsidies and price supports through an increasingly regulated agricultural marketing system (Vink, 1993, cited in Bayley, 2000). The latter culminated in the promulgation of the Marketing Act, 1937, which provided for the appointment of producer dominated marketing boards and for various controls with regard to the movement, price setting, quality standards, sale and supply of agricultural products (NAMC, 2001). However from about 1976 onwards support for agriculture was progressively reduced. At the same time marketing boards started coming under fire.

In the early 1990s a growing gap between the producer and consumer prices of agricultural products prompted official inquiries into the domestic marketing of agricultural products (NAMC, 2001). There were also calls for agriculture to be deregulated, and the statutory powers of control boards to be terminated. At about the same time the state was constrained to start reducing tariffs, as a party to the Uruguay Round of trade negotiations, and upon becoming a member of the WTO. In 1997 the government also scrapped the General Export Incentive Scheme (GEIS), an export subsidy that had benefited a number of exported agricultural products.²⁹ In the same year it repealed the Marketing Act, which led to the closure of the various marketing boards between 1997 and 2001.³⁰

Such measures to liberalize agriculture went far beyond what was required in terms of the Uruguay Round Agreement on Agriculture (URAA) (Griffiths, 2003). As a result the sector is today one of the 'least state-protected agricultural sectors in the world' (Tilley, 2002, p. 4). It is a notorious fact that developed countries, in contrast, have maintained high levels of support to their farmers.³¹ For instance, government support to farmers across the 30 countries of the OECD accounted for 32 per cent of farm income.³² In comparison, only 5 per cent of farm income in South Africa comes from government support (Promar International, 2005). Consequently producers in South Africa, as in other developing countries, are often unable to compete, even domestically, with highly subsidized imported commodities (Meyer, 2005).

There is of course a danger in generalizing about the impact of trade liberalization, as the case of agriculture illustrates. The sector is diverse, and the impact on different sub-sectors or

²⁹ Products eligible for subsidies under GEIS included cut flowers, deciduous fruits, citrus products, wheat and wheat products and sugar. Source: The US Department of Agriculture Foreign Agricultural Service <http://www.fas.usda.gov/cmp/com-study/1997/comp97-sa.html>

³⁰ It was replaced with the Marketing of Agricultural Products Act of 1997.

³¹ This is partly due to the fact that although GATT provided for reduction of subsidies in respect of agricultural products, it did not require the elimination of subsidies (Meyer, 2005).

³² The OECD uses its Producer Support Estimate indicator as a measure of farm support. This indicator takes into account two types of policy measures. First, the annual monetary transfers to farmers from policy measures that maintain domestic prices for farm goods at levels higher than those at the country border. Second, it tracks policy measures that provide payments to farmers based on criteria such as the quantity of a commodity produced, the amount of inputs used and the income received by farmers.

commodity value chains is not likely to be the same. Deciduous fruit and citrus, for example, are both labour intensive and export oriented. One would not expect, other things being equal, that trade liberalization and the dismantling of control boards would have the same effect as in wheat and dairy, which are less labour intensive, and produce primarily for domestic consumption. Yet, in fact, the impact of trade liberalization in each case has been similar, and largely negative.

In the case of deciduous fruit and citrus, for example, as well as certain agro-processing products such as wine, the dismantling of control boards resulted in increased supply (since the quantities exported were no longer regulated), and a proliferation of export agents, or intermediaries. This happened at a time of increased global supply, no doubt as a result of similar pressures in other producer countries. Hence prices were also falling. At the same time overseas retailers – the main buyers of South African fruit and wine – started to consolidate their power, and became increasingly prescriptive as to quality and other standards producers were expected to meet (Du Toit, 2004; Kritzinger, Barrientos and Rossouw, 2004).³³ As a result producers are caught ‘in a pincer movement between rising quality standards and falling prices’ (Barrientos and Kritzinger, 2004, p. 86).

In the case of wheat, one consequence of dismantling the marketing boards was that the price farmers would be paid was no longer guaranteed.³⁴ At the same time, quantitative import controls were replaced with an ad valorem tariff of only 2 per cent, facilitating cheap imports of a commodity whose price is notoriously distorted by subsidies.³⁵ The upshot is that the area planted under wheat has decreased significantly.³⁶ If there has been any benefit to the consumers in all this it has not been in the form of cheaper bread, a staple food, especially of the poor. This is because another consequence of dismantling the marketing boards is that the price of bread is no longer controlled.

In dairy, as in the case of wheat, quantitative import controls were phased out and replaced by tariffs which saw a drastic increase in legal and illegal dairy imports, from countries where dairy production is heavily subsidized (NAMC, 2001).³⁷ The milk-powder market was halved as a result, and the local butter and cheese markets were also heavily affected. The number of dairy producers has nearly halved in the period when trade liberalization has taken effect.³⁸ It is estimated that about 17 000 jobs and about 30 000 up- and downstream jobs were lost in the industry between 1996 and 2001 (NAMC, 2001).

The impact of trade liberalization on employment

In considering the impact of trade liberalization, it must be said at the outset that employment data on agriculture in South Africa are regarded as notoriously unreliable. Also, as already noted, employment had been declining since the 1960s. It is nevertheless highly

³³ These standards also include employment standards and compliance with labour legislation (Du Toit, 2004).

