



The International Regulatory Framework for National Employment Policies: Examples from Bangladesh, Ethiopia, Ghana, Madagascar, South Africa, Switzerland and Viet Nam

Christian Häberli

Employment policy is sensitive, and it is basically national even though international labour standards are even older than the United Nations. Globalisation is changing this situation where countries are free to prefer “more” or “better” jobs. The multilateral framework of the World Trade Organization at present can only have an indirect impact. But Regional Trade Agreements and International Investment Agreements are emerging as a new way of gradually enhancing the impact of the core labour standards. 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 which even small, locally operating enterprises cannot fail to take into account without risking marginalisation and market exclusion. The long-term influence of this new multi-pronged action on employment policies and on job location, gender issues and social coherence remains to be seen. Nonetheless, the admittedly 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 economies will find palatable.

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Abstract

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Keywords: trade, investment, employment, labour standards, regional trade agreements, ILO, WTO

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Websites: <http://www.wti.org> / <http://www.r4d.ch/E/employment/projects/employment-effects/Pages/default.aspx> / www.r4d-employment.com / <http://www.nccr-trade.org/people/haeberli/>

1. The International Polity for Sustainable Employment

This paper argues that national employment policies failing to take the relevant international regulatory framework into account are at risk of failure, inefficiency and ineffectiveness, regardless of whether international rules and competing markets are a pull factor or a race to the bottom for labour standards and sustainable employment.

Investment and production decisions are co-influenced by labour and employment policies. In a globalising world, multinational and to some extent even firms operating purely on the local level will take into account both their market prospects and the international regulatory environment when they make these decisions. This is so because their goods and services face increasing competition even on local markets with hitherto closed borders. A number of recent studies show that for a long time national regulators seemed to pay scant attention to the international regulatory framework in respect of employment; the same goes for many, mainly country-based analyses even by international economists (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 Marion Jansen et al had already emphasised this disconnect between the trade-and-employment linkages in public debates, and the lack of factual assessments of the employment and distributional implications of trade (ILO 2011). In another joint publication by the International Labour Organization (ILO) and the World Trade Organization (WTO) Haltiwanger addressed the impact of trade liberalisation on productivity, earnings and employment (Bacchetta and Jansen 2011). An earlier “World of Work” Report by the ILO found a rapidly increasing number of international trade agreements with social and labour provisions and called for further studies on the question whether such agreements were effective in “making globalization fairer” (ILO 2009; see also Doumbia-Henry and Gravel 2006).

Recent developments, however, might bring a wind of change to this very sensitive but still under-researched field of international social policy-making. This paper 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 national employment policies.

The oldest international element in the continuously evolving scheme shown in Figure 1 is the wealth of International Labour Standards (ILS) and the supervision and enforcement mechanisms in the ILO. The second and third, much more recent elements especially in their more stringent forms are references to labour standards in Regional Trade Agreements (RTA) and International Investment Agreements (IIA). These agreements often refer to ILS as a new way of enhancing the impact of the core labour standards.¹ All seven countries discussed here (Bangladesh, Ethiopia,

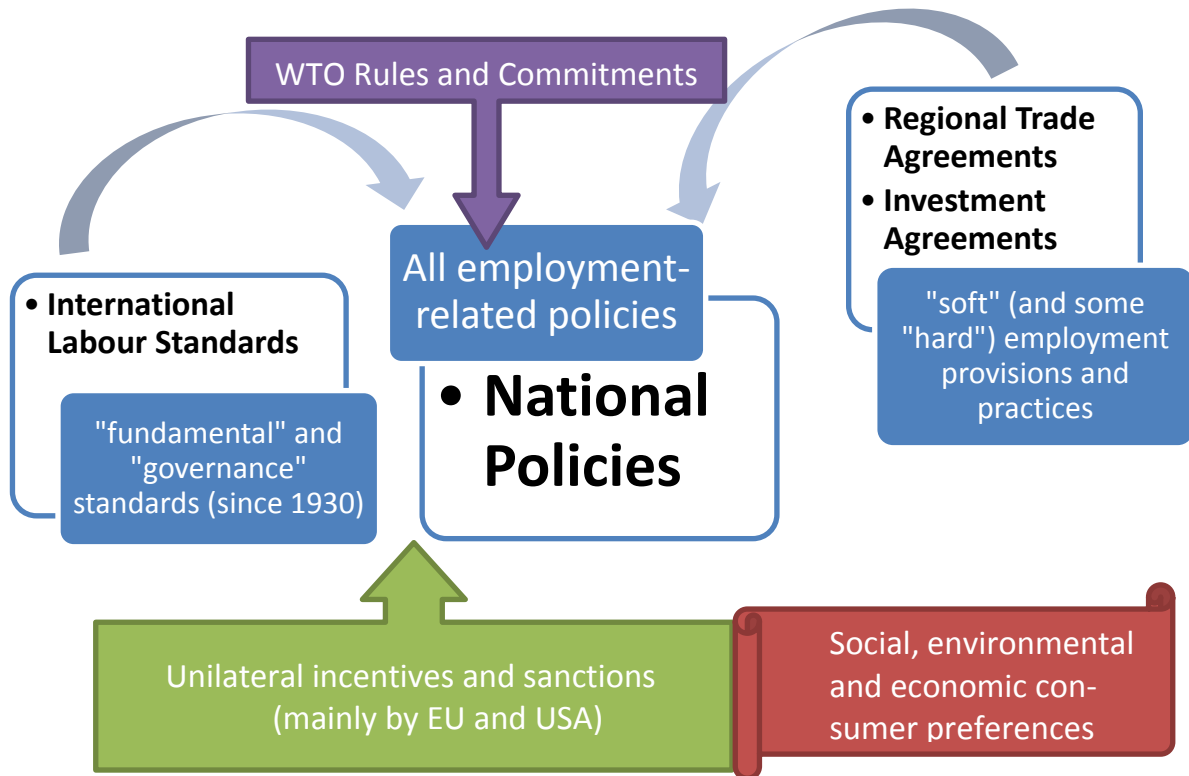
¹ Note on terminology used here: The WTO Secretariat has a database on unilateral preferences (non-reciprocal preferential schemes) which it calls *Preferential Trade Agreements* (PTA) (<http://ptadb.wto.org/?lang=1>), as opposed to the *Regional Trade Agreements* (RTA) falling under different and more stringent WTO Rules (<http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>). In this article RTA and FTA (Free Trade Agreements) are used interchangeably. “PTA” is actually a misnomer because these are mostly *unilateral measures*; their legal bases under International Economic Law are WTO/GATT Decisions like the Enabling Clause, *not* Article XXIV GATT and Article V GATS which exempt RTA and FTA from the most-favoured nation (MFN) clause. The term *core labour standards* often used in the relevant economic literature typically refers to the principles and rights

Ghana, Madagascar, South Africa, Switzerland and Viet Nam) have subscribed to such agreements because they wish to promote their investment climate as well as more and better job opportunities. Fourth, for various reasons and in very different ways market access especially for labour-intensive manufactures is also affected by a number of governmental incentives and unilateral sanctions, applied by the United States of America (USA) and (in a different way) by the European Union (EU). Fifth, social and environmental preferences and retailer and consumer pressure groups exert an increasing influence on higher labour standards and employment policies for better jobs everywhere. Sixth, while the multilateral trade framework of the World Trade Organization (WTO) has no rules specifically addressing the issue of labour standards or social policies, it does have general and relatively stringent (and enforceable) non-discrimination rules. WTO rules, up to a point, also protect third countries from discrimination by way of bilateral deals and RTA. However, very few countries have actually taken commitments in their RTA on the free movement of persons, except for specified service providers, and have taken even fewer such commitments in their WTO service schedules. At any rate, judicial enforcement of treaty-based social or labour protection clauses is only just starting.

