ACT/EMP
The Bureau for Employers' Activities

International Labour Organization

ACT/EMP Research note

Labour and social policy components in current trade agreements in Asia and the Pacific

ACT/EMP
Research note

March 2015

Labour and social policy components in current trade agreements in Asia and the Pacific[1]

This research note provides a brief overview of the current debates on social and labour components in trade agreements in Asia and the Pacific, with particular reference to the Trans-Pacific Partnership Agreement.

1 This research note was composed by Hans Bakker, with inputs from ILO colleagues across the Asia-Pacific region and in Geneva. Additional inputs were sought from employers' organizations in those countries referenced in this research note.

Acronyms and abbreviations

ACT/EMP	Bureau for Employers' Activities
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ASEAN+6	ASEAN plus Australia, China, India, Japan, New Zealand, and the Republic of Korea
CEPEA	Comprehensive Economic Partnership in East Asia
EU	European Union
FTA	free trade agreement
ILO	International Labour Organization
NAALC	North American Agreement on Labour Cooperation
NAFTA	North American Free Trade Agreement
P4	Trans-Pacific Strategic Economic Partnership Agreement
TPP	Trans-Pacific Partnership Agreement
US	United States
US-CAFTA-DR	US-Dominican Republic-Central America Free Trade Agreement
USTR	Office of the United States Trade Representative
WTO	World Trade Organization

Introduction

The 1996 WTO Ministerial Meeting in Singapore considered formally incorporating labour provisions within the World Trade Organization (WTO) structure. Participants decided, however, not to pursue that initiative. For one thing, developing countries were concerned that, within an increasingly globalized economic system, coupling labour to the WTO machinery threatened asymmetrical advantages, one of these being the ability to secure foreign investment for economic growth.

The ILO's Declaration on Fundamental Principles and Rights at Work (henceforth the 1998 Declaration) responded to this re-emerging labour-trade debate in part by affirming the political commitment to adopt and maintain internationally recognized labour principles, while simultaneously ensuring that this commitment incorporated all ILO member countries irrespective of their level of development. To this end, member States were not required to fulfil technical requirements regarding comprehensive international labour standards — given their highly heterogeneous political, economic and regulatory contexts, this would have failed to appeal to all members. Instead, the Declaration sought unanimous political will through the open acknowledgement of fundamental labour rights.

The 1998 Declaration has subsequently become a reference point for labour provisions in emerging international trade agreements.

Such agreements increasingly incorporate labour commitments despite deep-rooted concerns that they will undermine the ability of less-developed economies to sustain long-term economic development through foreign investment and comparative advantages in lower-wage labour. This document provides an overview of the development of labour provisions in the domain of international trade, focusing in particular on free trade agreements (FTAs) in Asia and the Pacific. The following questions have shaped the substance of this paper:

- What are the labour and social implications of the labour provisions emerging in FTAs?
- More specifically, to what extent do emerging labour provisions in FTAs disrupt the prevailing labour and social contexts of Asia-Pacific countries?
- What are the actual implications of enforceable labour obligations under emerging FTAs in practice?
- To what extent are emerging labour provisions in FTAs actually worsening the adoption and enforcement of internationally recognized labour rights in domestic labour legislation, for example where they pressure governments to pass unsustainable labour law reforms?

In addressing these questions, this paper contextualizes the trade-labour nexus by first outlining the ongoing debate regarding the interconnections between labour and international trade. The paper then goes on to interpret labour clauses in existing agreements, (a) identifying general trade-policy frameworks that will likely provide the basis for future United States (US) and European Union (EU) FTAs with Asia-Pacific trade partners, while (b) determining implications and forecasting future scenarios with respect to emerging FTA labour provisions in the region. The conclusions include a summary of findings and key concerns.

Background to the trade and labour debate

Including labour provisions in FTAs remains a contentious issue. Outlining the contending arguments of advocates and opponents of general trade-labour linkages helps to understand the development and implications of the labour-trade nexus.

Advocates of labour-trade linkages, generally representing the viewpoints of trade unions and workers' organizations, seek to better protect workers globally, particularly in countries with relatively weak labour standards and legislation. Workers' organizations, particularly in advanced industrialized countries, advocate for strong labour provisions in international trade agreements, aiming to balance the playing field through labour rights and standards, thereby fostering an equitable basis for competition between workers internationally. On the other hand, opponents of strong labour-trade linkages represent the viewpoints of employers, investors, and governments — particularly in less developed economies — that see strong labour-trade linkages as a threat to comparative advantages in lower-wage labour, foreign investment, and economic development. In short, opponents fear labour provisions in international trade agreements could be used for protectionist purposes and therefore undermine the overarching purpose of FTAs, which is facilitating economic growth through stronger flows of foreign investment and mutual market access.[2]

The 1998 Declaration informed the labour-trade debate in two main ways:

- It partly settled the question of whether labour could realistically be incorporated into international trade agreements — and international affairs in general — by embodying a universal reference point for adopting labour rights built on unanimous international consensus.
- As a result of this, it moved the debate from whether labour should be incorporated into the domain of international trade and investment to how this unanimous consensus on fundamental labour rights could be used as a point of departure in international trade agreements. The 1998 Declaration, sufficiently flexible in its commitment for all countries, appealed to both advocates and opponents of labour-trade linkages by establishing a commitment to upholding worker rights while respecting concerns regarding vulnerability to comparative advantages in lower-wage labour.

