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# An International Regulatory Framework for National Employment Policies

Christian HÄBERLI<sup>\*</sup>

*Employment-related policies are sensitive by any standard, and they remain basically national despite international labour standards (ILS) being even older than the United Nations. Globalization is changing this situation where countries may have to choose between 'more' or 'better' jobs. The multilateral framework of the World Trade Organization (WTO) can only have an indirect impact. But Regional Trade Agreements (RTA) and International Investment Agreements (IIA) are emerging as a new way of gradually enhancing the impact of certain labour standards. In addition, unilateral measures both by governments and importers driven by social and environmental consumer preferences and pressure groups increasingly shape the international regulatory framework for national employment policies. Even small, locally operating enterprises risk marginalization and market exclusion by ignoring these developments. The long-term influence of this new 'network approach' on employment-related policies, including job location, gender issues, social coherence and migration remains to be seen. Nonetheless, the still flimsy evidence gathered here seems to indicate that this new, international framework might increase sustainable employment where and when supporting measures, including through unilateral preferences and even sanctions, form a 'cocktail' which export-oriented industries and their suppliers will find palatable.*

## 1 THE INTERNATIONAL FRAMEWORK FOR SUSTAINABLE EMPLOYMENT

This article argues that international treaty law and practice increasingly shape domestic employment policies. At the national level, investment, production and marketing decisions are co-influenced by labour and employment policies. In a globalizing world, multinational firms will take into account both their sales prospects and the international regulatory environment when they make these decisions. But even small, locally operating enterprises cannot fail to consider these

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developments without risking marginalization and market exclusion. This is so because their goods and services face increasing competition even on local markets with hitherto closed borders.

For a long time domestic employment policy-makers seemed to pay scant attention to the international regulatory framework. The same goes for many, mainly country-based analyses (Betcherman 2015, Dixon, Lim and van Ours 2013, Felipe, Mehta and Rhee 2014, Godlonton 2014, Lavopa and Szirmai 2012, Zhang et al. 2013). A book edited by Jansen et al. had already emphasized this disconnect between the trade-and-employment linkages in public as well as in academic debates, and the lack of factual assessments of the employment and distributional implications of trade (ILO 2011). Recent developments, however, might bring a wind of change to this very sensitive but still under-researched field of interactive social policy-making.

This article is written from a legal perspective. It attempts to show a mutually reinforcing normative effect of six different sets of rules, measures and economic factors emerging as the new shapers of an international regulatory framework for all kinds of national policies relevant for employment (legislation, executive decisions, policy statements, budgetary decisions, private/public schemes, case law etc.):

(Section 1.1) The *International Labour Standards* ('fundamental' and 'governance' ILS) and the supervision and enforcement mechanisms in the International Labour Organization (ILO).

(Section 1.2) Recent, more stringent references to labour standards in *Regional Trade Agreements* (RTA).<sup>1</sup>

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<sup>1</sup> Note on terminology: under WTO law it is important to distinguish *Regional Trade Agreements* (RTA) or *Free Trade Agreements* (FTA) from *Preferential Trade Agreements* (PTA):

- RTA and FTA fall under stringent WTO rules like Article XXIV GATT and Article V GATS exempting them from the most-favoured nation (MFN) obligation.
- The term PTA designates at least partly non-reciprocal preferential schemes; others, such as the national schemes established under the Generalized System of Preferences (GSP) are purely unilateral. The main legal base for the MFN exemption of PTA is the *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause)*, GATT Doc L/4903, Decision of 28 November 1979, paras 1 and 2(a). The Enabling Clause now forms part of the GATT 1994.
- Some scholars note that trade agreements are increasingly concluded between non-adjacent countries and hence apply the term PTA to what in WTO legal terms are RTA and FTA.

(Section 1.3) *International Investment Agreements* (IIA) aiming at a better investment climate as well as more and better job opportunities.

(Section 1.4) *Governmental incentives and sanctions* mainly applied by the United States of America (USA) and (in a different way) by the European Union (EU).

(Section 1.5) *Consumer preferences* (social, environmental and economic) and retailer influence.

(Section 1.6) The more general but relatively stringent non-discrimination rules and commitments in the *World Trade Organization* (WTO).

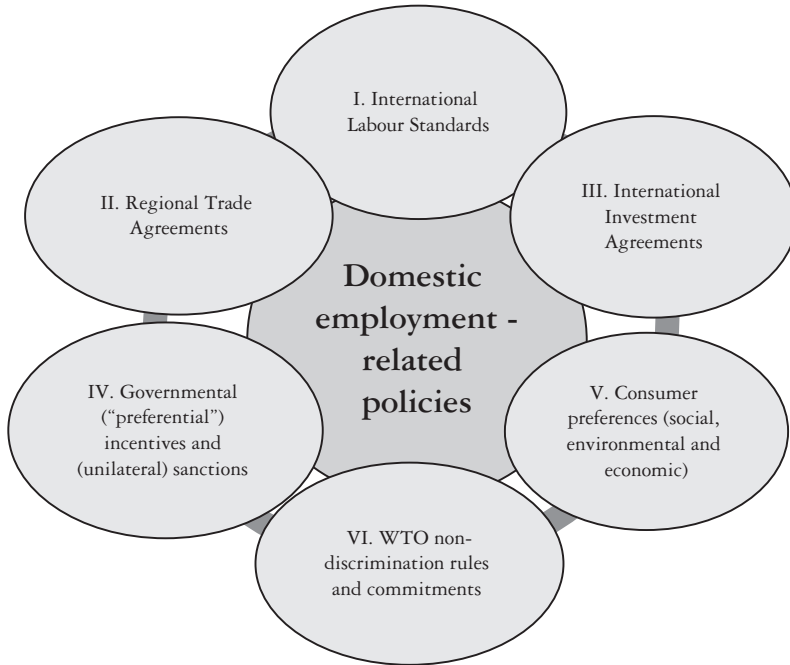
These six elements form the *international polity for sustainable employment* (Figure 1). No general conclusions are possible as to the relative strength (or weakness) of each element. The interaction between private interests and regulators keeps evolving, and judicial enforcement of treaty-based social or labour protection clauses has barely started. The research hypothesis, however, is that despite the absence of WTO rules preventing social dumping the interaction of all six elements is already exercising an upward pressure on labour standards in certain export-oriented goods and services sectors.