³⁴ This was irrespective of the transaction costs incurred due to varying distances to final destinations for the delivery of products (Meyer, 2005).

³⁵ Using criteria developed by the OECD, wheat is ranked sixth in the top ten most distorted agricultural markets. It is estimated that the world wheat imported price will increase by 9.8 per cent if global export subsidies, domestic support and import tariffs are removed (Elbehri and Leetmaa, 2002, cited in Meyer, 2005). As a result of these market distortions, the average profitability of South African wheat farmers is negative and at current prices and average yields, wheat producers will suffer losses in all the major dry land production regions (Jooste et al., 2006).

³⁶ The total area planted under wheat in South Africa in the 1997/98 production year – the year of deregulation – was 1 382 300 ha. In the 2005/6 production year the total area has decreased to 800 500 ha (Jooste et al., 2006).

³⁷ It is estimated that milk is the third most distorted agricultural market in the world (Promar International, 2005). The EU is the largest international trader in dairy products; their dairy support policies, which include large subsidies on primary and secondary level, have a large disruptive effect on the international market. The International Dairy Federation (2000, p. 10) reports on the EU and the US that “...neither is competitive without refunds....” (NAMC, 2001). In 2005 imports into South Africa increased sharply, in spite of perceived surpluses in the local market, to the highest level in seven years.

³⁸ In 1997 there were 7 077 registered producers, but by June 2002, there were 5 179 and by August 2006 there were only 4 039 producers. This means that there has been a decline of 43 per cent in the total number of milk producers countrywide from 1997 to 2006 (MPO, 2006).

suggestive that from 1993 to 2001, the period in which trade liberalization took effect, employment in agriculture fell by a dramatic 32 per cent (DFID Southern Africa, 2003).

Of course it is not possible to disentangle trade liberalization entirely from other factors affecting employment. These include exchange rate movements and adverse weather conditions. Other factors whose impact on employment is difficult to determine – in addition to labour legislation (see below) – are changes in the structure of the industry, as a result, for example, of take-overs by large multinational companies, and the introduction of the Extension of Security and Tenure Act (ESTA), aimed to protect the housing rights of farm workers.³⁹

Even so, it is difficult to avoid the conclusion that government's uncritical embrace of trade liberalization, indeed its over-zealousness in the case of agriculture, cannot fail to have contributed to the jobs crisis and rising inequality. The political roots of this over-zealous attitude in the case of agriculture are apparent. Commercial agriculture was made up of white farmers who overwhelmingly supported the old regime, and were thus politically expendable. The potential effect of these policies on emergent small farmers appears to have been disregarded.

Yet one of the most pressing legacies of the old regime that the government is called upon to address is land reform, and linked to it, policies that support the development of historically disadvantaged small farmers. How are small farmers expected to compete in a global market, when an established commercial farming sector is increasingly unable to do so? It does not seem that government has begun to consider this policy conundrum.

Perhaps more than any other component of agriculture, dairy is where one would expect government to begin to look for answers. This is both because of its association with the traditional farming of cattle, and because it is an industry in which small farmers, even very small farmers, have been able to compete in a global market through associating in cooperatives. Ironically the cooperative model was used successfully by white dairy farmers in the era prior to trade liberalization, but abandoned, for reasons that appear to have been political as much as commercial in nature.⁴⁰

All indications are that there has also been an absolute loss of jobs in the case of citrus and deciduous fruit, where the period of trade liberalization ought in theory to have opened new markets. A 2003 survey of 77 wine and fruit farms in six Western Cape districts, found that 58.7 per cent of farms (and 70 per cent of deciduous fruit farms) had reduced their permanent labour force in the previous three years, while almost half of the respondents (47 per cent) planned to decrease labour in the future (Du Toit and Ally, 2003). Another study of 18 apple producers in Grabouw and Ceres found that most producers were downsizing their permanent workforce, either by retrenching workers or through a process of attrition (Barrientos and Kritzinger, 2004).

At the same time externalization is rampant, doubtless because citrus and deciduous fruit farming is labour intensive, and labour is the one significant cost over which producers have control. In the survey of 77 farms referred to above, 53 per cent of producers indicated that they were making use of intermediaries, who styled themselves as labour brokers or contractors (Du Toit and Ally, 2003). In the other study referred to, about half of the producers used intermediaries to complement their workforce. In all cases these workforces include a seasonal component (Kritzinger et al., 2004).⁴¹ Seasonal workers have historically always been

³⁹ Act 62 of 1997. Conradie (2006) suggests that ESTA might have increased the perceived costs of standard labour relative to non-standard labour.

⁴⁰ Further research is needed to establish why cooperatives such as Cape Dairy Co-operative, National Dairy Co-operative and others, converted to companies (wholly or in part) in the 1990s. However, as a general phenomenon it appears that fear of state control by the new democratic government was a major factor influencing cooperatives, that had in the past received major state support, to convert in this manner.