These six main elements – ILS, IIA, RTA, unilateral “stick and carrot” measures, consumer pressures and the relevant WTO rules and commitments – form the *international polity for sustainable employment* (Figure 1). Obviously, no general conclusions are possible as to the relative strength (or weakness) of each element. The research hypothesis, however, is that despite the absence of WTO rules preventing social dumping the interrelation 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 trend which might well continue or even increase alongside growing globalisation is not unproblematic. Better jobs are not more jobs. Stakeholders in countries with high unemployment rates and without social safety nets are likely to prefer bad jobs to no jobs. Quite often they may simply have to let the informal sector provide (even non-sustainable) employment along with a substantial part of their economic growth. The international regulatory framework should not interfere with such policy choices. But with the appropriate toolkit it can increase effective adherence. It can also limit both protectionism (here: non-tariff barriers in the disguise of social protection against competition from abroad) and what is called social dumping, that is competition at the expense of the less skilled workforce as the weakest link in the supply chain. This would also help avoiding excesses such as indentured labour, child labour, forced migration and human trafficking.

Figure 1: Interaction of employment-related standards, policies, treaties, unilateral measures and consumer preferences



Source: by the author

No comprehensive list of all labour-related provisions in international treaties exists, let alone one with information on unilateral measures.² However, the project Design of Trade Agreements (DESTA) is a new, comprehensive dataset led by the World Trade Institute (WTI). 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.³

Two caveats apply to this research. Firstly, the question that cannot be addressed in 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 liberalisation acts as a brake for the creation of better jobs or an incentive

² The ILO Database NORMLEX (<http://www.ilo.org/dyn/normlex/en/f?p=1000:61:0::NO:61::>) is the most comprehensive ILS information system but it does not list labour-related clauses in RTA and IIA (ILO 2009). As for IIA, both UNCTAD and ICSID have databases without direct links to labour provisions (see Table 3 and FN28). The WTO Secretariat lists all trade-related agreements notified by its Members and in force. This database is available at <http://rtais.wto.org/ui/PublicMaintainRTAHome.aspx> (last accessed 16 February 2015). Labour provisions are retrievable but only if they have been mentioned explicitly under the WTO transparency mechanism. 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 three databases.

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

for employment dislocation (“race to the bottom”). Basically, the main academic contributions to this often emotional debate see little or no evidence for a race to the bottom (Maskus 1997 and Maskus et al 2005).⁴ Secondly, this article cannot answer the above-intimated fundamental issue of “better” vs. more employment. Substantive field research is needed in order to clarify priorities and to address the issue of competition and of investment climate distortions arising from different labour policies.

This paper starts with a short description of the trade-relevant parts in the core ILS and the present state of their ratification in the seven countries (2). It then presents the principal features of labour provisions in international treaties and unilateral measures, and reviews a few such provisions in IIA and RTA concluded by these seven countries (3). Based on this overview an attempt is made to gauge effective adherence to ILS and to the labour provisions in RTA and IIA with some anecdotal evidence from official records and media (4). The conclusion argues that effective adherence is likely to contribute to global and national development, and that those new combinations of international obligations and unilateral measures are most likely to further improve adherence in export-oriented developing countries; it also suggests four field study topics for national research teams (5).

2. International Labour Standards (ILO)

The ILO considers 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.

These ILS contain obligations for all ratifying States. A few examples may illustrate the obligations adhered to by ratifying states.

- Freedom of Association – the two Conventions ratified by all the countries under review except for Viet Nam – involves the right for workers and employers to establish and to join organisations of their own choosing without previous authorisation.⁵ It also prohibits any acts of interference with each other by employers and workers, and encourages governments to take measures to encourage and promote the full development and utilisation of machinery for voluntary negotiation

⁴ Reference is also invited to our Geneva University-led sister project’s earlier publication: Céline Carrère, Marco Fugazza, Marcelo Olarreaga, Frédéric Robert-Nicoud, Trade in Unemployment (April 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). For the “race” role especially of RTA see our previous analysis (Häberli, Jansen and Monteiro 2012).

⁵ Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Art. 2

between employers' and workers' organisations, by means of collective agreements for the regulation of terms and conditions of employment.⁶

- By ratifying the Forced Labour Convention (1930) each ILO Member “undertakes to suppress the use of forced or compulsory labour in all its forms.”⁷
- Similarly, the Minimum Age Convention (1973) obliges ratifying Members “to ensure the effective abolition of child labour.”⁸
- Equal Remuneration for men and women workers for work of equal value involves several different obligations.⁹ The same goes for any other discrimination on the basis of race, colour, religion, political opinion, or social origin “which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation” – including access to vocational training, employment and particular occupations.¹⁰ Inherent requirements for a particular job may allow some such discrimination. But for instance “national extraction” cannot be a criterion for such discrimination – an interesting clause in view of the fact that basically no trade agreement with developing countries foresees the free movement of persons.
- Effective Tripartite Consultations between representatives of the government, of employers and of workers, for example, must be organised, and financed, by all ratifying states.¹¹
- Labour Inspection must be carried out in all workplaces; only the mining and transport sectors may be exempted from this fundamental workers’ protection procedure.¹² This obligation also applies to agriculture (Convention 129 which Madagascar is the only one of the seven countries to ratify!). It provides that “the competent authority shall, after consultation with the most representative organisations of employers and workers concerned, where such exist, define the line which separates agriculture from industry and commerce in such a manner as not to exclude any agricultural undertaking from the national system of labour inspection.”¹³
- As for employment policies in general, ILS guidance is less restrictive. But even this “soft” convention has been ratified by just three out of the seven countries: it only foresees that “each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.”¹⁴

Such clauses do restrict national employment policy space, albeit to varying degrees. By mainly aiming at better jobs they may also increase labour costs. Notwithstanding their impact on productivity they are implicit criteria 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. As will be shown later, some references to ILS in RTA and IIA can mitigate a race to the

⁶ Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Art. 2 and 4

⁷ Forced Labour Convention, 1930 (No.29), Art. 1

⁸ Minimum Age Convention, 1973 (No.138), Art. 1

⁹ Equal Remuneration Convention, 1951 (No. 100), Art. 2

¹⁰ Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Art. 1

¹¹ Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), Art. 2 and 4

¹² Labour Inspection Convention, 1947 (No. 81), Art. 2

¹³ Labour Inspection (Agriculture) Convention, 1969 (No. 129), Art. 1

¹⁴ Employment Policy Convention, 1964 (No. 122), Art. 1

bottom by way of social dumping at the expense of the local workforce. Normative value and trade impact can of course only result from ratified conventions.

