

STUDIES ON GROWTH WITH EQUITY

**ASSESSMENT OF LABOUR PROVISIONS IN TRADE
AND INVESTMENT ARRANGEMENTS**

INTERNATIONAL LABOUR ORGANIZATION

EXECUTIVE SUMMARY

Over the past two decades, trade-related labour provisions have become more commonplace and comprehensive...

There has been an exponential increase in trade agreements over the past two decades. Consequently, more trade is conducted within the framework of bilateral and plurilateral trade agreements than outside: almost 55 per cent of goods exported took place within that framework in 2014, compared with 42 per cent in 1995. Furthermore, it is increasingly common for new trade agreements to include labour provisions, and currently a quarter of the value of trade that takes place within the trade agreements framework falls under the scope of such provisions – which were practically inexistent until the mid-1990s. The Trans-Pacific Partnership Agreement (TPP, which has recently been concluded though not yet ratified) and the Transatlantic Trade and Investment Partnership (TTIP, which is still being negotiated), may provide a further significant increase in the incidence of trade that falls within the framework of bilateral or regional agreements with labour provisions.

Trade-related labour provisions take into consideration any standard which addresses labour relations or minimum working terms or conditions, mechanisms for monitoring or promoting compliance, and/or a framework for cooperation. This definition groups together a broad range of labour provisions, including references to workers' rights, as well as frameworks for cooperation.

The first trade agreement to include a binding labour provision was the North American Free Trade Agreement, in 1994. As of December 2015, there were 76 trade agreements in place (covering 135 economies) that include labour provisions, nearly half of which came into existence after 2008. Over 80 per cent of agreements that came into force since 2013 contain such provisions. This figure includes the majority of trade agreements concluded with the main proponents of these provisions, such as

the European Union (EU), the United States and Canada, and their trade counterparts, and it is also increasingly common for such agreements to involve other actors, such as South–South partners, Chile, New Zealand and the European Free Trade Association.

As in the case of trade agreements, there has been a growing reference to labour standards in international investment arrangements (IIAs). Indeed, 12 out of the 31 IIAs concluded in 2014 refer to the protection of labour rights, including ILO instruments.

The purpose of this report is, first, to provide an analysis of the design, implementation and outcomes of labour provisions in unilateral, bilateral and plurilateral trade arrangements, as well as in some IIAs. Second, the report uses this analysis to gain a better understanding of whether and how labour provisions strengthen the framework conditions for decent work under which enterprises and workers operate, including through the involvement of the social partners and the wider public. Finally, the report aims to assess both descriptively and empirically the various contributions of the ILO's work on trade arrangements and to present areas for analysis with respect to implementation and coherence of labour provisions.

...while taking different forms in different countries

In the great majority of trade agreements that include labour provisions the parties commit to not lower their labour standards or derogate from labour law with a view to boosting competitiveness. Labour provisions also aim at ensuring that domestic labour laws are effectively enforced and are consistent with labour standards. Seventy-two per cent of trade-related labour provisions make reference to ILO instruments. Most include legally binding commitments with respect to fundamental principles and rights at work, working terms and conditions, and mechanisms for dispute resolution in case of violation of these obligations. In practice, however, dispute resolution mechanisms have only rarely been triggered, and in the cases where there was a possibility of economic sanctions, only one actually went to arbitration. Instead, the signing parties generally prefer

to engage in dialogue and cooperative activities to prevent and resolve labour disputes.

These trends point to increased awareness by governments (with their social partners) of the need to better align economic and social outcomes. The following examples demonstrate this emphasis:

- In the case of the United States, the focus on the effective enforcement of labour rights includes reforms in labour laws and practices before the agreement is in place (so-called pre-ratification requirements). In addition, once concluded, the agreement often includes cooperative activities to build capacity and monitoring to assess progress.
- In the EU, there is increasing focus on sustainable development which takes into consideration the Decent Work Agenda and ILO fundamental Conventions, *inter alia*. The approach relies on cooperation with trade partners and civil society to monitor progress.
- In Canada, there is an emphasis on the extension of labour rights as the country increases its obligations – going beyond the principles of the 1998 ILO Declaration on Fundamental Principles and Rights at Work – and the stringency of implementation mechanisms.
- In Chile there is a country-specific approach that relies mostly on cooperative activities to find more innovative and far-reaching ways to address issues with respect to labour practices in trading partner countries.