At the same time, depending on how these elements interact, this upward pressure which might well continue or even increase alongside growing globalization is not unproblematic. Better jobs are not more (or 'decent') jobs. Countries with high unemployment rates and without social safety nets may prefer, down to a point, bad jobs to no jobs. Quite often the informal sector provides a substantial part of economic growth. Governments may condone or simply have to accept even non-sustainable informal employment. The question then turns to the normative role of the international regulatory framework in shaping national policy choices and increasing effective adherence to minimal standards in such countries. Is there an international regulatory limit to social dumping in the form of competition at the expense of the less skilled workforce as the weakest link in the supply chain? On the other side, how can the international framework limit protectionism in disguise (here: non-tariff barriers against competition from abroad)?

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— The WTO Secretariat maintains two separate databases, respectively, for RTA/FTA (<http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>) and for PTA (<http://ptadb.wto.org/?lang=1>).

Figure 1 Interaction of Employment-Related Standards, Policies, Treaties, Unilateral Measures and Consumer Preferences



Because of the rules and institutional fragmentation at the international level, there is no comprehensive list of all labour-related provisions in international treaties, let alone one with information on unilateral measures.<sup>2</sup> A new, comprehensive dataset project led by the World Trade Institute (WTI) is the *Design of Trade Agreements* (DESTA). By 2017, it is expected to cover over 790 PTAs providing information on a large set of design features including references to labour standards – both in preambles and in operational paragraphs.<sup>3</sup>

<sup>2</sup> The **ILO Database NORMLEX** (<http://www.ilo.org/dyn/normlex>) is the most comprehensive ILS information system, but it does not list labour-related clauses in RTA and IIA (ILO 2009b). For RTA, the database of the **WTO Secretariat** lists labour provisions but only if they have been mentioned explicitly under the WTO transparency mechanism. For IIA, both **UNCTAD** (<http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>) and **ICSID** (searchable by Member States at <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/Bilateral-Investment-Treaties-Database.aspx>) maintain extensive databases, but without direct links to labour provisions.

As a result, numerous RTA and IIA labour provisions – even the most well-known ones, such as those in Northern American RTA – do not explicitly appear in any of these four databases.

<sup>3</sup> Access to publications and information on the DESTA database is available at <http://www.designoftradeagreements.org/>.

A question largely outside the scope of this article is whether, individually or together, these agreements and measures are a pull factor for more and better employment ('race to the top') or whether on the contrary trade liberalization acts as a brake for the creation of better jobs or an incentive for employment dislocation ('race to the bottom'). Basically, the main scholarly contributions to this often-emotional debate see little or no evidence for a trade-induced lowering of national labour standards (Maskus 1997 and Maskus et al. 2005; Fugazza, Olarreaga and Robert-Nicoud 2014). A less recent literature survey by OECD found scant evidence of effectively enforced labour provisions in trade agreements and, accordingly, for a race between investment-competing developing countries (Brown 2009). A legal and econometric analysis of different RTA labour provisions confirmed this view (Häberli, Jansen and Monteiro 2012).

This article first details each of the six above-mentioned elements of the international policy framework for sustainable employment. Based on this overview an attempt is made to gauge their impact on effective ILS adherence at the national level. The conclusion argues that while the normative value of this framework is still limited, it appears to be increasing especially in RTA and IIA, and in combination with unilateral measures and consumer pressures shaping effective access to important markets. Consequently, effective adherence is likely to contribute to global and national development. Those new combinations of international obligations and unilateral and (some) private measures are most likely to further improve adherence, especially in export-oriented developing economies. Hence, domestic employment policies failing to take the relevant international framework into account are at risk of failure, inefficiency and ineffectiveness.

### 1.1 INTERNATIONAL LABOUR STANDARDS

In its *Declaration on Fundamental Principles and Rights at Work* adopted in 1998 the ILO considered four core labour standards enshrined in a dozen conventions as deserving universal application:

- (1) Freedom of association (Freedom of Association and Protection of the Right to Organise; Right to Organise and Collective Bargaining).
- (2) Forced labour.
- (3) Discrimination (Equal Remuneration and Discrimination in Employment and Occupation).
- (4) Child labour (Minimum Age and Worst Forms of Child Labour).

In addition, four so-called governance priority conventions regulate Labour Inspection, Employment Policy and Tripartite Consultation.



To a certain extent the obligations in these ILS restrict national employment policy space. This is not only true for the mandatory consultative process leading to ILS ratification. It is difficult to isolate international instruments from other factors, such as local political culture. But ILS adherence can increase labour costs because they mainly aim at better jobs. On the other hand, and notwithstanding their impact on productivity, ILS are implicit factors for investment location and production decisions.