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 relating to agricultural FDI the argument was made that home states do have certain responsibilities based on their obligations under public international law (Häberli and Smith 2014).

Tables 1 and 2 present the ratifications of these ILS by the seven countries examined here. With 69 out of 84 possible ratifications the record is comparable to that in most other countries. However, what really matters and ought to be included in any ILS impact assessment is the functioning of the supervision process and the capacity of employers and workers to use the well-established ILO mechanisms at home and in Geneva. Efficient functioning can indeed improve the development impact of employment-related national policies.

Table 1: Adherence to the Fundamental Conventions (year of ratification)

Convention – Country	Freedom of association		Forced labour		Discrimination		Child labour	
	C087 ¹⁵	C098 ¹⁶	C029 ¹⁷	C105 ¹⁸	C100 ¹⁹	C111 ²⁰	C138 ²¹	C182 ²²
Bangladesh	1972	1972	1972	1972	1998	1972	–	2001
Ethiopia	1963	1963	2003	1999	1999	1966	1999	2003
Ghana	1965	1959	1957	1958	1968	1961	2011	2000
Madagascar	1960	1998	1960	2007	1962	1961	2000	2001
South Africa	1996	1996	1997	1997	2000	1997	2000	2000
Switzerland	1975	1999	1940	1958	1972	1961	1999	2000
Viet Nam	–	–	2007	–	1997	1997	2003	2000

Source: NORMLEX Information System on International Labour Standards (accessed 3 September 2014)

¹⁵ Freedom of Association and Protection of the Right to Organise Convention, 1948

¹⁶ Right to Organise and Collective Bargaining Convention, 1949

¹⁷ Forced Labour Convention, 1930

¹⁸ Abolition of Forced Labour Convention, 1957

¹⁹ Equal Remuneration Convention, 1951

²⁰ Discrimination (Employment and Occupation) Convention, 1958

²¹ Minimum Age Convention, 1973

²² Worst Forms of Child Labour Convention, 1999

Table 2: Adherence to the Governance Priority Conventions and Protocols (year of ratification)

Convention – Country	C081 ²³	C122 ²⁴	C129 ²⁵	C144 ²⁶
Bangladesh	1972	–	–	1979
Ethiopia	–	–	–	2011
Ghana	1959	–	–	2011
Madagascar	1971	1966	1971	1997
South Africa	2013	–	–	2003
Switzerland	1949	2013	–	2000
Viet Nam	1994	2012	–	2008

Source: NORMLEX Information System on International Labour Standards (accessed 3 September 2014)

The reasons for non-ratification of individual conventions and protocols are not addressed by this article. Country studies might shed more light on this aspect.

The question of effective adherence will be discussed in Chapter 4.

3. International investment agreements and regional trade agreements with references to labour standards²⁷

The following is an overview of labour provisions in bilateral investment treaties (BIT) and other international investment agreements (IIA), and in the RTA and FTA of all seven countries examined here. The rapidly growing number of intergovernmental agreements with some sort of reference to social and labour standards makes a detailed presentation of the situation impossible. What can be seen is that 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; even recent ones may at best contain preambular language on the harmonious development of social relations. But the treaties with other developed countries such as Australia, Japan and Switzerland have even fewer or no such references. This being so, the normative value of labour

²³ Labour Inspection Convention, 1947

²⁴ Employment Policy Convention, 1964

²⁵ Labour Inspection (Agriculture) Convention, 1969

²⁶ Tripartite Consultation (International Labour Standards) Convention, 1976

²⁷ The essence of this chapter is gleaned from the study by Häberli, Jansen and Monteiro, Regional trade agreements and domestic labour market regulation. ILO Employment Working Paper No. 120, 11 May 2012, and the chapter 10 in OECD/D. Lippoldt (ed.) (2012), Policy Priorities for International Trade and Jobs, e-publication available at: www.oecd.org/trade/icite, pp.287-326.

clauses in trade and investment treaties appears to be increasing, especially in RTA and in combination with unilateral measures shaping effective access to important markets.

a. International Investment Agreements (IIA)

After decades of stagnation many IIA are now in a process of rapid change, and there is increasing interaction between all the countries concerned. The slowdown in numbers of new IIA recorded in the UNCTAD Database has several causes but is not a sign of diminishing attention or importance.²⁸ Today there is no emerging universal IIA standard. Investor–state dispute settlement (ISDS) is only the most divisive among many other issues. But RTA with investment and social/labour clauses are still on the increase, while the European Commission is trying to develop community competence in this field. This trend towards mutual enhancement of disciplines and improved enforcement is likely to continue.

The more ambitious IIA contain several types of employment-related clauses and commitments, albeit with vastly differing normative value:²⁹

- no lowering of national standards
- references to ILS and/or to the ILO Declaration on Fundamental Principles and Rights at Work (1998)
- ensuring that investors do not manage or operate their investments in a manner that circumvents ILS
- obligation to respect corporate social responsibility (CSR) standards

Table 3 shows the number of BIT and other IIA in the seven countries, with data from UNCTAD’s International Investment Agreements Navigator. This dataset also provides access to individual treaties in some of their original languages.

Table 3: Number of BIT and other IIA in seven countries (Signed/In force)

	Bang-ladesh	Ethiopia	Ghana	Mada-gascar	South Africa	Switzerland	Viet Nam
BIT	29 (23)	29 (22)	26 (8)	9 (6)	41 (18)	118 (112)	60 (46)
Other IIA	4 (3)	6 (5)	8 (6)	5 (4)	10 (8)	31 (28)	19 (15)

Source: UNCTAD International Investment Agreements Navigator, available at <http://investmentpolicyhub.unctad.org/IIA/liaByCountry#iialInnerMenu> accessed 13 February 2015

Incidentally, the ICSID database only has BIT, and with a different number of treaties recorded: Bangladesh has 24 BIT, Ethiopia has 13, Ghana 21, Madagascar 6, South Africa 41, Switzerland 127 and Viet Nam 46.³⁰

²⁸ According to UNCTAD’s IIA Issues Note No.1 (February 2015) the number of new “BIT and other IIA” in 2014 was down to 27, bringing the total number of agreements to 3,268. See advance copy at http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf accessed 20 February 2015.