Evaluating the current labour-trade debate, including the ongoing evolvement and implications of labour provisions in international trade agreements, requires a recognition of the often blurred differences between rights, principles, standards, and Conventions regarding labour. Because most existing labour provisions in FTAs explicitly refer to the ILO's 1998 Declaration, and because of the mandate, remit, and authority of the Organization with regards to labour matters, this research note adopts the terminology regarding principles and standards developed within the framework of the ILO. International labour standards are legal instruments drawn up by the ILO constituents (governments, employers and, workers) and setting out basic principles and rights at work. They are either Conventions, which are legally binding international treaties that may be ratified by member States, or recommendations, which serve as non-binding guidelines.

2 M. J. Bolle: Trade Promotion Authority (TPA) renewal: Core labor standards issues: A brief overview (2007). Available from: http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1026&context=crs, pp. 2–3.

In many cases, a Convention lays down the basic principles to be implemented by ratifying countries, while a related recommendation supplements the Convention by providing more detailed guidelines on how it can be applied. [3]

There is a difference between labour "principles and rights" on the one hand, and ILO standards (Conventions and Recommendations) on the other. The existence of this difference is for instance also suggested by the ILO 1998 Declaration (although the 1998 Declaration concerns only the fundamental principles and rights at work and ILO`s fundamental Conventions):

"THE INTERNATIONAL LABOUR CONFERENCE

1. Recalls:

…

(b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization …".

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights …."

In other words, "principles and rights" are universal values that should (somehow) be respected, promoted and realized everywhere. As they are necessarily imprecise, it is not possible to control their implementation. International Labour standards (e. g. Conventions), on the other hand, spell out these principles in concrete and specific rules. Countries that have ratified a Convention are under a legal obligation to implement these rules. Implementation can and is supervised.

Advocates of labour-trade linkages support the introduction of international labour standards, since they offer strengthened measures to protect workers in the domain of international trade. Opponents of labour-trade linkages, meanwhile, believe such standards in international trade agreements threaten to undermine comparative national advantages in terms of lower-wage labour; infringe on a country's sovereign authority to set its own domestic labour laws; and are in practice difficult to achieve, given disparities across countries in technical capacity to implement and regulate them. The 1998 Declaration's reference to internationally recognized labour principles thus aimed to address these differences in the labour-trade debate, establishing a workable middle ground. For these reasons, the 1998 Declaration currently presents a point of departure for labour provisions in international trade agreements.

To this point we have outlined the developments of the labour-trade nexus; briefly summarized the

3 ILO: Introduction to International Labour Standards: Conventions and Recommendations (2014). Available from: http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm.

arguments of supporters and opponents of trade-labour linkages; and identified the 1998 Declaration as a point of departure for labour provisions in international trade agreements. The following section aims to evaluate the labour clauses emerging in modern bilateral and multilateral free trade agreements. Discussion focuses on anticipated labour and social implications for relevant ASEAN member countries involved in various free trade agreements, whether these are in force or under negotiation.

Mapping the implications of labour provisions in FTAs in Asia and the Pacific

International trade agreements that include labour provisions, both those in force and those under negotiation, refer to the 1998 Declaration for reasons outlined in the previous section. The 1998 Declaration provides a departure point for unanimous commitment to upholding internationally recognized labour rights while preserving the mutual benefits of international trade. Typically, FTAs that include labour provisions have been bilateral and multilateral agreements[4] with the US and, more recently, with the EU.

US foreign trade policy includes mandatory labour provisions based on the 2007 Bipartisan Agreement on Trade Policy[5] negotiated between the then-US administration and Congress. The Agreement stipulates that US trade agreements must incorporate enforceable obligations whereby parties must adopt and maintain in their national legislation five internationally recognized labour principles identified in the 1998 Declaration:

- freedom of association;
- effective recognition of the right to collective bargaining;
- elimination of all forms of forced or compulsory labour;
- effective abolition of child labour and prohibition of the worst forms of child labour; and
- elimination of discrimination in respect of employment and occupation.[6]

Violations of labour obligations under the bipartisan deal's model provisions, defined as infractions that solely affect trade or investment between parties, are addressed by government-to-government dispute settlement procedures using the same remedies and procedures used to address commercial obligations on a bilateral basis. Like commercial dispute settlements, remedies for labour disputes under this trade policy include fines and trade sanctions.[7] However, unlike escalated commercial dispute settlement procedures in trade agreements, which can revert the WTO dispute settlement procedures, violations

4 See Appendix A for a brief, non-exhaustive overview of relevant multilateral agreements in Asia and the Pacific.

5 USTR (Office of the United States Trade Representative): Trade facts: Bipartisan trade deal (May 2007). Available from: http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf.