This in turn may affect the conditions of competition for foreign direct investment (FDI) between countries with different obligations and effective adherence levels. The question discussed below is whether references to ILS in RTA and IIA may mitigate a race to the bottom by way of social dumping at the expense of the local workforce. As for FDI, an additional question is whether labour standards can be transnational, i.e., whether international investors are bound to respect those ILS ratified by their home states. In an article on agricultural FDI the argument was made that home states do indeed have certain obligations under public international law (Häberli and Smith 2014).

The following two sections are based on our earlier research and look at references to labour standards in RTA and IIA (Häberli, Jansen and Monteiro 2012; Häberli 2015). Generally speaking, new agreements concluded by the US, the EU and New Zealand systematically contain such references, albeit in very different forms and normative levels. So-called South–South treaties remain laggards here; with only a few exceptions, even recent ones may at best contain preambular language on the harmonious development of social relations. Even fewer or no such references are found in the agreements with other developed countries like Australia, Japan and Switzerland.

## 1.2 REGIONAL TRADE AGREEMENTS

The USA and the EU as the two biggest markets for agricultural and manufactured imports used to follow their respective RTA templates with all their trading partners. Nowadays the latter increasingly co-shapes form and content. More diversity (also called the ‘spaghetti bowl of regionalism’) is the result. This also goes for the social and labour provisions in the more recent RTA. Since around 2004, even countries like the USA which have not ratified all relevant conventions accept direct or indirect references to ILO core labour standards. Nevertheless, a closer look at labour provisions in four groups of RTA reveals several typological and functional differences:

- (1) The USA demands, and obtains, rather far-reaching commitments in its RTA. They are often a mixture of duties (e.g., prevent child labour)

and commitments to prevent a ‘race to the bottom’ (e.g., not to apply labour laws in a manner affecting trade). The USA tries to enforce such commitments in a number of diplomatic and, as shown below, even judicial ways. Since 1993, all its RTA have included such references, and in some cases even foresee the possibility of sanctions for violations of workers’ rights (re-invested, as it were, through technical cooperation). Some such interventions may be due to efforts by the US Congress to participate more forcefully in foreign economic affairs, or demands and participation attempts by trade unions and non-governmental organizations (NGO). There is still no case of actually applied trade sanctions based on RTA provisions – unlike the rather frequent withdrawals of unilateral tariff preferences. However, some examples discussed below indicate that this ‘red line’ might be crossed soon.

- (2) The EU prefers a ‘soft’ approach especially in its Economic Partnership Agreements (EPA): unconditional market access and technical and financial cooperation – with a large dose of supervision, and control of funds, by the EU Commission. While incentives are still the cornerstone of the EU’s ILS enhancement programmes, some more stringent provisions also appear in its more recent RTA and EPA; no RTA-based sanctions have so far been implemented.
- (3) RTA between developing countries used to contain some of the ‘softest’ labour provisions. Operative social clauses are still extremely rare, and preambular language dominates. The ILO noted that developing countries had not agreed on any substantive commitments in respect of labour standards in agreements between them (ILO 2009b). As shown in three examples, since then the situation has become more differentiated.
  - (i) The Association of Southeast Asian Nations (ASEAN) with its ten Member States foresees in its FTA no specific social or labour provisions. A couple of legal texts address migration and discrimination against foreign residents. For instance, human trafficking is prohibited, and ASEAN has adopted a Declaration on the Protection and Promotion of the Rights of Migrant Workers by which these workers receive facilitated access to justice and social welfare services ‘as appropriate’.
  - (ii) China has not committed to any stringent non-trade obligations in its treaties with those few but usually small developed countries with which it has entered bilateral treaty relations. Yet China’s RTA

- with other Asian developing countries contain obligations to not encourage trade or investment through weakening labour laws.
- (iii) South Africa (and Nigeria) as the largest African economies have become increasingly hostile to stringent treaty commitments, especially for social and environmental matters. The EU-South Africa FTA recognizes that social progress is a precondition for economic development, and it foresees a dialogue on social issues with the pertinent ILO standards as the 'point of reference'. The other South African RTA have social provisions only in the preamble.
  - (4) Reluctance to include labour provisions in trade and investment treaties is not limited to developing countries. While New Zealand has started to take a more active stance in such negotiations, Australia and Japan rarely include any such references in their RTA. None of Switzerland's 28 RTA contains any operative labour provisions. Even the recent (2014) China-Switzerland FTA only provides that the Parties 'shall enhance their cooperation on labour and employment', while their Agreement on Labour and Employment Cooperation foresees that the two Parties 'will strengthen bilateral cooperation relating to labour and employment as part of a global approach to trade and sustainable development' and 'improve their respective labour standards and practices in line with their national labour policy objectives and according to the obligations set out in applicable ILO Conventions'.

### 1.3 INTERNATIONAL INVESTMENT AGREEMENTS

After decades of stagnation many IIA are now in a process of rapid change, and regional treaties complement bilateral and other forms of agreements. Presently, there is no emerging universal IIA standard. Investor-State Dispute Settlement (ISDS) is only the most divisive among many other issues (Polanco 2014).

It is also interesting to note that the EPA between the EU and African, Caribbean and Pacific States (ACP) as well as the so-called mega-regionals which the USA negotiates with the Pacific Area (TPP) and with the EU (TTIP) comprise both trade and investment chapters and, as the case may be, labour provisions and development incentives contained in side agreements.