²⁹ Cf. APEC-UNCTAD, International Investment Agreements Negotiators Handbook: APEC/UNCTAD MODULES (December 2012)

b. International Trade Agreements (RTA)

Labour provisions in the more recent RTA are substantially different from ILS; they are also quite different in US and EU treaties. Yet, while these two biggest markets for agricultural and manufacture imports still dominate treaty-making, their trading partners increasingly co-shape form and content. Obviously, the political and economic might of the trading partners (which may differ in different regions) is of considerable importance, but historic and present dependency patterns – and negotiating skills – also matter.

A closer look at US and EU RTA reveals some common but also several different characteristics in respect of labour provisions.

1. The USA demands, and obtains, rather far-reaching labour provisions. They are often a mixture of duties (prevent child labour) and commitments to avoid a race to the bottom (enforce labour laws in a manner affecting trade (Häberli, Jansen and Monteiro 2012)). The US tries to enforce them 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). Given the reluctance in the same country to introduce well-functioning ISDS procedures even in its relations with its two neighbours such activism may seem somewhat surprising. Some intervention cases 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 organisations (NGO). Unlike the rather frequent withdrawals of tariff preferences e.g. under the African Growth and Opportunity Act (AGOA)³¹ there seems to be no case of sanctions actually being applied based on RTA provisions. As shown in Box 1 this may change soon. Both examples also point out the need for and interest in further studies.

Box 1: Judicial action in RTA to enforce labour standards

The *North American Free Trade Agreement* (NAFTA), the first RTA to which the USA became a party, has frequently used dispute settlement provisions for trade conflicts. But labour clauses are in a separate section with special (and “softer”) dispute settlement procedures (Chapter 11 *North American Agreement on Labor Cooperation* (NAALC)). Article 2 is presently the most stringent RTA provision to that effect:

Affirming full respect for each Party's constitution, and recognising the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.

There is no reference to international standards. This provision appears to merely reflect a commitment to apply one's own laws. Indeed, on the question of enforce-

³⁰ ICSID Database of Bilateral Investment Treaties: <https://icsid.worldbank.org/ICSID/FrontServlet> last accessed 7 September 2014. For South Africa's termination of its IIA with many developed countries see *infra* Section 3.5.c.

³¹ Signed into law on 18 May 2000 as Title 1 of The Trade and Development Act of 2000. See *infra* Section 4b.

ment the NAALC makes it very clear that “[n]othing in this Agreement shall be construed to empower a Party’s authorities to undertake labor law enforcement activities in the territory of another Party”. So far, it seems that none of the several cases initiated under NAFTA/NAALC has been concluded with a final ruling. This is not to say that international litigation on national labour matters is foreclosed.

The first formal dispute in relation to labour protection clauses under a RTA dates back to 2010 but may now move ahead: after having been suspended for further consultations between the parties, the re-composed panel under the *Dominican Republic-Central America-United States Free Trade Agreement* (CAFTA-DR) might very soon issue its ruling.³² The US Government had brought a complaint against Guatemala arguing that Guatemala had breached its obligations under this Agreement by failing to effectively enforce its own labour laws, including the right of association, the right to organise and bargain collectively, and to acceptable conditions of work, through a sustained and recurring course of inaction. CAFTA-DR Article 16.2.1(a) requires that “a Party shall not fail to effectively enforce its labor laws [...] in a manner affecting trade between the Parties.”³³

A recently reported example for informal procedures under a US RTA 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 to “enquire” in a high-level visit to Lima whether such a liberalisation might contravene social and environmental provisions in the Peru-US FTA (which also contains a separate Labour Chapter).³⁴ This example (also showing conflicting interests within US stakeholders i.e. US trade unions and investors and their advocates in Congress) might eventually lead to judicial action similar to the US-Guatemala case.

2. The EU used to prefer a “soft” approach especially in its Economic Partnership Agreements (EPA): unconditional market access and technical and financial co-operation – with a large dose of supervision and control of funds by the EU Commission). After the entry into force of the Lisbon Agreement (with a much stronger parliamentary involvement in treaty ratification and even in negotiation) demands were made in the EU Parliament for more constraining labour clauses. While incentives are still the cornerstone of the EU’s ILS enhancement programmes, some more stringent provisions also appear in its more recent RTA. However, so far only the EU’s unilateral measures (involving market access additional to WTO/MFN and GSP rules, and to RTA provisions) have been subject to preference withdrawals – or the threat thereof – e.g. for human rights violations (see Box 2 for labour rights).³⁵

³² World Trade Online, 18 September and 13 November 2014, and 24 March 2015. CAFTA-DR comprises 7 countries (USA, Dominican Republic and the five Central American Customs Union (CACU) states Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua).

³³ Simon Lester, International Economic Law and Policy Blogs dated 6 November 2014 and 15 February 2015, available at <http://worldtradelaw.typepad.com/ielpblog/>

³⁴ World Trade Online, Daily News, posted 4 September 2014: U.S. Officials Assess Peruvian Labor, Environmental Law Changes (<http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-09/05/2014/us-officials-assess-peruvian-labor-environmental-law-changes/menu-id-172.html> accessed 9 September 2014)

³⁵ The main measures are *Everything But Arms* (duty-free quota-free market access for all products except arms for all LDC) and the additional preferences under the so-called GSP+ which is a special market access scheme granted by the EU to developing countries that commit to international standards on human and labour rights, as well as environmental protection and good governance.

Box 2: The Rana Plaza Disaster

Bangladesh is by far the largest least-developed country (LDC) and a very important textile and garment producer. Its labour standards have been the object of repeated criticism by stakeholders in competing countries and by NGO worldwide.

On 24 April 2013 the Rana Plaza factory, an eight-storey commercial building with 5000 workers, collapsed in Savar, a sub-district in the Greater Dhaka Area. The accident killed 1,129 mostly female workers, insufficiently protected by low and unenforced labour standards. The reasons for this, the deadliest garment-factory accident in history, were four upper storeys built without a permit, substandard building quality and criminal behaviour of the main employer.³⁶

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. 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 concluded on 8 July 2013 in Geneva. The “Sustainability Compact for Bangladesh” foresees increased adherence to ILS, with ILO monitoring and support projects funded by the EU.³⁷

One year later, European Commissioner for Trade Karel De Gucht and Commissioner for Employment, Social Affairs and Inclusion László Andor welcomed the progress made but also urged the Government of Bangladesh “to complete the labour law reform, training and recruitment of inspectors and to create the conditions for meaningful freedom of association. Better labour conditions will support sustainable trade links with many markets, especially the European Union.”³⁸

3. The “softest” labour provisions are those found in RTA between developing countries. Operative social clauses are extremely rare, and preambular language still dominates. The ILO World of Work Report for 2009 noted that developing countries had not agreed on any substantive commitments in respect of labour standards in agreements between them (ILO 2009). Since then the situation has become more differentiated.
 - 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. Also, it seems that because of labour costs and other considerations, some Chinese investors have already shifted some operations to Bangladesh.