6 USTR: Trade facts: Bipartisan trade deal (May 2007). Available from: http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf.

7 Ibid.

relating to labour provisions have no formal guidelines outside of the actual agreement.[8] Therefore, dispute settlement procedures for violations relating to labour obligations are based solely on mechanisms agreed upon bilaterally or multilaterally. They cannot be settled within the WTO machinery, its framework being designed to address trade disputes only, and incorporating no provisions regarding labour. Meanwhile the ILO, the competent and authoritative agency on labour matters and standards, is not designed to monitor or settle violations in international trade. Therefore, no FTAs between countries can formally refer to an international body for dispute settlement procedures.

The US FTA trade template is embodied in the 2007 Bipartisan Trade Policy. The EU, however, does not negotiate FTAs on the basis of a particular FTA model including labour provisions.[9] Instead, based on negotiating mandates, policy statements, and recently concluded FTAs with the Republic of Korea[10] and Singapore, FTAs negotiated by the EU have made similar references to the 1998 Declaration on Fundamental Principles and Rights at Work. The following sub-sections outline possible labour and social implications both in recently completed FTAs and in those currently under negotiation.

Trans-Pacific Partnership Agreement

The Trans-Pacific Partnership Agreement (TPP) is a major multilateral free-trade agreement currently under negotiation among 12 countries[11] spanning Asia-Pacific and the Americas. With a combined population of 798.5 million people and a total GDP of US$27.75 trillion, the agreement has the potential to create a free-trade area comprising 37.5 per cent of global economic output.[12]

The TPP emerged from the 2006 Trans-Pacific Strategic Economic Partnership Agreement (P4) between Brunei Darussalam, Chile, New Zealand, and Singapore that aimed inter alia to eliminate trade barriers, promote labour cooperation, and devise a workable dispute settlement mechanism. In 2008, the US and P4 countries announced the launch of negotiations leading toward the TPP.[13] Today, negotiations have expanded to include 12 out of 21 Asia-Pacific Economic Cooperation (APEC) members, and is likely to expand further following expressions of interest from the Republic of Korea and Taiwan (Province of China) and technical consultations with the Philippines.[14] Although it is not an APEC initiative, the

8 The WTO framework does not incorporate labour elements, with the exception of trade related to prison labour. Similarly, the framework and machinery of the ILO is not built to address matters of trade.

9 S. Woolcock: European Union policy towards Free Trade Agreements (2007). Available from: http://www.felixpena.com.ar/contenido/negociaciones/anexos/2010-09-european-union-policy-towards-free-trade-agreements.pdf.

10 Henceforth "Korea".

11 I.e. Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Viet Nam.

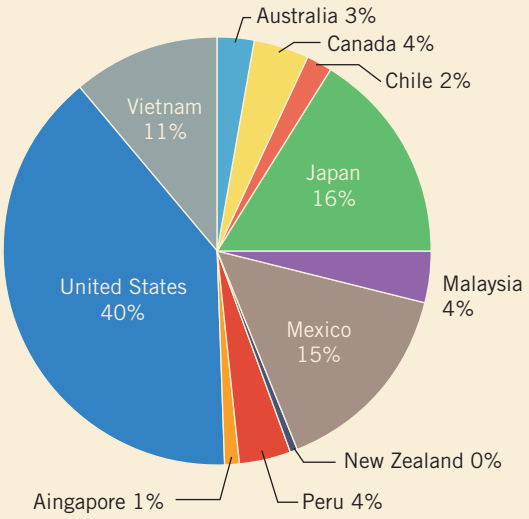
12 Australian Department of Foreign Affairs and Trade: TPP overview. Available at: http://www.dfat.gov.au/fta/tpp/tpp-overview.pdf.

13 USTR, Trans-Pacific partners and United States launch FTA negotiations. Available from: http://www.ustr.gov/trans-pacific-partners-and-united-states-launch-fta-negotiations.

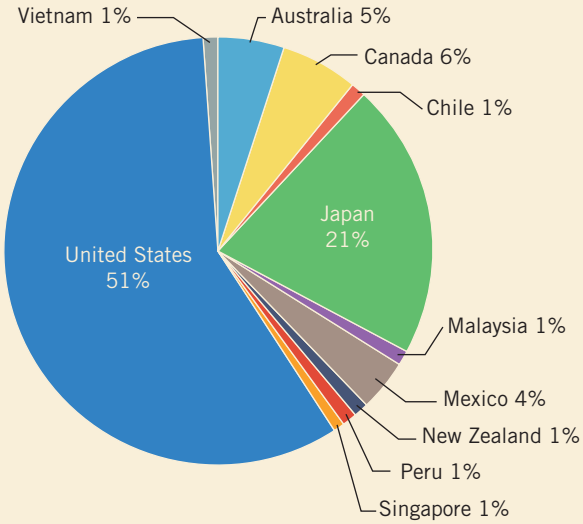
14 USTR, "United States and Philippines commit to intensified engagement on trade" (2014). Available from: http://www.ustr.gov/about-us/press-office/press-releases/2014/March/US-and-Philippines-commit-to-intensified-engagement-on-trade.