The more ambitious IIA contain four types of employment-related clauses and commitments, albeit with vastly differing normative strength: (i) No lowering of national standards (ii) References to ILS and/or to the ILO Declaration on

Fundamental Principles and Rights at Work (1998) (iii) Ensuring that investors do not manage or operate their investments in a manner that circumvents ILS (iv) Obligation to respect corporate social responsibility (CSR) standards.<sup>4</sup>

As shown in five examples, labour provisions in IIA are more precise than the more general references and commitments not to weaken social standards contained in RTA:

- (1) Ghana has 14 IIA presently in force. For instance, the 1995 investment treaty with Germany has no social clauses. But Ghana is also a party to the Economic Community of West African States (ECOWAS) which in 2014 became a customs union. One objective of ECOWAS is the integration of all sections of the population in the social development of the region. For this purpose the Member States undertake to 'harmonise their labour laws and social security legislations'.
- (2) Ethiopia is a member of the Cotonou Agreement where it committed to certain social policy provisions (e.g., Article 28). It also participates in the negotiations for an EPA between the EU and the Eastern and Southern Africa (ESA) group of countries. Moreover, Ethiopia's IIA with Belgium and Luxembourg (not in force) foresees that 'each Contracting Party shall strive to ensure that its legislation provide for labour standards consistent with the internationally recognised labour rights' and that 'it is inappropriate to encourage investment by relaxing domestic labour legislation'.
- (3) Bangladesh's most recent IIA with a developed country, concluded with Switzerland in 2001 has no references to labour standards, and the one with Austria from 2000 only has a 'commitment to the observance of internationally recognised labour standards'. Nonetheless, besides its always active participation in the ILO, Bangladesh has acknowledged its international obligations in several instances, including in the Rana Plaza Disaster described in section 2.3.
- (4) South Africa is the leading member in the *Common Market for Eastern and Southern Africa* (COMESA), a customs union with only a few cooperation commitments in the field of labour laws. Its national and foreign investment policy is called Trade and Investment South Africa (TISA). In 2012–13, South Africa terminated its IIA containing ILS references with Belgium-Luxembourg, Austria, Germany, Denmark, the Netherlands and Switzerland. The main reasons for these widely noted withdrawals appear to have been: (i) the compatibility with

<sup>4</sup> Compare APEC-UNCTAD, *International Investment Agreements Negotiators Handbook: APEC/UNCTAD MODULES* (December 2012).

evolving sustainable development objectives, and (ii) ISDS procedural abuse by investors leading to divergent legal interpretations of similar provisions, without a well-functioning appeals option (Zhan 2013). It is too early to gauge the effects this cancellation has had on South Africa's investment climate, let alone on employment quantity and quality. South African IIA still in force, for instance with Sweden and the UK, contain no references to labour standards. But there is still other IIA with South Africa as a member. The COMESA Investment Agreement foresees that its members will not 'waive or otherwise derogate from or offer to waive or otherwise derogate from measures concerning labour, public health, safety or the environment as an encouragement for the establishment, expansion or retention of investments' (Article 5 lit. e). And the US-COMESA Agreement Concerning the Development of Trade and Investment Relations foresees that 'the Parties may conclude further agreements, particularly in the areas of commerce, taxation, intellectual property, labor, and investment' (Article 7).

- (5) In the ASEAN community, most members are rather reluctant to address non-trade concerns, let alone commit to free movement of persons or harmonize labour standards. However, a commitment not to undercut social protection has been concluded between New Zealand and the Philippines as a bilateral side agreement to the ASEAN-Australia-New Zealand Agreement (2010). This agreement aims to 'improve working conditions and living standards' and to uphold high-level standards of labour laws, policies and practices 'in the context of economic development and trade liberalization'. It foresees a long list of cooperative activities and establishes a Labour Committee, and a consultative mechanism. There is no obligation to provide information 'contrary to the public interest or the laws'. Even so, the commitment to shield social policies from competitive pressures arising from trade liberalization is remarkable and might show the way for other countries with similar interests.

#### 1.4 PREFERENTIAL INCENTIVES AND UNILATERAL SANCTIONS

In addition to their market access commitments under WTO rules and RTA, many countries grant additional 'preferential' benefits mainly by way of tariff reductions for all or only for certain developing countries. Some of these incentives are enshrined in PTA, while others are entirely unilateral.

The most important PTA are those of the two largest import markets for goods and services:

- (1) Under its Trade Act of 1974 and based on the WTO Enabling Clause, the US has established a general GSP. In addition it grants significant additional preferences covered by a WTO waiver, most importantly the African Growth and Opportunity Act (AGOA).<sup>5</sup> A hitherto seldom used but recently expanded provision in section 307 of the Tariff Act of 1930 generally bans imports of goods made with forced or child labour from entry into the USA. Under this provision, if evidence indicates ‘reasonably but not conclusively’ that goods were made with forced or child labour, a withhold release order (WRO) permits holding such goods at the border. Exporters are then given the opportunity to present evidence certifying that their supply chains are free of forced or child labour, in order to allow their goods to be released.<sup>6</sup>
- (2) The main preferential instruments of the EU are its own GSP as well as duty-free quota-free market access for all products except arms for all LDC (*Everything But Arms/EBA*). Additional preferences are offered under the so-called GSP+ which is a special market access scheme for developing countries respecting international standards on human and labour rights, as well as environmental protection and good governance.

Unilateral preference withdrawals are discussed below (section 2.3).

## 1.5 CONSUMER PREFERENCES

This article cannot describe the numerous attempts of end-of-pipe stakeholders like consumers (or retailer and civil society pressure groups purporting to act on their behalf) to directly improve working conditions in farms and factories through ‘fair trade’ and other incentive schemes. Their ‘non-economic’ objectives are mostly social and environmental, and the preferred tools comprise private standards, consumer information labels and development policy-shaping. They may act directly (e.g., through ‘fair trade’ shops) or indirectly (by lobbying retailers and policy-makers). However, the influence of retailer and consumer pressure groups on upstream labour conditions needs to be factored into this research on the international policy framework for sustainable employment.