³⁶ Cf. the well-researched entry “2013 Savar building collapse” in Wikipedia (http://en.wikipedia.org/wiki/2013_Savar_building_collapse last accessed 07 September 2014).

³⁷ See the ILO Press release dated 10 July 2013 at http://www.ilo.org/global/about-the-ilo/activities/all/WCMS_217271/lang--en/index.htm accessed 19 February 2015.

³⁸ EC, Staying Engaged: Bangladesh Sustainability Compact – one year on, at http://europa.eu/articles/en/article_15235_en.htm accessed 19 February 2015.

- With few exceptions, South America has been more timid about entering the “South–South” treaty field for both trade and investment, and Brazil especially is still a notable absentee (except for the Southern Common Market MERCOSUR established 1991, presently composed of Argentina, Brazil, Paraguay, Uruguay and Venezuela). Consequently, with this exception and the Pacific Alliance (with Chile, Colombia, Mexico and Peru, established in 2011), there are only a few South American RTA and even fewer IIA – and none of them have stringent labour provisions. However, most countries have accepted ISDS under the International Centre for Settlement of Investment Disputes (ICSID, established in 1966 as a member of the World Bank Group).
 - South Africa and Nigeria as the largest African economies have become increasingly hostile to stringent treaty commitments, especially for social and environmental matters. But both have concluded several RTA with social provisions in the preamble. On the other hand, South Africa is among the biggest beneficiaries of unilateral preferences such as AGOA.
4. It should be recalled that other developed countries like Japan and Switzerland rarely include any references at all to labour standards in their RTA. Australia is in the same league, while New Zealand has started to take a more active stance in such negotiations.³⁹

c. Labour Provisions in RTA and IIA

The following is a brief overview of RTA and IIA to which one or more of the seven countries are parties. With the exception of the agreements signed by Bangladesh and South Africa, all contain references to social and labour provisions.

i. Bangladesh

Bangladesh is a member of only two RTA, the Asia-Pacific Trade Agreement (APTA) and the South Asian Free Trade Agreement (SAFTA). Neither treaty has operative social clauses.

Bangladesh’s most recent IIA with a developed country, concluded with Switzerland in 2001 has no such reference either, and the one with Austria from 2000 looks rather flimsy.⁴⁰

Nonetheless, besides its always active participation in the ILO, Bangladesh has acknowledged its international obligations in several instances. The most conspicuous recent example is the Joint Statement adopted together with the EU, the USA and the ILO in the aftermath of the Rana Plaza incident (see Box 2 *supra*): “Bangladesh reiterates 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.”⁴¹

³⁹ Cf. *infra* Chapter 3.c.vii.

⁴⁰ The Preamble has a “commitment to the observance of internationally recognised labour standards” (Abkommen zwischen der Republik Österreich und der Volksrepublik Bangladesch über die Förderung und den Schutz von Investitionen (NR: GP XXI RV 441 AB 705 S. 75. BR: AB 6425 S. 679)

⁴¹ Staying engaged: A Sustainability Compact for continuous improvements in labour rights and factory safety in the Ready-Made Garment and Knitwear Industry in Bangladesh. Signed 8 July 2014 in Geneva.

This is a relatively new way 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. This may be at the limit of national “Westphalian” sovereignty, with new actors and media channels (Weber 2004). Other such narratives, with or without US, ILO and activist NGO involvement are reported from Jordan, Guatemala, Pakistan, Cambodia and other developing countries (Elliott and Freeman 2003).

ii. Ethiopia (COMESA)

Apart from its membership in the Cotonou Agreement and its participation in the negotiations for an Economic Partnership Agreement (EPA) between the EU and the Eastern and Southern Africa (ESA) group of countries to which it belongs, Ethiopia is a member of the *Common Market for Eastern and Southern Africa* (COMESA) which is a Customs Union. This agreement has no stringent social clauses but a couple of “best endeavour” cooperation commitments in the field of labour laws (Art.143). It also aims at progressively achieving the free movement of persons, labour and services (Art.164). Ethiopia is not yet a WTO Member.

The IIA with Belgium and Luxembourg foresees in Article 6 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”.⁴²

The COMESA Investment Agreement goes even less far. It aims at a “freer flow of capital, skilled labour and professionals, and technology amongst Member States” (Art. 3); Member States “shall accord to investors the right to hire technically qualified persons from any country” (preferably from Member States, cf. Art.16) but they will not “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” (Art. 5).

Similarly, the US-COMESA Agreement Concerning the Development of Trade and Investment Relations only foresees that “the Parties may conclude further agreements, particularly in the areas of commerce, taxation, intellectual property, labor, and investment” (Art. 7).

iii. Ghana (ECOWAS)

Besides its Interim EPA with the EU, Ghana is only 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” (Art.61/2(b)).

Only 14 of Ghana’s 22 IIA are presently in force. For instance, the 1995 investment treaty with Germany has no social clauses.

iv. Madagascar (COMESA)

⁴² Signed in 2003 and in 2006, neither in force, at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/360> accessed 11 September 2014.

Like Ethiopia, Madagascar is a member of the *Common Market for Eastern and Southern Africa* (COMESA). It has also signed the Cotonou Agreement with similar provisions (e.g. Art. 28), and it has adhered to one FTA, the *EU - Eastern and Southern Africa States Interim EPA*. The labour-related commitment here is limited to technical cooperation activities, for instance by training for new skills in order to mitigate economic costs of adjustment (Annex IV, Art.6). Similarly for the provisions in respect of seamen to which the Interim EPA refers: the *ILO Declaration on fundamental principles and rights at work* applies to seamen signed on Community vessels, regardless of their nationality (Chapter III, Title II, Article 32).

Madagascar's IIA with Belgium and Luxembourg (2005) and the US-COMESA Investment Agreement have the same labour chapter as the one concluded by those countries with Ethiopia (2006).

v. South Africa (SACU)

The most important RTA in force with South Africa as a partner is the South African Customs Union (SACU). South Africa is also the leading member of the Southern African Development Community (SADC; it has also concluded RTA with the EU and with EFTA and has announced one with India. The 2002 SACU and the SADC Agreements have no formal social or labour provisions. However, SADC takes measures enabling Member States to be competitive in the labour market, and fights against trafficking syndicates for forced labour in mines and on farms. The long-term goal of SADC is a Common Market with free internal trade, a common tariff and currency, and free movement of labour and capital among Member States. The EU-South Africa FTA recognises 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" (Art. 86.2).