TPP promises a potential pathfinder role within an expanded Asia-Pacific free-trade area. Indeed, the US delegation has a significant stake in negotiations, given that a completed TPP — together with a successful Trans-Atlantic Trade Investment Partnership[15] and using the foundations of the North American Free Trade Agreement (NAFTA) plus subsequent US bilateral and multilateral trade agreements[16] — would create a free-trade zone covering two-thirds of world production. [17]

Shares of total population in the TPP area, 2012



Shares of economic output in the TPP area, 2012



The TPP's interregional scope is unprecedented, aiming to include countries with diverse political, economic, and legislative systems under one comprehensive multilateral free-trade agreement across the Pacific Rim. However, free-trade agreements that incorporate varying levels of legally binding labour obligations are not new, particularly in recent US bilateral and multilateral trade agreements. As mentioned above, US foreign trade policy legislation stipulates that US trade agreements must incorporate, among others, the following binding national labour obligations:

- to adopt and maintain in their national legislation the five internationally recognized labour principles as set out in the 1998 ILO Declaration; and
- to effectively enforce their national labour law.

Under the US template, TPP countries would be able to invoke bilateral and multilateral[18] dispute

15 A proposed free trade agreement between the European Union and the US.

16 J. Kelsey, "Introduction", in J. Kelsey (ed.) No ordinary deal: Unmasking the Trans-Pacific Partnership Agreement (Allen and Unwin, Sydney, 2010), pp. 9–28.

17 Swarnim Wagle and Miles McKenna, "Trade regionalism in the Asia-Pacific: New game, old rules?" (2013). Available at: http://blogs.worldbank.org/trade/trade-regionalism-asia-pacific-new-game-old-rules.

18 The US-Peru FTA stipulates that if bilateral disputes are not resolved by a given deadline, then the agreement's labour council, consisting of cabinet-level labour representatives, will be convened. If this council does not achieve a resolution, then a commission comprising cabinet-level trade representatives is to be convened. Further failure to reach consensus leads the concerned parties to form and appeal to an arbitral panel.

settlement procedures where violations of labour obligations affect international trade or investment, and where violations are defined as "non-enforcement of labour obligations occur[ing] through a sustained or recurring course of action or inaction."[19]

If the TPP labour chapter includes the first enforceable obligations above, it could pose a challenge for countries with existing legislation that explicitly contradicts fundamental principles outlined in the 1998 Declaration. Restrictions on freedom of association, for example, would directly contradict the commitment to freedom of association outlined in the 1998 Declaration, particularly in the case of Viet Nam. Indeed, none of the four ASEAN countries participating in TPP negotiations have ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), although this observation relates to standards rather than the 1998 Declaration's commitment to principles, and does not suggest a contradiction or failure to adopt those rights in principle. On the other hand, the second binding obligation — to effectively enforce domestic labour laws — could, if included in the TPP labour chapter, be problematic for countries with gaps in their national labour law and its enforcement in practice. Countries party to the TPP negotiations that have limited resources to mobilize the legislative, regulatory, and technical capacity needed to effectively enforce their existing domestic labour laws may be vulnerable to violations of this obligation. TPP labour provisions are likely to pose a challenge for participating countries in the Asia-Pacific region where national labour laws are not implemented in practice, and where they fail to enforce them "through a sustained or recurring course of action or inaction".

Nevertheless, the labour provisions that have emerged in US bilateral and multilateral FTAs, as in the US template, can also be interpreted as sufficiently flexible as not to create significant problems for the countries party to the TPP. Because the 1998 Declaration created a commitment to labour rights among all ILO member States, the labour provisions' reference to the Declaration essentially serves to reaffirm a prior commitment. However, a key difference between the commitments in the Declaration and a labour chapter with an obligation to uphold these commitments is that the latter is subject to a dispute settlement mechanism, along with other labour provisions. Thus, unlike with the Declaration, if there is a "sustained or recurring course of action or inaction" either towards non-commitment (a) to adopting and maintaining internationally recognized labour principles in national legislation, or (b) to effective enforcement of domestic labour laws, then, according to the agreement's provisions, a complaint regarding trade and investment may be lodged against the offending party.

Given the lack of formal criteria to judge a country's obligation to the 1998 Declaration, however, two conclusions may be drawn:

- Disputes regarding commitment to obligations will likely not emerge in the first place, since it is difficult, due to the absence of guidelines or reference for measurement of the commitment, to prove or disprove non-conformity and therefore to settle disputes.
- Where a complaint is indeed lodged, then any tangible effort or measure, however small, taken to rectify non-conformity to the obligation to adopt internationally recognized labour rights in principle

19 USTR, op cit.

may be sufficient to mobilize measures to address the dispute, but does not guarantee the capacity to do so.