In theory, labour provisions may help improve the social impact

By a number of metrics, trade has had positive impacts, particularly with respect to improving access to markets and lowering the prices of imported goods, which may have improved incomes of certain groups. However, the academic literature presents mixed findings regarding the impact of trade on labour markets, particularly in terms of job quality and income distribution. In particular, income inequality has tended to widen in the

majority of countries since the 1980s, partly due to trade and investment liberalisation. More generally, the winners from trade are not adequately compensating those who lose in terms of jobs and incomes.

The *World Employment and Social Outlook 2015* report on the changing nature of employment lends support to this empirical literature. It found that in a large part of the trade conducted through global supply chains (GSCs), trade tends to generate economic benefits for firms (in terms of higher productivity) but not necessarily for workers (in terms of wages). This disparity is due partly to the asymmetric power dynamics between supplier and lead firms in GSCs, and partly to the weak capacity within governments to implement and monitor labour rights and working terms and conditions effectively.

Indeed, several studies argue that such labour market outcomes depend strongly on institutional factors. In this context, trade-related labour provisions can be regarded as one option to boost the benefits of growth, minimise costs and tackle inequalities.

However, questions also arise as to what extent these provisions have been effective and can be evaluated. The report examines the macro and micro impacts of labour provisions with respect to trade, institutional changes and labour market outcomes.

In practice, the report finds that labour provisions do not harm or divert trade...

Based on empirical analysis, no evidence is found at the cross-country macro level to support the claim that implementation of labour provisions leads to a reduction or diversion of trade flows. Trade agreements boost trade between members of the agreement to a similar extent, irrespective of the existence of labour provisions. According to the estimates, a trade agreement with labour provisions increases the value of trade by 28 per cent on average, while a trade agreement without labour provisions increases trade by 26 per cent. In line with these findings, there is also no

evidence that labour provisions cause trade flows to shift to non-members of the trade agreement.

...while supporting labour market access, particularly for working-age women...

Results show that, on average, trade agreements that contain labour provisions impact positively on labour force participation rates, bringing larger proportions of male and female working-age populations into the labour force and, particularly, increasing the female labour force. One possible explanation for the positive impact on labour force participation rates is that the policy dialogue and awareness raising that is often associated with labour provisions in trade agreements can raise people's expectations of better working conditions, which in turn increases their willingness to enter the labour force. The gender-related aspects of trade and, in particular, labour provisions are highlighted in other key findings of the report. In particular, the emphasis on gender equity (mostly through the principle of non-discrimination in employment and occupation) found in some labour provisions will have had some impact on the closing of gender gaps.

The aggregate cross-country analysis does not indicate any impact of labour provisions on other labour market outcomes. Nevertheless there is the possibility that labour provisions may still have an impact at the country-level, at least in some countries. The evidence suggests that at the country-level, labour provisions are only one of several mechanisms for promoting labour standards. In this respect, implementation mechanisms at the domestic level are a crucial factor in the application of labour provisions.

...and going hand-in-hand with stronger labour market institutions

Additional analyses based on case studies were also undertaken for this report to investigate the extent to which labour provisions may impact on labour market outcomes, positively or negatively.

The case studies were selected on the basis of data availability and whether a sufficient time period had elapsed since conclusion of the trade agreement. Although the findings are not fully generalizable they provide some relevant examples of what has and has not worked in specific country contexts. In each of the cases, capacity-building activities, monitoring and stakeholder involvement were all associated with positive institutional and legal changes and, in some cases, improvements in working conditions at the sectoral level. More specifically, the following findings emerge from the analysis:

- In the case of Dominican Republic-Central America Free Trade Agreement, the challenge has been to address the gaps between labour legislation and its enforcement. In this respect the agreement was helpful in strengthening institutions and capacity building in ministries of labour and the judiciary. There has also been sustained involvement of non-state actors and training of particular stakeholders (e.g. trade unions). This has led to a number of concrete institutional and legal improvements, such as ratification of outstanding ILO fundamental Conventions, increases in the budgets of labour inspectorates and improvements in training. For example, in the Dominican Republic, training has allowed labour inspectors to reconcile compliance and competitiveness in specific areas, such as export processing zones. However, challenges still remain in achieving broad-based improvements, which is reflected in the number of dispute resolutions conducted under this agreement.
- In the Cambodia-US Textile Agreement, implementation has mainly focused on direct intervention at the firm level –largely reflecting weaknesses in the institutional environment. This has meant tying the positive incentive of increased trade to improvements in working conditions at the firm level. The result is improved wages at the firm level, including a reduction of the gender wage gap, and some strengthening of the right to freedom of association.
- In Bangladesh, activities have been undertaken within the framework of a unilateral trade arrangement in the aftermath of the Rana Plaza tragedy. This was facilitated by the close commercial relations that existed

between Bangladesh and the EU prior to the tragedy. Additionally, an Action Plan was implemented within the framework of the US Generalized System of Preferences labour requirements. Achievements include more frequent and improved inspections regarding fire and building safety, and amendments to the Bangladesh Labour Act.