⁴¹ Barrientos and Kritzinger (2004) argue that contract labour enables producers to meet tight production schedules and yet cut costs and contractual employment commitments.

predominantly female. Not unexpectedly, other workers in non-standard forms of employment are also predominantly women or, increasingly, African (Ewert and Du Toit, 2005).⁴²

Externalization is also taking place in labour-intensive nodes of the milk value chain. Many processors have restructured the workplace and have outsourced or contracted out functions to labour brokers that supply casual workers to the processor (Newman, 2004). Apart from having more insecure employment arrangements than their permanent counterparts, seasonal workers and workers provided through intermediaries, are generally paid lower wages.⁴³

The impact of labour regulation on employment

What then of the impact of labour regulation? Unlike other major sectors of the economy, the agricultural sector was largely unregulated until the early 1990s. Legislation regulating basic conditions of employment was only extended to cover agriculture in 1993. But agriculture was still treated as a special case, with separate provisions regulating basic conditions of employment, collective bargaining, dispute resolution and the like.⁴⁴ This policy can only be said to have changed with the adoption of the 1995 Labour Relations Act (LRA).

Even then, the impact of the 1995 LRA was limited, since the sector was (and remains) largely unorganized. It is estimated that fewer than 6 per cent of farm workers belong to trade unions, and of the trade unions that have organized farm workers, few belong to the principal trade union federations, Cosatu or Nactu (DFID-SA, 2003). As a consequence centralized bargaining, the bugbear of employers, is unknown. To the extent that collective bargaining takes place at all, it is at a local level, and of very limited scope. In addition, both because of a weak union presence and the physical isolation of farm workers, agriculture has probably been affected less than other sectors by the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA).

The provision of labour legislation calculated to have the greatest effect on agriculture is that which empowers the Minister of Labour to determine wages and conditions of work by way of a sectoral determination.⁴⁵ In 2001, the Employment Conditions Commission published a report on conditions of employment in agriculture, pursuant to arriving at a sectoral determination. This found that the average cash wage in agriculture in 1996 was R419 per month. Thereafter, in 2002, minimum wages for the sector were promulgated. However it was only in March 2003 that the new minimum wages eventually came into effect.⁴⁶

⁴² Greenberg argues that in the seasonal employment sector men are increasingly in direct competition with women. Several farmers reported a decline in the number of women in temporary positions. This might be the result of labour legislation that requires that men and women in the same position be paid the same wage. Farmers argue that given the same wage rate for men and women, they prefer men to work in the fields (Greenberg, 2003).

⁴³ In their study of the 18 apple producers in Ceres and Grabouw, Barrientos and Kritzinger (2004) found that male permanent workers on average received the highest wages, followed by male contract workers, followed by permanent female workers. However, male contract workers did not have access to any of the benefits permanent workers enjoyed. These included protection during period of unemployment from the Unemployment Insurance Fund (UIF), paid leave, farmer contributions to medical expenses, free housing, free electricity and water and child care. On-farm housing and childcare are estimated to be equivalent to an additional 30 per cent of on-farm workers' monetary income (Kritzinger et al., 2004). It should be noted that categories such as 'permanent' and contract workers' have a racial connotation. Historically, permanent workers in these parts have been predominantly coloured whilst contract workers have been African men. The only women employed on contract are usually categorized as 'seasonal workers', since their security of employment is even more tenuous than the men.

⁴⁴ The Basic Conditions of Employment Act of 1983 was extended to agricultural workers in 1993. In the same year, the Agricultural Labour Act of 1993 was adopted. The Unemployment Insurance Act was also extended to farm workers in 1993.

⁴⁵ According to Le Roux (2005), sectoral determinations can be introduced by the state as an interventionist tool to protect vulnerable workers in sectors where labour is either not well organized or where the nature of industry negates collective power. Sectoral determinations may deal with a range of employment conditions, such as the setting of a minimum wage, prohibit task-based work, piecework, home work and contract work, set minimum standards for housing and sanitation for employees and regulate education and training schemes.

⁴⁶ Sectoral Determination 8: Farm worker sector, published under Government Notice No. 24114 of 2 December

When the minimum wages in the sector were first promulgated in 2002 the farming union AgriSA estimated that it would lead to 150 000 permanent and 13 000 seasonal jobs losses (Business Day, 27 February 2002; Kritzinger, Barrientos and Rossouw, 2004). However, the minimum wages prescribed were decidedly conservative, relative to the findings of its own report, and in many areas would not have represented an increase at all. Thus, in area A, comprising the areas of prime agricultural importance, the minimum wage prescribed was R800 per month, while in area B it was R650 per month. The latter certainly represent less in real terms than the Commission's report found workers were on average earning in 1996.

This is not to say that the minimum wages prescribed are of no benefit to farm workers. However the most significant benefit has probably been in eliminating unfair competition by unscrupulous farmers, particularly in low-wage areas located near the borders of Zimbabwe and Mozambique, where there is a ready supply of illegal immigrant labour. The progressive elimination of the differential between areas A and B must be understood in this context. This differential is due to disappear in 2008, after which all farm workers must be paid a minimum wage of R1091 per month.⁴⁷

The sectoral determination has probably also enhanced the status of women workers on farm. It precluded paying women workers lower wages, and the study of conditions amongst apple producers suggests that from the mid-1990s farmers, keen to maximize the full productivity of on-farm labour, extended 'permanent' status to women who were previously employed on a seasonal basis. According to another study, by the late 1990s women's conditions of employment had improved significantly (Kritzinger, Barrientos and Rossouw, 2004).