In 2012-13 South Africa terminated its IIA with Belgium, Spain, the Netherlands, Germany and Switzerland. According to James Zhan of UNCTAD, the main reasons for these widely debated withdrawals were (i) the compatibility with 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.⁴³ 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.

vi. Switzerland

With 149 investment treaties Switzerland is among the IIA record holders, behind Germany (197), the UK (167), France (166), Netherlands (159), Luxembourg (156), Belgium and Italy (155 each) and ahead of China (147).⁴⁴

⁴³ James Zhan, South Africa: The Investment Regime - Break-Out or Reform? © The Trade Beat, Johannesburg, 20 November 2013 (<http://allafrica.com/stories/201311210442.html> accessed 9 September 2014)

⁴⁴ Source: UNCTAD International Investment Agreements Navigator: <http://investmentpolicyhub.unctad.org/IIA/liasByCountry#iialnnerMenu> (as of 8 September 2014)

According to the WTO Database Switzerland is a party to 28 RTA in force, and has made an “early announcement” of 7 more RTA, including one between EFTA and Viet Nam.⁴⁵

However, Swiss IIA and RTA so far contain no operative labour provisions. The traditional reluctance of the ministry of the economy in charge of trade and investment treaties to address non-trade issues is the main reason for this, despite criticism from NGO (and despite the same Ministry’s responsibility for all ILO affairs). Some exceptions exist e.g. for EFTA RTA where the preamble refers to such non-trade concerns, or for export risk insurance schemes with Government participation. Nonetheless, specific labour provisions are still lacking, and employers or trade unions have rarely protested against this situation.

Tripartite domestic interaction is therefore limited to the ratified ILS. This means that a ratification of a new ILO Convention will have to undergo mandatory consultations between the Government, employers and workers before entering the ratification process in Parliament. On the other hand, a new RTA is subject not to employer and worker consultations but to much wider stakeholder consultations, and sometimes even to the possibility of a referendum vote by the people, for instance for EU enlargement decisions involving free movement of persons with Switzerland, and Swiss “cohesion contributions”.⁴⁶

The China-Switzerland FTA foresees that the Parties “shall enhance their cooperation on labour and employment” (Art.13.5).⁴⁷ Natural persons benefit from market access facilitation as business visitors, managers and suppliers of specified services but not as job seekers (Annex V, Art. 3). The 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” (Art.1 and 3). Incidentally, the Parliament in the ratification of the hotly contested RTA with China rejected demands to open up the possibility of a referendum vote.

vii. Viet Nam (ASEAN)

Viet Nam is a member state of ASEAN which is a RTA in itself (AFTA). ASEAN has notified 5 RTA to the WTO, with Australia/New Zealand, China, India, South Korea and Japan (both bilateral and through ASEAN). It is presently negotiating RTA with

⁴⁵ WTO RTA Database at <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=756&lang=1&redirect=1> last accessed 8 September 2014

⁴⁶ Each EU enlargement implies increased market access for Swiss exports. This also leads to Switzerland making (bilateral) “cohesion contributions” for the economic development of the new member, similar to the contributions by EU Member States. See FDFA, Switzerland’s Contribution to the Enlarged EU, at <https://www.erweiterungsbeitrag.admin.ch/erweiterungsbeitrag/en/home.html> accessed 20 February 2015.

⁴⁷ All legal texts of the China-Swiss FTA are available at <http://www.seco.admin.ch/themen/00513/00515/01330/05115/index.html?lang=en> accessed 16 February 2015.

EFTA, the EU and with Russia/Belarus/Kazakhstan (CIS) as well as for a Transpacific Partnership Agreement (TPP).⁴⁸

The 2009 Japan – Viet Nam Partnership Agreement has no social clauses or labour provisions; market access is provided for certain service suppliers, but Article 57 excludes employment seekers from its scope. The same applies to the ASEAN RTA: apart from the limited market access for service suppliers, none have specific social or labour provisions, nor does AFTA with its 10 Member States. On the other hand 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”.

By the end of 2015 the ASEAN Economic Community (AEC) is to be fully operational. Yet, at the end of 2014 ASEAN economy ministers recognised that efforts would have to be doubled to achieve the AEC targets “to reduce and abolish non-tariff and regulatory barriers in goods, services and investment.”⁴⁹ There seems to be no intention to introduce a commitment for the free movement of persons. By contrast, the ASEAN – Korea treaty on trade in goods explicitly reserves domestic labour legislation. In respect of movement of natural persons, the ASEAN-Australia-New Zealand Agreement specifies that it does not apply “to natural persons seeking access to the employment market of another Party, nor shall it apply to citizenship, residence or employment on a permanent basis”; it also recognises the need to protect the domestic labour force and permanent employment in the territories of the Parties (Chapter 9, Art. 1d). Thus Viet Nam’s specific commitment under this agreement is limited to the free movement of business people and other specialists such as service sales persons, under certain conditions.⁵⁰ Under the ASEAN-Korea RTA Viet Nam has specified additional restrictions, and quotas, limiting market access for service providers.⁵¹

Here too, the situation is dynamic even in the ASEAN community where most members are rather reluctant to address non-trade concerns, let alone commit to free movement of persons or harmonise labour standards. However, a commitment not to undercut social protection has been concluded between New Zealand and the Philippines as a side agreement to the ASEAN-Australia-New Zealand Agreement (2010).⁵² 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

⁴⁸ Source: WTO RTA Database at

<http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=704&lang=1&redirect=1>
accessed 18 February 2015

⁴⁹ Key Outcomes of 46th AEM and Related Meetings 1 September 2014, available at <http://www.asean.org/images/Community/AEC/AEM/Key%20Outcomes%20of%2046th%20AEM%20and%20Related%20Meetings%201%20Sept%202014.pdf> accessed 16 February 2015.

⁵⁰ Viet Nam’s Services Schedule in the ASEAN-NZ-AUS RTA is available at http://www.fta.gov.sg/aanzfta/aanzfta_annex4_viet%20nam.pdf accessed 16 February 2015.