However the impact of labour provisions depends crucially on, first, the extent to which they involve stakeholders, notably social partners...

Importantly, the study suggests that, for labour provisions to be effective they need to involve stakeholders, notably social partners, in the making and implementation of trade agreements. This reflects an overall trend of seeking to make trade negotiations – which have traditionally been conducted between governments, with only limited public participation and insight – less opaque. Explicit references to the involvement of stakeholders in trade agreements have become more common and comprehensive. In part, this development has been driven by the expanding range of issues covered by trade agreements, which can extend to labour standards, environmental protection, health and safety and public procurement, as well as other regulations that can affect the way in which people lead their lives.

In the negotiation phase for a new trade agreement, most of the examined countries set up permanent consultative structures with fixed participation and inclusive mechanisms involving broader segments of civil society and the general public. To promote involvement in the implementation process, some countries, such as the United States and Canada, usually provide an opportunity to consult or establish stakeholder advisory groups on a voluntary basis. In the case of the EU, it is mandatory for both parties to consult with advisory bodies; and there are institutional mechanisms explicitly aimed at promoting dialogue between the civil societies of the trading partner countries. However, the implementation of some of these mechanisms is still limited in practice.

The evidence from this report suggests that progress is being made in enabling labour advocates to promote labour rights. Furthermore,

cross-border civil society coalitions can play a fundamental role in the activation of implementation mechanisms. For example, in the case of the EU–Republic of Korea trade agreement, cross-border dialogue between the domestic advisory groups raised awareness, helped to identify areas for further action with respect to labour rights, and triggered discussions on development cooperation projects.

...second, transparency of trade negotiations and implementation mechanisms...

While governments to a certain extent provide information to and seek the views of stakeholders, stakeholders have expressed limited satisfaction with overall transparency, particularly in negotiation processes. A key additional challenge is to enhance the dimension of accountability. This could be achieved by providing feedback and establishing formal mechanisms to inform stakeholders of how their contributions have been taken into consideration in the decision-making process.

...and third, coherence of trade-related labour provisions with respect to the “right to regulate” as well as ILO standards

Cross-cutting trade agreements that include labour provisions can be very complex, therefore the rules they impose can give rise to some degree of incoherence. There are three main reasons for this. First, there can be a lot of variation between the normative contents of different trade agreements, and also between the implementation mechanisms used by different actors. This suggests there is a need to examine and better understand the different approaches being adopted, to ensure that the overall objective of promoting labour standards through trade agreements can be achieved. Second, non-labour elements of trade agreements, such as provisions on investment protection, may constrain the capacity of governments to implement sustainable policies in other areas, particularly labour. As a response, a “right to regulate” or “policy space” clause is often included in agreements, to balance the concerns of investors on the one hand and the State’s ability to achieve legitimate policy objectives on the other. Third,

to an increasing extent ILO instruments are being explicitly referred to in trade agreements, highlighting the possibility of inconsistent application at the national level and across agreements.

ILO expertise, if properly mobilised, can be instrumental in making labour provisions effective

The ILO, in line with its mandate, can contribute to enhanced coherence between labour provisions and the international system of labour standards. This can be done by providing advice and technical expertise, as well as through its development cooperation programmes.

Already, parties to trade agreements have actively sought advice from the ILO concerning the design of labour provisions. Also, the ILO, through the information which is publicly available from its supervisory mechanisms, has occasionally provided an important reference in terms of how best to implement labour provisions. Almost 30 per cent of cases discussed during the Committee on the Application of Standards at the 2015 International Labour Conference made reference to trade agreements.

As well as being a source of advice and information, the ILO can also be involved in the implementation of labour commitments through its cooperative activities, which tend to focus on technical assistance and institutional capacity of trade partners. All areas of ILO involvement are interlinked, as the comments of the ILO's supervisory mechanisms are used to identify the critical areas that technical cooperation can address.

Nevertheless, there is scope for building further coherence between States' obligations as members of the ILO and their relationships with each other in trade arrangements. The trends presented in this paper, and the continued widening of income inequalities, highlight the importance of promoting greater coherence between ILO instruments and labour provisions of trade and investment agreements.