On the other hand what gains there have been really only apply to workers in standard employment. There are still significant numbers employed on a seasonal basis and, as we have seen, through intermediaries. The employment of these workers is highly insecure and in the case of those employed through intermediaries, the sectoral determination is probably entirely disregarded. It is also the diminishing core of workers in standard employment who stand to benefit from land reform initiatives, such as share equity schemes, which producers implement not only in response to pressure from government, but also from international supermarket chains.⁴⁸ To this extent, it may be argued that labour legislation is failing to stem a growing inequality between workers in standard and non-standard employment on farms. However, as already indicated, the job losses that precipitated this trend had happened, or were already happening, by the time labour legislation came into effect. Despite gloomy prognostications by agricultural lobby groups, there is nothing to suggest that job losses in agriculture can be attributed to labour legislation.⁴⁹

7. A case study in the manufacturing sector

Clothing is the middle link of a commodity chain made up of textiles, supplying the fabric that clothing manufacturers use to make garments, and the retail sector, which sells the finished product. There is almost no horizontal integration between these three sectors, i.e. hardly any firms operate in more than one of them, and clothing is traditionally perceived as being squeezed between the other two.

2002.

⁴⁷ Sectoral Determination 13: Farm worker sector, published under Government Notice 8401 of 17 February 2006. This determination came into effect on 1 March 2006, and supersedes Sectoral Determination 8.

⁴⁸ A wide variety of 'share equity' schemes have been introduced, in terms of which farm workers become owners of a portion of the 'equity' of the farms on which they are employed. The critical issue about such schemes is of course whether their equity share holding is meaningful, and entitles them to a real say in the running of such farms.

⁴⁹ Again, when further increases in the minimum wages were announced in April 2006 both Free State Agriculture and the Transvaal Agricultural Union (TAU) warned that it might lead to "thousands" of job losses within the sector.

Thus the textile industry in South Africa has been dominated by large firms that were historically protected by tariffs. Its alleged inefficiency is also seen as affecting the competitiveness of the clothing sector, which has wanted protection on textiles lifted so that it can source cheaper fabric from elsewhere. At the same time, the retail sector is highly concentrated, so that a few big retail chains wield enormous power vis-à-vis clothing firms, which operate with very low profit margins. Recently pressure on the clothing sector has been increased by the retail chains importing rising quantities of clothing from abroad, particularly from China. This led government to impose quotas on imports from China with effect from 2007.

This decision of government created a highly public spat, exposing not only the tensions between organized labour and business, but also between retailers and the different manufacturers. Yet all of these are dependent on one another. If the clothing sector disappears it will reduce the demand for textiles by almost half. Similarly, despite the retail sector's increased sourcing from overseas, it remains heavily dependent on the domestic clothing sector.⁵⁰ If the clothing sector disappeared, it would rely entirely on imports. So, while cheap imports might have benefits for the retail sector in the short term (and these benefits have been considerable) there are dangers in the long term if the local clothing industry does not survive.

In the apartheid era clothing was protected by a complex mix of formula and specific tariffs.⁵¹ As a result of the system of protection "aggregate levels of specialisation within the sector was extremely low", "(c)ompetition was restricted and levels of efficiency were almost certainly low by international standards (Gibbon, 2002, p. 15).⁵² Furthermore, because the development of the industry was centred on the domestic market it was not able to achieve economies of scale (Barnes, 2005, p. 7).

In the late 1980s there were attempts to protect clothing from the adverse effects of trade liberalization, in large part spurred by the main union in the sector, SACTWU, which proposed a development plan for the industry, in terms of a coherent industrial policy that recognized the interrelationship between trade, investment, employment and labour relations. Employers and government, however, were narrowly focused on tariffs and import quotas (Hirschsohn et al., 2000, pp. 117-118).

In 1992 government established a commission which considered the phase-down of tariffs, in the light of South Africa's commitments under GATT, as well as supply-side measures to counter the impact of tariff reductions on the clothing and textile sectors, until they became internationally competitive.⁵³ However the Minister of Trade and Industry under the old regime rejected supply-side measures as unaffordable, a stance the incoming minister confirmed. Instead of a phase-down of tariffs over ten years, as the commission proposed, it would take place over seven years. Specific tariffs were eliminated completely and ad valorem rates were to fall to 40 per cent by 2002.⁵⁴ The only major concession to the clothing sector was to extend the Duty

⁵⁰ This would "lead to less flexibility, increased costs and greater price volatility due to exchange rate fluctuation, all of which would negatively impact on consumers" (Barnes, 2005, p. 8).

⁵¹ By the 1980s there were approximately 2000 separate clothing and textile tariff rates, many apparently targeting specific firms for protection, and by the beginning of the 1990s the average trade-weighted tariff level was well over 100 per cent (Gibbon, 2002, p. 15).

⁵² Barnes has described the effect of protection on the industry in the following terms: "it is comparatively inefficient, lacks capital, technology and innovation, and has high labour and management costs in relation to output" (2005, p. 7).