<sup>5</sup> Signed into law on 18 May 2000 as Title 1 of The Trade and Development Act of 2000. See *infra* s. 4b.

<sup>6</sup> Compare World Trade Online, posted 4 May 2015.

After the entry into force of the Lisbon Agreement (with a much stronger parliamentary involvement in treaty negotiation and approval) demands were made in the European Parliament for more constraining labour clauses. Similarly, so-called fast track negotiating authority for the US Government is today not only linked to offensive and defensive market access interests but to environmental and social concerns expressed by certain parliamentarians echoing civil society concerns about, say, forced labour or migrant worker protection. Sometimes protectionist interests may also intervene. What is new today is the assumption that trade and investment agreements can and must play a role in solving old and new issues like indentured labour, child labour, forced migration and human trafficking for so-called 3D jobs (dirty, difficult and dangerous).

Here again, the pressure for higher labour standards and 'better' jobs can conflict with policies aiming at 'more' jobs including for marginal groups, migrants, adolescents, and in the informal sector where mandatory social policies, and labour, public health and environmental standards may be waived or not applied.

Some examples of new forms of interaction between private interests and government policy and action will be discussed in section 2.3.

#### 1.6 WTO NON-DISCRIMINATION RULES AND COMMITMENTS

The multilateral trade framework of the WTO has no rules specifically addressing the issue of labour standards or social policies. There is no case of a successful social dumping challenge under its trade remedy rules. A special waiver is required e.g., for preferential treatment of products from countries fully respecting ILS. But few such preferences have actually been granted, besides those in the GSP+ of the EU and AGOA.

On the other side, WTO does have general and relatively stringent (and enforceable) non-discrimination rules. Up to a point, WTO rules can also protect third countries from discrimination by way of bilateral deals and RTA. For instance, a mutual recognition agreement (MRA) on labour standards between two countries could allow a third country, upon showing substantial equivalence of its own standards, to access both markets on equal terms as those foreseen by the MRA.

The protection afforded by WTO rules against arbitrary withdrawals of preferences is discussed in section 2.3.

## 2 DISCUSSION ON EFFECTIVE ADHERENCE

So far we have found that adherence to ILS is still a crucial issue, and that it also co-shapes the trade and investment climate – even where it increases labour costs. But what matters in a trade perspective is the extent of adherence. Effective adherence is difficult to establish in a desk study which in the absence of comprehensive statistical evidence remains limited to anecdotal pieces of information.

In order to test our hypothesis of the increasing interaction and upward pressure of the six international parameters on domestic employment policies and enterprise performance, this analysis tries to gauge effective adherence by different stakeholders in three (not mutually exclusive) ways: adherence to ILS (2.1), by way of labour provisions in trade and investment treaties (2.2), and the ‘stick and carrot’ effect of measures taken by governments, be they treaty-based or unilateral and induced by various domestic stakeholders (2.3).

### 2.1 ADHERENCE TO INTERNATIONAL LABOUR STANDARDS

The well-established traditional monitoring and supervision procedures in the ILO reflect the highly sensitive character of social policies. The specific merits and limitations of tripartite procedures are beyond the scope of this article which sees the biggest impact of international labour-related instruments on domestic labour policies in their mutual responsiveness and interaction with other elements of the international regulatory framework. Actually, most scholars see here a positive relationship between the exercise of trade union rights and manufacturing exports (Kucera and Sarna 2006).

The following three country cases describing ILS adherence are gleaned from Freedom of Association cases on record, and from the *Representation Procedure* under Articles 24 and 25 of the ILO Constitution:<sup>7</sup>

1. Bangladesh is among the most prolific users of ILO monitoring and supervision. In 2010 the Bangladesh Cha-Sramik Union argued interference by the authorities in the election of officers to its Central Executive Committee, as well as the violent suppression of demonstrations organised to protest against this interference. In 2004 the International Textile, Garment & Leather Workers’ Federation (ITGLWF) alleged that the 1969 Industrial Relations Ordinance was incompatible with the right of workers to form and join organizations of their own choosing; the application for registration of the Immaculate (Pvt.) Ltd. Sramik Union had been unlawfully and

<sup>7</sup> The *Representation Procedure* grants an industrial association of employers or of workers the right to present to the ILO Governing Body a representation against any Member State which, in its view, ‘has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party’.



unreasonably refused by the Registrar of Trade Unions; and that seven of the most active workers in the union had been dismissed for anti-union reasons. The ITGLWF also alleged that the Government of Bangladesh had violated freedom of association in export processing zones (EPZs).

2. Madagascar also appears several times in ILO representation procedures. In 2004 the General Maritime Union of Madagascar (SYGMMA) alleged anti-union discrimination, and that the employer of their principal union leaders had set up and run an association serving as an intermediary between seafarers and the recruiting ship-owner which seafarers were obliged to join and which hindered the legitimate activities of SYGMMA. In 2001 various Malagasy trade unions alleged interference by the Government in the internal affairs of trade unions, and the suspension of social dialogue. Furthermore, the ILO Committee of Experts (CEACR) made numerous observations and requests on the application of a convention in Madagascar. At the end of 2014, 41 of these comments were still pending.
3. In 2014 Switzerland had two pending Freedom of Association cases. One was instigated in 2013 by the public services trade union (SSP-VPOD), and the other one in 2003 by the Swiss Federation of Trade Unions (USS). In the latter case the USS alleged that, in respect of anti-union dismissals in the private sector, Swiss legislation was not in keeping with ILS, particularly Convention No. 98 which Switzerland had ratified, in that it does not provide for the reinstatement of trade union officials or representatives and only results in the payment of nominal compensation, amounting to approximately three months' salary and limited to six months' salary. The CEACR also made observations on the application of the Labour Inspection Convention (1947) and on the Swiss Penal Code in respect of the Worst Forms of Child Labour Convention (1999).