⁵¹ Viet Nam’s Services Schedule in the ASEAN-Korea RTA is available at

<http://www.fta.gov.sg/akfta/ak-ats%20-%20sc1%20vie%20-%20final%20signed%2021%20nov%202007.pdf>

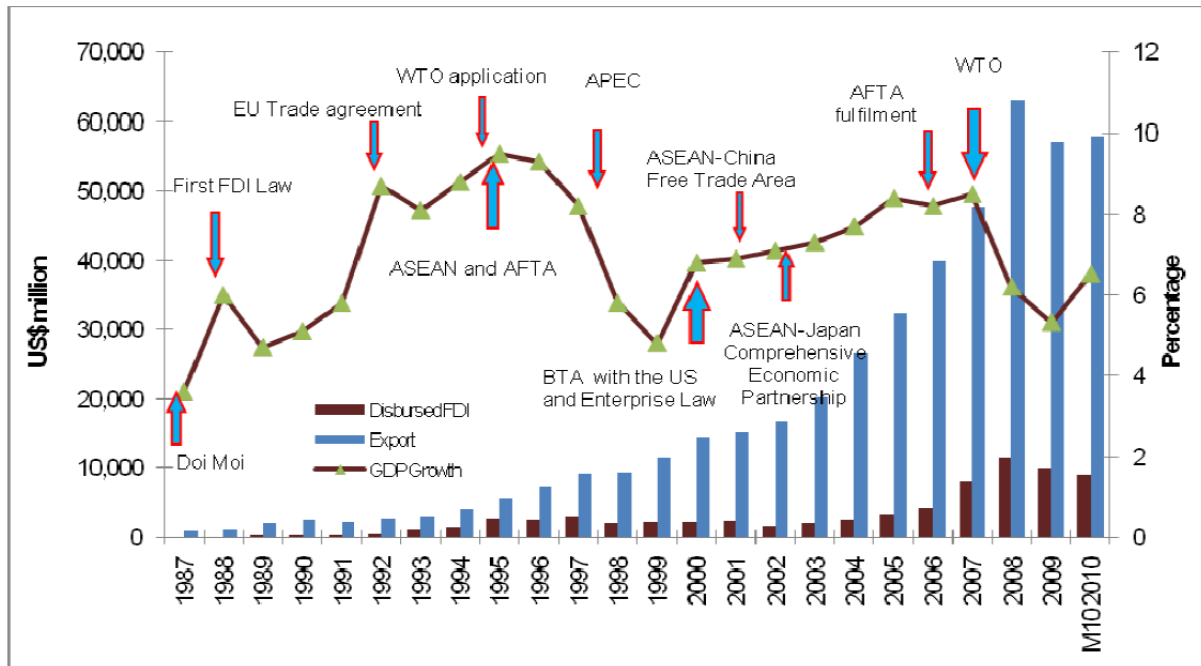
⁵² Available at:

www.asean.fta.govt.nz/assets/Downloads/Instruments/moa-labour-nz-philippines.pdf (accessed 29 April 2011).

cooperative activities and establishes a Labour Committee, and a consultative mechanism.⁵³ There is no obligation to provide information “contrary to the public interest or the laws” (Art. 6). Even so, the commitment to shield social policies from competitive pressures arising from trade liberalisation is remarkable and might show the way for other countries with similar interests.

A most impressive indication of a possible correlation between trade and investment liberalisation and economic development is provided for Viet Nam in Figure 2.

Figure 2: Viet Nam: Trade Liberalization and Economic Development



Source: Nguyen 2014

This graph shows economic growth and from an economic sustainability viewpoint it is most impressive. It does not show labour market or social developments during the period under review. Further studies will be needed on the question of sustainable employment generation by Viet Nam’s outward-oriented economic policy. Even more complex are assessments of the indirect social impact of trade and investment liberalisation on local suppliers and in the informal sector.

4. Discussion on Effective Adherence

So far we have found that adherence to ILS is a crucial issue, and that it does co-shape the trade and investment climate – even where it increases labour costs. But it is the extent of effective adherence which matters. However, effective adherence is difficult to establish in a desk study which in the absence of comprehensive statistical

⁵³ The two provisions which are to prevent a “social race to the bottom” read as follows:
 “The Parties recognise that it is inappropriate to set or use their labour laws, regulations, policies and practices for trade protectionist purposes.” (Art. 2.4)
 “The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labour laws, regulations, policies and practices.” (Art. 2.5)

evidence remains limited to anecdotal pieces of information. Empirical country studies could shed more light on the actual situation.

A few points may nevertheless be discussed now in order to test our hypothesis of the convergent action of the six international parameters on national employment policies and enterprise performance. The next section looks at the effective adherence impact of trade and investment treaties. The “stick and carrot” effect of unilateral measures by governments (with or without pressure group influence) will be addressed in Section b. On this basis and to close this interactive cycle, Section c returns to the narrative of effective adherence to core labour standards in each of the seven countries.

a. Adherence by way of treaties

It seems obvious that adherence to ILS as a result of treaties such as RTA and IIA will follow different paths from the ratification and monitoring of ILO conventions. This is due to the different objectives and enforcement procedures of the former which at best turn adherence to ILS into a collateral effect of such treaties. The main difference is in the different timespan and in the different nature of these labour clauses. Some core ILS 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 just beginning to have a scientifically measurable impact. The “evidence” which can be gleaned e.g. from press releases only provides an indication of the state of affairs in respect of adherence.

This being so, scientific assessments of adherence effectiveness are still rare. For EU treaties with (less stringent) labour clauses, a commissioned study found little evidence of effective adherence (Bourgeois, Dawar and Evenett 2007; see also Kerremans and Orbie 2009). Incidentally, a critical assessment by the US General Accounts Office on the impact of US RTA came to a similar conclusion (US GAO 2009).

A recent field study in 97 countries finds that where countries have comparative advantages in sectors with strong labour market frictions, trade liberalisation causes higher unemployment, whereas if frictions are only weak they actually reduce unemployment in such countries (Carrère, Fugazza, Olarreaga and Robert-Nicoud 2014). A less recent 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).

Interestingly, conflicting societal and investor interests within developed countries do not necessarily lead to home state governments condoning host state behaviour of their investors. For instance, the well-known problem of “regulatory freeze” of environmental and social standards as an incentive for FDI may at least in the above-quoted case in Peru find a new development-friendly solution preventing a race to the bottom as a result of FDI incentives and competition (see Box 1). The US position here was at least partly shaped by various domestic pressure groups. While societal pressure in this case had a clear impact on adherence the actual US intervention was

not of a unilateral nature but treaty-based and at least formally motivated by unfair competition prevention. The same is true for examples from other developing countries, and this also goes beyond those regulatory freeze clauses in investment contracts.

The actual impact of ILS, RTA and IIA on national policies and practices cannot be further assessed in this article. What is clear from the general discussion on trade vs. employment is that, at best, answers to the question of the impact of trade liberalisation on employment in developing countries need to be circumstantiated. This is especially true for the crucial issue of “better” vs. “more” jobs raised in Chapter 1 of this paper.

b. Adherence impact of unilateral measures

In Figure 1 social preferences and retailer and consumer pressure groups are presented as elements influencing national employment policies, especially by way of unilateral incentives and sanctions under various governmental schemes, mainly operated by the USA and the EU. In reality, social 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 ILS. However, it is here that WTO disciplines moderate the appetite for unilateral measures by preference-giving countries. Both preferences, and their withdrawal, are only possible within certain limits defined by the so-called *Enabling Clause*.⁵⁴ For instance, the preferential market access offered to developing countries under the Generalized System of Preference (GSP) programs cannot be withdrawn e.g. when a country violates a ILO convention it has ratified (Bartels and Häberli 2010). Such withdrawals are only possible for additional measures such as AGOA and GSP+, and provided these preferences are based on a *waiver* granted by the WTO (Häberli 2008 and FN35).