⁵³ The so-called 'Swart Commission' for the Textile and Clothing Industries. All stakeholders, including SACTWU, were represented on the Commission. South Africa had committed itself to a 12-year phase-down period, but SACTWU and the textile and clothing sectors proposed an accelerated phase-down over 10 years to a level equal to or below the GATT tariffs. The retail sector and small clothing manufacturers went even further: they proposed a five-year phase-down for fabric and seven years for clothing, with end rates well below the GATT offer (Hirschsohn et al., 2000, pp. 118-119).

⁵⁴ It is a common view in the clothing sector that real levels of protection in the sector are about half of their scheduled levels because of the inability of the customs service to effectively police clothing imports (Gibbon, 2002, p. 16).

Credit Certificate (DCC) scheme, an export incentive scheme that allowed a manufacturer to offset exports against import duties.⁵⁵

The impact of trade liberalization on the sector has been complex, because of both increased imports and new export opportunities.⁵⁶ Comparing the balance of trade in clothing in recent years one sees a marked difference between knitted products, for example, and woven products. Thus knitted clothing moved from a situation of net imports in the period 1995-1998 to sharply rising net exports in 1999-2000, while woven clothing shows the opposite trend. Increased penetration of the domestic market by foreign producers saw a positive balance of trade in woven clothing decline from 1995 to 1997 and then go into the negative in the period 1998-2000. Putting both sets of data together one finds a sharp downward trend from 1995 to 1998, which was reversed in 1999 to 2000 to end with a positive net trade balance (Naumann, 2002, pp. 15-16).

On the whole the clothing sector has not fared well since the advent of liberalization (Barnes, 2005, p. 3). This has led to a number of initiatives to 'save' the industry and stem the tide of job losses. The most recent of these is a Customised Sector Programme (CSP), which the clothing and textile sectors are currently finalizing under the auspices of the Department of Trade and Industry (DTI). This is effectively a crisis management plan, rather than an industrial strategy. It identifies 26 'key action programmes' (KAPs) that need to be implemented to stabilize the sector in the short-term. The KAPs are divided into seven strategic themes. The fact that the two themes categorized as 'critical' are 'recapturing domestic market share' and 'maintenance/growth of exports' is an indication of the impact of trade liberalization.⁵⁷

The evolution of labour relations and employment in the period of trade liberalization

When SACTWU was formed in 1989 it had 185 000 members and no rivals in the sector (Maree and Godfrey, 1995, pp. 131-132). It immediately set about addressing the historically low wages in the clothing industry, and also demanded the formation of a national industrial council for the sector. This was in line with a key demand of COSATU, for the establishment of centralized bargaining structures in every industry.

The establishment of a national council would mean the amalgamation of the existing five regional clothing industrial councils,⁵⁸ plus a knitting council in Gauteng and two small millinery councils. The amalgamation of these councils, however, would not cover the entire sector;

⁵⁵ In March 2005 the DCC scheme came to an end and was replaced by the Interim Development Programme (IDP), effective until 31 March 2007. The IDP is identical to the DCC scheme except that in the second year of its operation rebates earned can be sold only to other manufacturers. This measure was introduced to address a perceived abuse of the DCC scheme.

⁵⁶ The South Africa / European Union Free Trade Agreement should benefit the local clothing industry because Europe has traditionally been the main export market for the industry, but it will also expose it to increased competition (Naumann, 2002, p. 27). Another significant agreement is the African Growth and Opportunities Act (AGOA), introduced in 2000 as part of the US Trade and Development Act. In terms of AGOA the United States gives certain non-reciprocal tariff preferences that cover 6 000 product lines to 37 sub-Saharan African countries until 2015. A specific set of conditions under AGOA applies to clothing, the most important being conditions relating to rules of origin. These conditions provide that the clothing has to be made from US fabric, yarn and thread, or from fabric, yarn and thread that is produced in an AGOA-beneficiary sub-Saharan country. South Africa, while deriving certain benefits from AGOA, is disadvantaged vis-à-vis a large number of less developed countries that also have clothing industries (Barnes, 2005, p. 9).

⁵⁷ The other themes are as follows: Under the heading 'foundational', there is 'capital upgrading', 'firm-level competitiveness' and 'creating a sustainable skills base'; under the heading 'developmental', are the themes of 'industry transformation' and 'coordinating value chain opportunities'. Only one KAP makes reference to labour regulation, i.e. KAP number 14 (in strategic theme 3) identifies the need to increase "the flexibility of the SA labour market so as to shorten amortisation periods" (Barnes, 2005, p. 13). It is unclear exactly what is intended by this KAP, or what the implications might be for labour regulation and worker rights.

⁵⁸ These industrial councils covered much of the Western Cape, KwaZulu-Natal, Gauteng, the Eastern Cape and the Free State/Northern Cape.

substantial parts of the industry were located in regions not covered by an industrial council and were regulated by wage determination. SACTWU wanted the proposed new council to cover the sector countrywide and saw the establishment of a national industrial council as critical to its effort to reduce the regional wage differentials in the sector.⁵⁹

After a protracted struggle a national bargaining council was registered for the clothing sector in 2002 (Anstey, 2004). A set of collective agreements now covers the clothing sector nationally: one agreement covers specified metropolitan areas; another covers certain non-metropolitan areas; and a third covers certain 'country' areas. These agreements set minimum wage levels and other conditions of work, and are extended so that together they cover the entire country.⁶⁰ However, although differentials between regions have been narrowed, they have by no means been eliminated.