## 2.2 ADHERENCE BY WAY OF TREATIES

Different pathways apply in the implementation of ratified ILO conventions and for the effective adherence to labour standards referred to in RTA and IIA. Recent studies show that ILS references in current treaties are narrower and sometimes less precise than the comprehensive approach of the ILO, but quite possibly better adhered to because of the economic advantages enshrined in those same treaties (Deacon et al 2011; Bernaciak 2012). It also appears that social norms in economic treaties have become more constraining, first in the US and more recently in the EU (Häberli, Jansen and Monteiro 2012).

The main difference is probably in the objectives, the timespan and in the nature of the respective provisions. Some of the core labour standards are almost a century old, and records available on ILO websites report quite well on actual country supervision results and on the inherent limits of this difficult approach in a highly sensitive area. On the other hand, the much more recent (and more stringent) labour provisions in trade and investment treaties are only beginning to have a notable impact. Hence, the 'evidence' which can be gleaned e.g., from press

releases only provides an indication of the state of affairs in respect of treaty adherence.

Scientific assessments of adherence effectiveness are still rare. For EU treaties with labour clauses, a commissioned study found little evidence of effective adherence (Bourgeois, Dawar and Evenett 2007; see also Kerremans and Orbie 2009). A self-critical assessment by the US General Accounts Office on the impact of US RTA (where labour provisions are much more stringent than in the EU) came to similar conclusions (US GAO 2009).

A recent field study in ninety-seven countries finds that where countries have comparative advantages in sectors with strong labour market frictions, trade liberalization causes higher unemployment, whereas if frictions are only weak they actually reduce unemployment in such countries (Carrère, Fugazza, Olarreaga and Robert-Nicoud 2014). Another study found that regional social and labour policies are gaining importance in different parts of the world, albeit at varying and generally low speeds (Deacon et al. 2011). However, there is no clear pattern for the increasingly frequent references to labour standards in trade agreements (Bartels 2009). Even among developed countries, the practice is far from being universal (Dawar 2008).

Judicial action in RTA to enforce agreed labour standards remains an extremely rare last-resort measure so far only used by the USA. (This article does not deal with national labour courts and administrative procedures.) Even so, none of the four randomly selected examples involving the US Government presented here have led to formal rulings at the time of writing this article:

- (1) The North American Free Trade Agreement (NAFTA), the first RTA to which the USA became a party, has frequently used dispute settlement provisions for certain trade conflicts. But labour clauses are in a separate section with special (and 'softer') dispute settlement procedures. There is no reference to international standards, merely a commitment to apply one's own labour laws. So far, none of the few cases initiated has been concluded with a final ruling.
- (2) The beginning of the first formal dispute in relation to labour protection clauses under a RTA dates back to 2010. The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) requires that 'a Party shall not fail to effectively enforce its labor laws [...] in a manner affecting trade between the Parties'. The US Government had argued that Guatemala had breached its obligations under this agreement by failing to effectively enforce its own labour laws, through a sustained and recurring course of inaction. After having been suspended for further consultations between the

parties, the re-composed panel under CAFTA-DR might finally issue a ruling.

- (3) An example for informal procedures applied under a US FTA is a follow-up to the Peruvian Government's new FDI legislation offering to waive or to freeze social and environmental constraints for new investors. This led the US Government in October 2014 to 'enquire' in a high-level visit to Lima whether such a liberalization might contravene social and environmental provisions in the Peru-US FTA (which also contains a separate Labour Chapter). In August 2015, the Office of the U.S. Trade Representative (USTR) announced that it was evaluating a potential case against Peru's environmental law changes. This example (despite conflicting interests within US stakeholders i.e., US trade unions and investors) might eventually lead to judicial action similar to the US-Guatemala case.
- (4) In a similar case concerning Honduras, the US Department of Labour in February 2015 decided to hold off on recommending 'cooperative labor consultations' under CAFTA Article 16.6 – the first step toward dispute settlement – because of the Honduran government's decision to cooperate with the US through an informal procedure.

These examples reflect a relatively new approach of prodding effective ILS adherence by a developing country dependent on access to big markets, in particular to the fundamental conventions on freedom of association, with more tripartite action and direct ILO participation. Developed country partners – here, the USA – try to prevent 'regulatory freeze' (of environmental and social standards) as an incentive for FDI. Such actions may be at the limit of national 'Westphalian' sovereignty, but they are based on treaty provisions, and the US Government claims to look for development-friendly solutions and to avoid races to the bottom as a result of FDI incentives and competition distortions. Other such examples of 'nudging', with or without US, ILO and activist NGO involvement (and without formal dispute settlement) are reported from Jordan, Guatemala, Pakistan, Cambodia and other developing countries (Elliott and Freeman 2003). If undertaken without protectionist intentions, such measures may actually bring trade relations closer to a level-playing field in tune with globalization.