If the US-Peru FTA is viewed as a dispute-settlement blueprint for TPP labour provisions, then it may well be the case that Asia-Pacific countries with statutes or regulations inconsistent with the labour principles and rights of the 1998 Declaration who repeatedly fail to enforce domestic labour laws, including those reflecting international labour principles, may come under pressure to address any such inconsistencies in an effort to expedite negotiations and avoid potential future violations of labour provisions in the Agreement. The Agreement's dispute-settlement mechanisms are too exclusively bilateral, though if no resolution is reached through cooperative labour consultations and a Labour Affairs Council comprising cabinet-level representatives,[20] then consultations may be convened with cabinet-level representatives of all parties to the agreement, and an arbitral panel may be appointed to prepare a report on the violation of the party complained against.[21] Although this suggests that labour-provision disputes would follow the bilateral resolution procedures in place — and then, where these are ineffective, multilateral and arbitral procedures — it is more likely that political pressure arising from such procedures will be sufficient to address any disputes. Whether it is possible to address those inconsistencies effectively is an equally important matter.

If the TPP is signed and no measures are taken to address potential contradictions between the political commitments to the 1998 Declaration and existing national legislation, the above factors may combine to leave some participating ASEAN countries vulnerable to violations. Similarly, if no sustained measures are taken to address existing gaps between official labour legislation and practical enforcement, countries without adequate means to enforce domestic labour laws may be vulnerable to violations under the provisions of the TPP's labour chapter. In practice, however, the inherent flexibility of the provisions, and the fact that no guidelines are available for enforcing obligations under the 1998 Declaration, mean that significant labour disputes become unlikely.

Clear guidelines do exist for domestic labour law, however. Thus it is more important to ask whether pressure applied to rectify inconsistencies in negotiating countries might lead to inadequate domestic labour law reform where (a) clear contradictions to labour principles exist or (b) enforcement mechanisms of domestic labour law are absent. As a result, both employers and governments could be pressured to address gaps in enforcement of domestic labour law in activities that relate to international trade or investment.

The TPP represents an extension to an interregional, multi-country platform of current bilateral and multilateral agreements incorporating labour provisions. The latter agreements have acted as pathfinders for the kind of multilateral labour-trade nexus offered by the TPP. Indeed, given that it is a multilateral proposal involving key Asia-Pacific economies, the future of labour-trade linkages in the region may be largely determined by the outcome of the TPP. It remains to be seen, however, how this will develop against

20 Preliminary dispute settlement procedures as found in Articles 17.5 and 17.7 in Chapter 17 of the US-Peru FTA.

21 As outlined in Articles 21.4 to 21.18 of Chapter 21: Dispute settlement of the US-Peru FTA.

negotiations of the competing ASEAN+6 Comprehensive Economic Partnership in East Asia (CEPEA), which includes Australia, China, India, Japan, New Zealand, and the Republic of Korea. Nevertheless, these negotiating parties are likely to set the labour provisions and conditions for any wider regional trade integration under the TPP format, and will serve as a standard condition for any future expansion of membership. This is evidenced by an official exchange of letters between the Malaysian and Australian ministries of trade, wherein discussions on labour provisions were effectively postponed in the Malaysia-Australia Free Trade Agreement, in force since 2013, due to ongoing TPP discussions at the multilateral level.[22]

The TPP does not pressure participating countries to adopt international labour Conventions, nor does it impose external labour standards legislation on domestic laws. US trade policy requirements in the TPP proposes, however, to make international trade and investment conditional upon effective enforcement of domestic labour laws. Thus TPP negotiations may present a challenge: will all countries be prepared to mobilize the legislative, regulatory, and technical capacity needed to adhere to existing domestic labour laws, if they are not doing so already?

EU bilateral FTAs: the Republic of Korea, Malaysia, Singapore, Thailand, and Viet Nam[23]

In 2007, the EU began a new framework of trade agreements. To date these have led to the completion of two FTA negotiations in the Asia-Pacific region: the EU-Korea FTA, in force since July 2011, and the EU-Singapore FTA, signed in September 2013. Currently, the EU is pursuing negotiations with five other countries in the region: India since June 2007; Malaysia since October 2010; Viet Nam since June 2012; Japan since November 2012; and Thailand since March 2013. These initiatives have failed to make significant progress, so the EU discontinued those negotiations with ASEAN launched in 2007 to instead pursue bilateral FTA talks with individual ASEAN member States.[24]

Labour provisions have similarly been incorporated in EU bilateral FTAs. Unlike US bilateral and multilateral FTAs, EU FTA negotiations do not adhere to a specific trade policy template, though recent FTAs and EU policy statements on international trade suggest a general EU trade framework. The EU-Korea FTA was the first EU free trade pact to go into force within an Asia-Pacific country. Chapter Thirteen of that agreement, "Trade and Sustainable Development", details labour provisions, as well as other provisions and obligations related to the environment, to which the Parties commit. Similar to those in US bilateral

22 Australia Government Department of Foreign Affairs and Trade: Malaysia-Australia Free Trade Agreement: Side letter Labour - Malaysian confirmation to Australia (2014). Available from: https://www.dfat.gov.au/fta/mafta/html/mafta-side-letter-labour-malaysia.html.