The national bargaining council is not stable. Its continued existence is constantly threatened by employers within the system threatening to pull out of the council. This arises because of the pressure experienced by registered employers from the increasing number of unregistered clothing manufacturers. This, in turn, is the result of a process whereby an increasing number of employees in the industry work for informal clothing firms that are not registered with the council. As a result the bargaining council is less and less representative of employers and employees in the sector, and it is more difficult to have its agreement extended.⁶¹

The inroads made by trade liberalization into the sector have certainly contributed to a downward pressure on wages, and as a result the trade union has battled to maintain the standard of living of its members. Since wage levels of organized workers in South Africa are sometimes characterized as being relatively high, it is useful to contextualize an analysis of wages in clothing firstly within the context of manufacturing as a whole, and secondly within the context of the broadly-defined textiles, clothing and leather sector, of which clothing is part.

In manufacturing as a whole, in the ten years between 1996 and 2005, the average wage for elementary occupations (i.e. least skilled and lowest paid occupations) rose from R410.85 to R561.05, a nominal increase of R150.20.⁶² This translates into a 36.6 per cent nominal increase over the period. However, if one factors in the rise in the consumer price index (CPI) then the real average wage for elementary occupations fell by 8.7 per cent from 1996 to 2005.⁶³ If one does the same exercise for the broadly-defined textiles, clothing and leather sector, there is also a decrease in real earnings, although it is marginal. Furthermore, the sector has relatively low

⁵⁹ In the course of the struggle by SACTWU to establish a national industrial council, the transition to democracy took place and a new set of labour statutes was introduced. A key issue in the negotiations around the new Labour Relations Act was the nature of the collective bargaining system, more specifically whether there would be compulsory centralized bargaining (as demanded by COSATU) or not. The final form of the Act did not greatly help SACTWU's cause; the 1995 LRA stuck with a voluntarist model for collective bargaining, although it did include a number of provisions to encourage centralized bargaining. SACTWU therefore had to rely primarily on power in its effort to get a national bargaining council (the new name, in terms of the Act, for industrial councils).

⁶⁰ Agreements can be extended by the Minister of Labour to cover all employers and employees within the jurisdiction of a bargaining council, i.e. the agreements do not cover only the members of the employers' organizations and trade unions that are party to the agreements.

⁶¹ Employer parties on the bargaining council currently represent 52 per cent of the industry if one counts the number of employees as a proportion of all (registered) employees (i.e. 50 509 employees out of 97 958). If one had to take account of the 31 459 employees that work for unregistered employers (see above), the representivity of the employer parties would drop to 39 per cent (i.e. the employer parties would employ 50 509 of 129 417 employees (39 per cent) rather than 50 509 of 97 958 employees (52 per cent)). So counting all the employees at unregistered firms would considerably alter the representivity of the council. Not counting them means that the representivity of the council is adequate but there are a large number of employees (and employers) outside the council that undermine the conditions it sets (Godfrey et al., 2006, pp. 45-46).

⁶² The data on wage rates in this section are calculated from the AWARD Wage Database compiled by the Labour Research Service in Cape Town.

⁶³ The CPI rose by 45.26 per cent over the same period.

wages compared to the manufacturing sector as a whole, and the nominal increase over the 10 years was lower than in the manufacturing sector.⁶⁴

If one focuses on the clothing sector alone, there is a similar trend. Between 1997 and 2005 (there are no data for 1996) the average wage for elementary occupations in the clothing sector rose from R256.51 to R375.21, a nominal increase of R118.70. This amounts to an average increase of just over R13 per year (about 5.1 per cent per year) or 46.3 per cent over the period. When one takes the CPI into account the real increase in wages is only 1 per cent.

On the face of it, and leaving aside the different base wage rates, the clothing sector has done a bit better than the broadly defined textiles, clothing and leather sector, which has in turn done a bit better than the manufacturing sector as a whole. This, however, takes account only of the wages of those in formal employment and covered by collective bargaining. The fact that there is a well organized union and a number of big national bargaining councils in the textiles, clothing and leather sectors is clearly reflected in the fact that wage increases have been marginally better than in the manufacturing sector as a whole. If one had to factor in the wages being earned by those in informal employment in the clothing sector, which is where the impact of trade liberalization is being felt, there would be a very different picture. And it is evident that informal wage rates are exerting a downward pressure on formal rates: the fact that a strong union like SACTWU has managed only a 1 per cent real wage increase over a nine- year period is indicative of this pressure.

Employment in the clothing sector

To contextualize changes in the patterns of employment in clothing, it is first of all useful to consider data for manufacturing as a whole. In 1995 total employment in the manufacturing sector was 1 420 956. Thereafter employment grew slowly, to reach 1 605 000 in 2001, an increase of 13 per cent over the period (McCord and Bhorat, 2003, p. 120). The slow rate of increase continued until 2004, with a further 90 000 jobs added and the skills profile changing slightly, with semi-skilled work declining and skilled work on the increase (Oosthuizen, 2006, pp. 26-31). However, manufacture's share of total employment has declined, indicating that it is growing more slowly than the economy as a whole: in 1995 employment in the manufacturing sector made up 15.1 per cent of all employment but by 2001 the proportion had dropped to 14.8 per cent (McCord and Bhorat, 2003, p. 120).