### 2.3 ADHERENCE IMPACT OF UNILATERAL MEASURES

In Figure 1 social and consumer preferences are presented as elements influencing domestic employment policies, with new non-state actors, social media channels, and retailer groupings acting on behalf of their clients, or some of them. Domestic

societal preferences laid down in private standards and reflected in corporate social responsibility statements and norms interact with extra-state governmental schemes (or others). These are unilateral incentives, and some may command sanctions under various governmental schemes, mainly those operated by the USA and the EU. In reality, with or without references in international treaties, societal preferences and governmental schemes interact for better and for worse i.e., as incentives for higher labour standards and by way of sanctions for violations of core labour standards. This being said, it is not always clear that citizens and consumers are aware of and understand these norms and their implications. Also, protectionist interests may hide between well-meaning citizen initiatives.

It is here that WTO disciplines moderate the appetite for unilateral carrots and sticks. First of all, no tariffs can be increased over and above the limits laid down in a country's schedule under GATT Article II; the same goes for non-tariff barriers incompatible with relevant WTO rules. This limit to all sanctions will increase with further trade liberalization steps, especially those involving tariff reductions, but also in the standard-setting 'megaregional' RTA (TPP and TTIP).

Hence, preferential tariffs and their withdrawal are possible but only under the conditions laid down in the above-mentioned legal bases, especially the above-mentioned *Enabling Clause*. For instance, the preferential market access offered to developing countries under the GSP programmes cannot be withdrawn when a country violates an ILO convention it has ratified (Bartels and Häberli 2010). Such withdrawals may be possible for additional preferences such as AGOA and GSP+, based on the *waiver* granted by the WTO. In both cases, however, and unless motivated, for instance, by a UN Security Council resolution, purely arbitrary sanctions might be difficult to sustain in a legal challenge (Häberli 2008).

The EU has withdrawn GSP preferences from Belarus, Myanmar, Sri Lanka and Venezuela, invoking serious human rights violations. In the first example discussed below, the EU (and the USA) came close to, but did not implement, a withdrawal for reasons of workers' rights violations.

Evidence is often difficult to come by. But three more cases may illustrate the impact on adherence to ILS of unilateral measures taken by governments upon presentations by consumers and retailers, social and environmental concerns, and peace-building efforts:

- (1) A recent example of interaction between exporting and importing governments and private actors is the handling of the Rana Plaza Disaster in Bangladesh which occurred on 24 April 2013. In this deadliest garment-factory accident in history four upper storeys had been built without a permit, at substandard building quality. Reactions rippled along the whole supply chain, starting with mass

demonstrations throughout the country and immediately reaching importing country governments and retailers. Employers and enforcement authorities in Bangladesh were accused of leniency and corruption, but also of numerous ILS violations. While some importers and retailers in the US and in Europe tried to blame middlemen and subcontractors, other companies worked with the European Commission and the ILO, and under the watchful public eye including trade unions and activist NGO in the USA and in Europe, towards a cooperation agreement which was concluded on 8 July 2013 in Geneva. On that occasion the Government of Bangladesh reiterated 'its continuing efforts to effectively implement in law and practice the international labour standards embodied in the fundamental ILO Conventions and other ILO Conventions that it has ratified'. The *Sustainability Compact for Bangladesh* foresees increased adherence to ILS, with ILO monitoring and with support projects funded by the EU. In 2014 and 2015 the European Commission published two update reports on progress made on labour and safety issues, and indicating further improvements to be achieved by Bangladesh's main export industry 'thanks in large part to its duty-free quota-free access to the EU market via *Everything But Arms* (EBA) trade preferences'.

- (2) A well-known example of unilateral measures aimed at conditionally benefiting developing countries is the already mentioned AGOA of the USA. The Act is periodically reviewed in the US Congress, and in 2015 newly evaluated by the USTR. The 2014–15 extension debate also included 'dolphin-safe' canned tuna and other conditions. Perhaps tellingly, South Africa which is among the biggest beneficiaries of unilateral preferences has repeatedly signalled readiness to improve market access for US meat if it remains eligible for AGOA. Such apparently 'negotiable' features had also appeared in the domestic approval process for the US GSP scheme, with parochial interests against Bangladeshi sleeping bags delaying extension of the whole scheme by more than six months (Daly 2011).
- (3) After the WTO Hong Kong Ministerial Decision in 2005 to allow duty-free and quota-free access for 97% of LDC exports, market access conditions for Cambodian textiles and apparel became equal to or better than benefits enjoyed under AGOA – and apparently even led to labour shortages in Cambodia. Following allegations of serious human rights violations in Cambodia, preferential access to the US market by Cambodia is now conditioned by an onsite pre-shipment inspection supervising the effective adherence to ILS by beneficiary employers

manufacturing textiles and garments (ILO 2009a). On the other hand, despite serious concerns expressed by European stakeholders, and by the UN Special Rapporteur for Human Rights in Cambodia, allegations of similar violations in the sugar industry benefitting from duty-free preferential tariffs did not lead to preference withdrawal by the EU (Nuñez Évora 2015).