23 See Appendix B for a non-exhaustive list of ASEAN member-state FTAs that include labour provisions.

24 EU Commission: Overview of FTA and other trade negotiations (2014). Available from: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

and multilateral FTAs, labour provisions in the EU-Korea FTA reaffirm the country's commitment to "respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental [labour] rights"[25] as outlined in the 1998 Declaration. Furthermore, this obligation to "respect, promote and realise" internationally recognized labour rights is binding to the bilateral mechanisms agreed upon in the agreement's Chapter Fourteen, on dispute settlement. As discussed earlier, this binding commitment is unlikely to be strictly enforced in practice, given that no formal guidelines exist to measure commitments entailed in the 1998 Declaration.

A key difference between the EU-Korea FTA and the US template for foreign trade policy is that the EU-Korea labour chapter does not include a binding obligation to "effectively enforce domestic labour laws". Indeed, besides reaffirmed commitment to the 1998 Declaration, significant EU-Korea FTA labour provisions include (a) Article 13.4.2, reaffirming commitment to the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, and (b) reaffirmation of commitments under ILO Conventions to which the Parties are signatories. Thus the labour provisions in the EU-Korea FTA are primarily reaffirmations of existing international commitments to labour, without formal benchmarks by which to measure those obligations. In comparison to the enforceable labour provisions outlined in the US trade policy template, the EU-Korea agreement does not propose any provisions that do not already exist in previous commitments and, most significantly, it does not make international trade and investment conditional upon sustained enforcement of domestic labour law.

Similarly, the more recent EU-Singapore FTA also included labour provisions in its Chapter Thirteen, on trade and sustainable development, binding under the bilateral mechanisms established in Chapter Fifteen, on dispute settlement. Besides stipulating an identical obligation to adopt and maintain the internationally recognized labour principles in the 1998 Declaration and implement the Conventions already ratified by the respective country, the provisions similarly include reaffirmation of commitments under the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work and Article 13.3.4, which states that the "Parties will make continued and sustained efforts towards ratifying and effectively implementing the fundamental ILO conventions … Parties will also consider the ratification and effective implementation of other ILO conventions, taking into account domestic circumstances."[26] Like the EU-Korea FTA, the EU-Singapore FTA's labour provisions primarily reaffirm prior commitments without introducing additional new measures or labour conditions for international trade and investment under the agreement.

Given the trade policy framework found in both the recent FTAs with the Republic of Korea and Singapore, it is possible to infer the EU's framework for labour provisions in ongoing bilateral FTAs and future negotiations. As with US bilateral and multilateral FTAs, the FTA framework in Asia and the Pacific makes explicit reference to the 1998 Declaration and to the commitment to internationally recognized labour principles. This is because, as discussed above, the 1998 Declaration provides a flexible foundation

25 EU Commission: EU-Korea FTA Chapter Thirteen: Trade and Sustainable Development, L 127/62 (2014). Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL&from=EN. Article 13.4.3.

26 Ibid.: Text of the EU-Singapore Free Trade Agreement, Chapter Thirteen: Trade and Sustainable Development (2014). Available from: http://trade.ec.europa.eu/doclib/press/index.cfm?id=961.

and reference point from which to integrate labour concerns into the domain of international trade and investment. In addition, EU FTA labour provisions have included reaffirmation of (a) the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, and of (b) the commitments established by each country's respective ratification of ILO Conventions, including the call to make "continued and sustained efforts to ratify" both the fundamental and other ILO Conventions. A key difference between the labour provisions emerging between the FTAs negotiated by the US and the EU, however, is that the US also includes a binding obligation to "effectively enforce" domestic labour laws. Unlike the US, the EU does not introduce conditions that do not already exist in other agreements on international trade and investment between parties.

These observations suggest labour implications for Asia-Pacific countries currently negotiating FTAs with the US or the EU.

Under US bilateral and multilateral agreements, most significantly the TPP, legislation requires that trade agreements include a binding obligation on Parties to effectively enforce their domestic labour laws. This means that trade partners must be prepared to address gaps, if any, in labour legislation and practice. "Recurring and sustained action or inaction" leading to non-conformity with this obligation, in a manner that affects trade and investment, is subject, at least in theory, to being disputed under the proposed US labour provisions. Any measures taken by an FTA negotiating country to address such gaps, due to wider pressure to conclude TPP talks by the end of 2014, could prove difficult because of gaps in regulatory capacity. Thus, whether countries currently have any gaps in labour law and practice is a potential problem during negotiations now as well as when and if a respective agreement enters into force.

These negotiations suggest another area of concern — some participating countries in the Asia-Pacific region might experience pressure to conform strictly to the associated obligations but lack the resources and regulatory capacity to adequately address prevailing gaps.

Conclusions

The ILO's 1998 Declaration on Fundamental Principles and Rights at Work represented a significant milestone — one that addressed the concerns of both camps in the labour-trade debate, and moved the discussion forward. It set out a universal framework of fundamental labour principles for countries at all levels of development within their given economic, social, and political national contexts, whatever their respective regulatory, implementation, and monitoring capacities.