Employment data for the clothing sector will generally take one of two forms. First, there are data for the sector as a whole, including informal employment in the industry. Second, there are data on the number of employees covered by the bargaining council, which represents those in formal employment. The former data will generally produce a much bigger estimate of employment than the latter, and have remained more or less stable. However, formal employment, as reflected by the numbers covered by the bargaining council, has shown a huge decline over the period.

The following table shows the number of employees registered with the five bargaining councils, alongside an estimate of total employment by the Department of Trade and Industry (DTI) and Statistics South Africa (SSA).

⁶⁴ Between 1996 and 2005 the average wage for elementary occupations rose from R288.16 to R416.57, a nominal increase of R128.41. This translates into a 44.6 per cent nominal increase over the period. Factoring in the CPI, however, means that the real average wage for elementary occupation in the textile, clothing and leather sector declined by 0.7 per cent over the period.

Table 1. Bargaining council and estimated clothing employment: 1995-2001

| | WCape | KZN | Gauteng | ECape | OFS/NCape | Total | DTI/SSA |
|------|-------|-------|---------|-------|-----------|-------|---------|
| 1995 | 46980 | 34720 | 10888 | 2423 | 1432 | 96443 | 131350 |
| 2000 | 38262 | 19714 | 7517 | 1489 | 1004 | 67986 | 138371 |
| 2001 | 34655 | 34655 | 6626 | 6626 | 1315 | 59580 | 135959 |

(Naumann, 2002, p. 9)

This indicates that clothing employment was increasingly shifting to areas outside the bargaining councils' areas of jurisdiction and to unregistered firms. An example of the former relocation was the shift by a number of Durban-based clothing manufacturers to those areas in the Natal Midlands just outside the jurisdiction of the bargaining council. This was followed by a proliferation of Chinese-owned firms in this area (Prinsloo, 1996, p. 10).⁶⁵

More recent research again emphasizes the dichotomy in the estimates of employment. Given that these data are for the period after the formation of the national bargaining council, which covers the whole country, the difference in total employment is accounted for only by employment at unregistered firms. In 2004 the national clothing bargaining council covered 97 958 employees. These were employed in what Statistics SA would define as occupational categories 4 to 9. The Labour Force Survey (September 2004) estimate of employment in the clothing industry in these categories is 129 417. If one accepts the Labour Force Survey estimate then it means that the national bargaining council regulates conditions for only 97 958 of the 129 417 employees in the industry (76 per cent), while the remaining 31 459 employees (24 per cent) are employed by unregistered employers, i.e. they are unregulated.⁶⁶

The period since 1994 has therefore been characterized by the displacement of jobs from the formal, regulated part of the sector to the informal, unregulated part. There could be a number of explanations for this development but the most compelling is that clothing producers in countries with lower labour costs are driving a process of informalization in the local clothing sector. A shrinking number of formal clothing manufacturers are able to remain competitive within the existing labour cost structure and an increasing number are seeking competitiveness by evading the labour cost structure. However, Barnes indicates that there is a limit to the absorptive capacity of the informal clothing sector. He projects that the textile and clothing sectors will together lose a total of 50 000 to 75 000 formal and informal jobs in the next nine years (2005, p. 6). To appreciate the enormity of this loss, it must be borne in mind that employment comprises mainly unskilled and semi-skilled jobs.

The nature of informal firms makes them a difficult subject for accurate quantification and for research that will expose the conditions under which employees are working. Recent research on homeworking in the clothing sector does not provide all the answers with respect to the informal component of the clothing sector but does reveal its linkages to the formal retail sector and homeworkers' conditions of employment.

Although there are no reliable data on the extent of homeworking, the research by Godfrey et al. (2005)⁶⁷ indicates that homeworking is prevalent in the sector in Cape Town and Durban

⁶⁵ In theory nothing precludes trade unions from organizing these workers, and seeking either to extend the scope of the existing councils to cover them, or to establish a separate council. In practice trade unions have not been able to do so.

⁶⁶ Barnes does not distinguish between employment registered with bargaining councils and total employment, but rather between formal employment and a projected figure for total employment including informal employment. He finds that employment in the clothing sector declined from 125 181 employees in 1994 to 110 739 in mid-2004. This amounts to a loss of 14 442 jobs. However, he calculates that total clothing employment amounted to 158 879 in 2004, (Barnes, 2005, p. 4) Although the figures are somewhat different to those mentioned above, the trends are the same, i.e. declining formal employment and a much higher total for all employment in the sector, indicating a shift to informal employment.

⁶⁷ The finding that homeworking is on the increase is supported by Fakude (2000), and Baden and Velia (2001).

and is increasing.⁶⁸ This is consistent with the analysis of the quantitative data that indicates a shift from formal to informal employment in the clothing sector. The interviews with homeworkers confirmed this process; almost all the homeworkers had previously been employed in the formal clothing sector and had moved on to homeworking after being retrenched in the period 1997 to 2000 (Godfrey et al., 2005, pp. 3 & 22).