### 3 CONCLUSIONS

Three caveats may be warranted before our attempt at drawing some preliminary conclusions:

- (1) Sustainable employment can mean better jobs, or more jobs, but not necessarily both at the same time. Here we only look at this question in the framework of the *International Policy Framework for Sustainable Employment*. This may imply hard choices for governments and employers – regardless of the ‘better job’ objectives of both ILO and RTA/IIA. Some such treaties might not have a direct impact on national policy-making. Even NAFTA which has the most stringent international labour provisions of any RTA specifies that nothing in this agreement can ‘empower a Party’s authorities to undertake labor law enforcement activities in the territory of another Party’.
- (2) The actual development impact of social and labour provisions in RTA and IIA is difficult to assess. Their often ‘best endeavour’ nature does not in itself offer much scope for shaping domestic employment policies. As for unilateral measures, there are some specific cases of a possibly successful impact. There are others – but this in itself is no guarantee that unilateralism will always help ILS adherence.
- (3) The lack of multilaterally constraining and easily enforceable ILS maintains policy space. But this is also a source of rules fragmentation. It may allow for competition distortions at the expense of the basically non-displaceable asset i.e., the national workforce. Although this article does not deal with this aspect, it shows that a more coherent and stronger international regulatory framework for domestic employment policies would definitely smooth the international playing field nowadays biased by competing domestic policies. Harmonization of standards remains constrained even where it could help to prevent social policy excesses both above and below such standards. This being said, it is also clear that harmonization e.g., of wages cannot lead to the fulfilment of such an objective.

A few intermediate conclusions may nevertheless seem to be appropriate.

It has been argued that the normative value of social norms is higher where ILS are enshrined in trade and investment treaties, or where unilateral measures and consumer preferences exert sufficient pressure on governments and employers to increase labour standards. Such moves, of course, are only sustainable (be it by way of 'more' or of 'better' jobs) if overall productivity is not reduced, or where international human and social rights effectively prohibit social dumping such as child labour or slavery (Bernaciak 2012). Incidentally, child labour seems to be an issue even in the 'modern' USA (Maoyong Fan et al. 2014). For RTA and IIA there is little evidence of direct post-treaty impacts on domestic labour relations (Huang et al. 2014).

At the same time the sensitivity of social policies everywhere sets clear limits to the normative value and enforceability of both ILS and RTA/IIA. It also explains why WTO has never reached agreement to even consider the competition distortions and negative trade impact that may result from differing labour standards. Unlike, say, a tariff binding, social standards cannot for the time being be 'locked in' alongside commitments to liberalization of investment and trade. Under these circumstances ILS and even social norms in RTA continue to have only a limited impact on domestic policies. This is presumably the case both for lowering standards and for increasing them.

On the other side, several studies have found that there is no proof for a 'race to the bottom' in a developing country as a result of its RTA with a developed country (Maskus et al. 2005; Olney 2011). To the contrary, it appears that a lowering of protection levels occurs especially in high income countries, mainly as a result of RTAs among such countries rather than from RTA with middle income or low income countries. Consequently, commitments not to lower existing domestic standards could potentially become binding especially for high income members of RTA (Häberli, Jansen and Monteiro 2012).

It is too early to be able to demonstrate a generally positive impact on employment of labour provisions in investment and trade agreements. This goes for both qualitative and quantitative results (better versus more jobs).

In a few very specific cases, unilateral incentives and sanctions by trading partners, as well as consumer preferences and pressures, may act as pull factors for better if not for more jobs. This impact is definitely enhanced by RTA and IIA. However, it should be noted that for a long time many economists have argued that trade sanctions for core labour standards violations are both ineffective and expensive (Maskus 1997; Maskus et al. 2005; Jansen, Peters, and Salazar-Xirinachs 2011; but see also Bernaciak 2012, and Olney 2011).

It is also too early to assess the outcomes of new forms of internationally initiated and concerted efforts at improving governance in labour-intensive

sectors. Today it appears that, besides the classical tripartite standard-setting mode, civil society, social media action and various international governance bodies, are increasingly co-shaping the social agenda even in poorer countries. At any rate, both the US Government and the European Commission seem to apply their 'sticks' with caution. On the other hand, parliamentary involvement in policy-making and enforcement in supplying markets is also increasing, calling into question the executive branch's erstwhile monopoly in trade negotiation and treaty implementation. The long-term influence of this new multipronged action on employment policies and effective ILS adherence, and on job quality and quantities remains to be seen. The same goes for job location, migration and gender issues, social coherence and other factors. This being so, the anecdotal evidence gathered here seems to indicate that even 'stand-alone' labour chapters in trade and investment treaties might increase sustainable employment where and when support measures, including through unilateral preferences and even sanctions, form a 'cocktail' which export-oriented economies will find palatable.

Finally, four sets of questions are submitted for further consideration:

- (1) At country level, can the international framework increase multipartite interaction at the national level for more sustainable development? Can the ILO-enshrined stakeholder constituencies and collective bargaining apply even where workers' representation is mitigated by state monopolies? Is social media a significant new channel for stakeholder interaction?
- (2) What are the reasons, as seen by domestic stakeholders, for non-ratification of individual conventions and protocols, or for the absence of labour provisions in IIA and RTA? Does non-ratification of core labour standards have a negative or a positive impact on the investment climate?
- (3) Can internationally harmonized (and observed) standards prevent distortions and competition at the expense of the weakest link in the supply chain? In the absence of a multilaterally binding solution e.g., in the WTO can free-riders ever be avoided? Can the action of international stakeholders such as trade unions or consumer organizations lead national authorities to allow for freedom of association and collective bargaining?
- (4) Are 'better' jobs (and too stringent ILS) an impediment to more jobs in poor countries? If yes, are international stakeholders part of the problem or of a solution? How would standard harmonization need to be formulated in order to take into account different country situations and choices, and the policy dilemma between 'more' and 'better' jobs?



The window for a maximum use of this still emerging international framework by all stakeholders and policy-makers is probably limited to the products with significant tariffs, and to the time before these tariffs are negotiated away in major RTA or in the WTO. Nonetheless, cooperative interaction along the way indicated in this article will definitely increase sustainable employment worldwide.

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