The Declaration was endorsed by both sides to the debate. It achieved unanimous political commitment to internationally recognized labour rights, while keeping labour provisions out of the WTO framework. Moreover, these principles were based on both the ILO constitution and the UN Universal Declaration of Human Rights, and the 1998 Declaration has become a point of departure for current and future debate on the incorporation of labour provisions into international trade agreements.

Recent EU and US bilateral and multilateral FTAs alike include the emergence of these labour provisions. Both the US and EU frameworks for trade policy include labour provisions binding under the mechanisms in bilateral FTA dispute settlement procedures. These provisions reaffirm the obligation to adopt and maintain internationally recognized labour principles as found in the 1998 Declaration. Although technically enforceable under the bilateral dispute settlement procedures outlined in both frameworks, it is unlikely that a dispute would arise in practice, given that no formal guidelines are available against which commitment to the 1998 Declaration can be measured.

The EU trade policy framework incorporates only clauses that reaffirm prior commitments to labour agreements, introducing no new conditions for international trade and investment under its agreements. The US labour provisions, on the other hand, based upon the 2007 Bipartisan Agreement on Trade Policy, include a binding obligation to effectively enforce domestic labour laws. As a result, governments need to be prepared to address noticeable gaps, if any, in labour law and practice. For the Asia-Pacific region, labour provisions in emerging FTAs may pose a challenge if they explicitly contradict fundamental labour principles, and if they pressure countries to address gaps in domestic labour law where only weak regulatory and monitoring capacity is available.

Appendix A

Two existing multilateral trade agreements incorporate a separate agreement on labour cooperation. The North American Free Trade Agreement (NAFTA) negotiations included a separate North American Agreement on Labour Cooperation (NAALC) that represented the first key link between labour standards and international trade. The agreement encourages Canada, Mexico, and the US to uphold their respective national laws, but does not introduce obligations to enforce international labour standards in a way that would weaken domestic labour law.[27] The US-Dominican Republic-Central America Free Trade Agreement[28] (US-CAFTA-DR) is another regional multilateral FTA, one that includes a labour chapter[29] containing the two enforceable obligations as outlined in the 2007 Bipartisan Trade Policy template.

More recently, the P4 presents another multilateral trade agreement that incorporates labour provisions through its separate Memorandum of Understanding (MoU) on Labour Cooperation. This MoU (a) explicitly recognizes the parties' commitments to the principles of the 1998 ILO Declaration; (b) commits the Parties to work towards aligning national labour codes with their international labour standard (ILS) commitments; and (c) discourages weakening labour codes for the purpose of encouraging trade and investment.[30] Like the NAALC, the P4's MoU on Labour Cooperation includes neither a dispute settlement mechanism nor any type of enforceable obligation. Unlike the NAALC, the P4 explicitly links national labour law to ILS and discourages the weakening of domestic labour laws to encourage investment and trade.

27 Commission for Labor Cooperation: North American Agreement on Labour Cooperation. Full text. Available from: http://www.naalc.org/naalc.htm.

28 USTR, CAFTA-DR (Dominican Republic-Central America FTA). Final text (2014). Available from: http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

29 Ibid.: Chapter Sixteen: "Labour". [Online.] Available from: http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf.

30 New Zealand Ministry of Foreign Affairs and Trade: Trans-Pacific Strategic Economic Partnership Agreement: Memorandum of Understanding on Labour Cooperation. Available from: http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/labour-mou.pdf.

Appendix B

List of asean member states' existing international trade agreements with labour provisions[31]

Note: An exhaustive database for all Asia-Pacific FTAs is available at http://aric.adb.org/fta.

ASEAN

- AANZFTA
- ASEAN – China FTA
- ASEAN – India FTA
- ASEAN – Japan FTA
- ASEAN – Republic of Korea FTA

Brunei Darussalam

- Brunei-Japan Economic Partnership Agreement
- P4

Under negotiation

- TPP

Cambodia

- EU: currently under the "Everything But Arms" Generalised Scheme of Preferences (GSP), i.e. duty-free access to the EU for exports of all products except arms and ammunition. [No labour provisions.]

Indonesia

- EU: currently under the general Generalised Scheme of Preferences (GSP), i.e. duty-free access to the EU for exports of all products except arms and ammunition. [No labour provisions.]

Lao PDR

- EU: currently under the "Everything But Arms" Generalised Scheme of Preferences (GSP), i.e. duty-free access to the EU for exports of all products except arms and ammunition. [No labour provisions.]

Malaysia

- Malaysia – Japan Economic Partnership Agreement
- Malaysia – Chile FTA
- Malaysia – New Zealand FTA
- Malaysia – Australia FTA

31 Unless otherwise stated, all agreements have been concluded.

Under negotiation

- Malaysia – EU FTA (negotiations began in October 2010)
- TPP

Myanmar

- EU: currently under the "Everything But Arms" Generalised Scheme of Preferences (GSP), i.e. duty-free access to the EU for exports of all products except arms and ammunition. [No labour provisions.]

Philippines

Engaged in consultations to join the TPP.