The vast majority of the homeworking operations were not registered with the bargaining council and did not comply with any other labour legislation. Wage rates were generally below the bargaining council minimum rates, particularly at the homeworking operations in Durban where wages were significantly lower. Importantly, workers were generally not paid overtime, sick pay or holiday pay, as required by the bargaining council agreement and the Basic Conditions of Employment Act. They also did not contribute to or have the benefit of any social security schemes, as would be the case if the employer was registered with the bargaining council (Godfrey et al., 2005, pp. 19-20).

Most homeworkers reported that their work was insecure and their working hours were determined by contracts with suppliers. In other words, when there was work they worked, if necessary into the night or over weekends, but if there was no work they were told to stay at home and were not paid. Workers generally expressed high levels of anxiety about the duration of the contracts, both in terms of the pressure to meet suppliers' deadlines and the fact that once deadlines were met there was no guarantee of further work (or income) (Godfrey et al., 2005, pp. 21-22).

The working environment in the homeworking operations was generally poor, especially in the small survivalist operations. In the latter operations small lounges, kitchens and backrooms were converted into working spaces, with sewing machines packed into each room. Rolls of fabric, packaging and boxes were stored in any available space. In these operations family members generally played a part in the operations and it was impossible to separate work and family life. More established homeworking operations had better working environments, with work taking place in garages or rooms added on to houses (Godfrey et al., 2005, p. 21).

8. Conclusions

It is clear that trade liberalization has had an impact on the South African economy, and therefore on employment. However, any assessment of its impact is complex, even within a given sector, because of a range of other factors that also affect the sector. In agriculture, for example, changes in labour legislation and legislation affecting security of tenure have almost certainly had an impact, and more so than in other sectors. On the other hand in sub-sectors or in commodity chains where one might expect trade liberalization to have had a beneficial impact, such as deciduous fruit and wine, the same kinds of changes in the structure of employment have taken place.

In summary, there has been no significant improvement in the unemployment situation in the period of trade liberalization. At the same time the structure of employment has changed, in that formal employment has declined relative to informal employment. Amongst those in formal employment, there has been an increase in the proportion of skilled and semi-skilled jobs relative to unskilled jobs. There is an unknown number of unskilled workers in the informal economy, rendering services to the formal economy, who are in effect not protected by labour legislation.

Proponents of trade liberalization hypothesize that although it may result in a loss of employment in some sectors of the economy (typically in production), such loss of employment

⁶⁸ The research involved interviews with 38 homeworkers in 19 homeworking operations in Cape Town and Durban (the main clothing centres). Interviews were also conducted with the owners of six homeworking operations and at design houses and retailers.

will be more than compensated by growth in other sectors (typically in services). On a superficial reading of the data, there has been a growth of employment in the services sector. However, even if there has been some employment growth, primarily in the tertiary sector, and in sectors like construction, where there are questions as to its sustainability, it has not been nearly sufficient to compensate for the job losses as well as the growth of the economically active population.

Moreover there is reason to question how real the growth of employment in the tertiary sector really is. One would expect a growth in services attributable to trade liberalization to be in semi-skilled and skilled occupations (Edwards, 2001). The data suggest a growth in unskilled workers, at least some of whom must be providing services to the formal economy, in factories, on mines and even on farms, as the case study of agriculture illustrates. In the case of homeworkers producing garments for retailers, it is quite possible that the data gatherers have captured them as employed in 'private households', whereas they are assuredly employed in manufacturing.

Proponents of trade liberalization argue that just as competition in product markets is a good thing, so too is competition among producers of regulatory policy, and that countries that elect to maintain comparatively high labour standards will have to bear the 'cost', in the form of lower investment (Tucker, 2005, pp. 99-100).⁶⁹ South Africa is commonly characterized as a country with high labour standards, and is under relentless pressure from the World Bank and others, relying on the 'Doing Business' reports and the like, to lower standards. However the case study of clothing shows to what extent labour standards have already been lowered in a highly regulated industry, let alone in the informal economy.

South Africa has a surplus of workers with low skills. If the country is not able to devise policies that will provide employment and protection to such workers, in sectors such as agriculture or manufacturing, in established industries such as clothing or agro-manufacture, then it would seem there is no prospect of even narrowing let alone closing the widening divisions in society. These divisions cannot all be laid at the door of trade liberalization. But the failure of liberalization to ameliorate the position entitles us to treat the claims of its proponents with a degree of scepticism.

Hirst and Thompson argue this:

One key effect of the concept of globalization has been to paralyse radical reforming strategies, to see them as unfeasible in the face of the judgement and sanction of international markets. If, however, we face economic changes that are more complex and equivocal than the extreme globalists argue, then the possibility remains of political strategy and action for national and international control of market economies in order to promote social goals (Hirst and Thompson, 1999).

This is surely the possibility South Africa needs to explore with vigour.

⁶⁹ Tucker characterized this as relating to the normative dimension of the debate as to whether trade liberalization would inevitably weaken labour market regulation. In response to prognostications that the NAFTA agreement would lead to a regulatory race to the bottom in Canada, with increasingly deregulated labour markets, he suggests that there is nothing inevitable about this process, and that empirical evidence indicates that a race to the bottom has in fact not happened to the extent that pessimists anticipated.

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