Singapore

- Singapore – Australia FTA
- Singapore – Japan EPA
- Singapore – Korea FTA
- Singapore – Peru FTA
- Singapore – US FTA
- Singapore – New Zealand Closer Economic Partnership
- P4

Pending domestic approval

- Singapore – EU FTA (Negotiations were completed on 17 December 2012, now pending signing and verification. First ASEAN country to launch talks after EU-ASEAN negotiations were discontinued.)

Under negotiation

- TPP

Thailand

Under negotiation

- Thailand – EU FTA (negotiations launched 6 March 2013)

Viet Nam

- Viet Nam – Chile FTA
- Viet Nam – Japan Economic Partnership Agreement
- Viet Nam – EU FTA (negotiations began in June 2012, expected completion is October 2014)

Under negotiation

- Viet Nam – EU FTA (under negotiation since June 2012)
  - Background: The EU-Viet Nam FTA negotiations began in June 2012 as part of the EU pivot to

secure FTAs bilaterally with individual ASEAN countries following the suspension of EU-ASEAN FTA[32] amid political concerns regarding Myanmar. Currently, the EU is negotiating FTAs with Malaysia, Thailand, and Viet Nam, and finalized FTA negotiations with Singapore in December 2012.

- TPP

List of existing (concluded and under negotiation) non-asean, asia-pacific international trade agreements with labour provisions

China

No FTA negotiations are under way, but China is keen on initiating FTA talks with the EU. The EU has agreed to begin talks towards an FTA once an EU-China investment treaty is concluded.

India

- EU-India FTA (under negotiation – no noticeable momentum)

Japan

- Japan – EU FTA (under negotiation)

Republic of Korea (non-ASEAN member)

- EU-Korea FTA (in force as of 1 July 2011)

32 There is reason to believe talks may resume post-2015 (see http://www.bilaterals.org/?foreign-ministers-rekindle).

References

Australian Department of Foreign Affairs and Trade. *TPP ove*rview. Available at: http://www.dfat.gov.au/fta/tpp/tpp-overview.pdf.

Australia Government Department of Foreign Affairs and Trade. 2014. *Malaysia-Australia Free Trade Agreement: Side letter Labour – Malaysian confirmation to Australia* Available from: https://www.dfat.gov.au/fta/mafta/html/mafta-side-letter-labour-malaysia.html.

Bolle, M. J. 2007. *Trade Promotion Authority (TPA) renewal: Core labor standards issues: A brief overview*. Available from: http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1026&context=crs.

Commission for Labor Cooperation, *North American Agreement on Labour Cooperation*. Full text available from: http://www.naalc.org/naalc.htm.

EU Commission. 2014. *Overview of FTA and other trade negotiations*. Available from: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

—. 2014. EU Commission, EU-Korea FTA Chapter Thirteen: Trade and Sustainable Development, L 127/62. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL&from=EN. Article 13.4.3.

—. 2014. EU Commission, Text of the EU-Singapore Free Trade Agreement, Chapter Thirteen: Trade and Sustainable Development. Available from: http://trade.ec.europa.eu/doclib/press/index.cfm?id=961.

ILO. 2014. *Introduction to International Labour Standards: Conventions and Recommendations*. Available from: http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm.

Kelsey, J. 2010. "Introduction", in J. Kelsey (ed.) *No ordinary deal: Unmasking the Trans-Pacific Partnership Agreement*. Allen and Unwin, Sydney.

New Zealand Ministry of Foreign Affairs and Trade, *Trans-Pacific Strategic Economic Partnership Agreement: Memorandum of Understanding on Labour Cooperation*. Available from: http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/labour-mou.pdf.

USTR (Office of the United States Trade Representative). 2007. *Trade facts: Bipartisan trade deal* Available from: http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf.

—. 2007. Trade facts: Bipartisan trade deal. Available from: http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf.

—. *Trans-Pacific partners and United States launch FTA negotiations*. Available from: http://www.ustr.gov/trans-pacific-partners-and-united-states-launch-fta-negotiations.

—. 2014. "United States and Philippines commit to intensified engagement on trade" (2014). Available from: http://www.ustr.gov/about-us/press-office/press-releases/2014/March/US-and-Philippines-commit-to-intensified-engagement-on-trade.

—. 2014. CAFTA-DR (Dominican Republic-Central America FTA). Final text (2014). Available from: http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

Wagle, Swarnim; McKenna, Miles. 2013. "Trade regionalism in the Asia-Pacific: New game, old rules?" Available at: http://blogs.worldbank.org/trade/trade-regionalism-asia-pacific-new-game-old-rules.

Woolcock, S. 2007. European Union policy towards Free Trade Agreements Available from: http://www.felixpena.com.ar/contenido/negociaciones/anexos/2010-09-european-union-policy-towards-free-trade-agreements.pdf.

ILO Regional Office for Asia and the Pacific
United Nations Building, 11th Floor
Rajdamnern Nok Avenue
Bangkok 10200, Thailand
Tel.: +66 2 288 1234
Fax: +66 2 288 3062
Email: BANGKOK@ilo.org

www.ilo.org/asia