Consequently, when looking at the impact on adherence to ILS, “unilateral measures” are understood as comprising both governmental sanctions (or non-reciprocal preferences) and actions undertaken by activist NGO and consumer (or retailer) pressure groups aiming at “better work” and at “better governance” along the supply chain. The outcome of the Rana Plaza tragedy in Bangladesh has been described above (Box 2). Four more examples may illustrate the impact on adherence to ILS of unilateral measures taken by consumers and retailers, social and environmental concerns, non-reciprocal regional preferences and peace-building efforts.

1. Cotton as one of the oldest non-food agricultural commodities also has one of the longest supply chains. There have been multiple attempts and programmes, including the Geneva-based *Better Cotton Initiative* (BCI), intended to make cotton attractive for consumers and sustainable for all participants along the supply chain. Initiated in 2005 as part of a “round table” initiative led by the World Wide Fund for Nature (WWF), the BCI aims at improving global cotton production for producers, for the environment and for the sector’s future. The Better Cotton Standard System covers all three pillars of sustainability (environmental, social and economic). This private, retailer-led initiative is partly funded by importing country governments. It includes capacity building and monitoring of the consen-

⁵⁴ 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.

- sus-defined standards for pesticide use, water management, decent work, record keeping, training and other factors.⁵⁵
2. A well-known example of unilateral measures aimed at directly benefiting third countries is AGOA. According to the website of the United States Trade Representative (USTR), AGOA offers tangible incentives for African countries to continue their efforts to open up their economies and build free markets. Particularly noteworthy is a hatchet clause by which AGOA benefits are automatically withdrawn after a coup d'Etat. The Act is periodically reviewed in the US Congress. The 2014–15 extension debate involves “dolphin-safe” canned tuna and other conditionalities.⁵⁶ AGOA is non-reciprocal, and the preferential tariffs are of still considerable economic importance. Perhaps tellingly, South Africa has repeatedly signalled readiness to improve market access for US meat if it remains eligible for AGOA.⁵⁷ Unfortunately, such “negotiable” features of AGOA have also been noted in the domestic approval process for the tariff preferences granted to all developing countries, with parochial interests such as Bangladeshi sleeping bags preventing or delaying extension by the USA of the whole preference scheme.⁵⁸
 3. After the quota system enshrined in the Multifibre Agreement of the GATT was phased out by the WTO Textile Agreement, market shares for developing country textile and garment manufacturers underwent fundamental changes. What is interesting here is that after the WTO Hong Kong Ministerial Decision to grant duty-free and quota-free access to 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.⁵⁹ This, incidentally, was an extension bitterly opposed by African leaders, considering this decision as an unfriendly act of preference erosion by the US. Perhaps as a result of these debates, but also because of the alleged human rights violations in Cambodia, preferential access to the US market by Cambodia is now conditioned by a pre-shipment inspection system supervising the effective adherence to ILS by beneficiary employers manufacturing textiles and garments (ILO 2009).
 4. Certain developed country governments also try to augment corporate social responsibilities abroad, for instance when addressing corruption of foreign authorities by their own firms, or to combat base erosion and profit shifting (BEPS) by multinational enterprises. For many years, both the US executive and legislative sought to ensure that their own companies adhere to CSR standards abroad

⁵⁵ Better Cotton Initiative, Annual Report 2013 at <http://bettercotton.org/about-bci/bci-annual-report/> accessed 16 February 2015.

⁵⁶ World Trade Online, Daily News, posted 4 September 2014: (i) U.S. faces key question as it mulls adding products to AGOA (<http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-09/05/2014/us-faces-key-questions-as-it-mulls-adding-ag-products-to-agoa/menu-id-172.html>) and (ii) Mauritius, Others Press For Liberalizing Tuna Rule Of Origin Under AGOA (<http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-09/05/2014/mauritius-others-press-for-liberalizing-tuna-rule-of-origin-under-agoa/menu-id-172.html>) both accessed 9 September 2014)

⁵⁷ World Trade Online, Daily News, posted 7 August 2014: South Africa Willing to Work on Meat Barriers if it Can Stay in AGOA (<http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-08/08/2014/south-africa-willing-to-work-on-meat-barriers-if-it-can-stay-in-agoa/menu-id-710.html> accessed 9 September 2014).

⁵⁸ For this example of a protectionist and counterproductive unilateral measure, with opposing US trade and manufacturer interests not further discussed here, cf. Erin Marie Daly, Importer Blasts Bid for Duties on Asian Sleeping Bags. *Law360* dated 16 March 2011, New York, at <http://www.law360.com/articles/232360/importer-blasts-bid-for-duties-on-asian-sleeping-bags> accessed 16 February 2015.

⁵⁹ Labour crisis troubles Cambodian garment industry. Story in www.fibre2fashion.com dated 10 December 2012 at http://www.fibre2fashion.com/news/PrintStory.aspx?news_id=118790 accessed 9 February 2015.

(Aaronson 2005). Similar efforts are being made by various agencies in the EU (Weber 2014). A “race to the top” can only take place unilaterally or at best in a concerted intergovernmental framework such as the G20 and/or OECD. The question here is whether third countries will be amenable to joining such frameworks. Absent a multilaterally agreed binding framework, various free-riding interests will restrain such a race – and the sustainability of the employment opportunities it could generate.⁶⁰

Obviously, such anecdotal evidence cannot claim scientific probity or even measure the respective impact on effective ILS adherence of each action and actor. Nonetheless, it is submitted that all these actors make efforts to secure more sustainable employment on a more level playing field. This overview of treaties and of unilateral measures aimed at providing better social and employment conditions and at avoiding social dumping concludes with a look at the ILS implementation mechanisms in the ILO as applied in the seven countries under review in this article.

c. Adherence to core labour standards

At the ILO the well-established traditional monitoring and supervision procedures reflect the highly sensitive character of social policies. The specific merits and particular problems of tripartite procedures are beyond the scope of this paper which sees the biggest impact of international labour-related instruments on national labour policies in their interaction and mutual responsiveness.

One general view on the relationship between the exercise of trade union rights and manufacturing exports may nevertheless be in order. A gravity trade model with data from 162 countries finds a strong correlation between stronger trade union rights and higher exports as well as between stronger democracy and higher total exports (Kucera and Sarna 2006).

For the seven countries under review only anecdotal evidence can be presented here. The examples, all on official ILO records, are gleaned mainly from Freedom of Association cases and from the *Representation Procedure* under Articles 24 and 25 of the ILO Constitution.⁶¹

i. Bangladesh

- In 2010 the Bangladesh Cha-Sramik Union (BCSU) 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 Public Services International (PSI) alleged anti-union discrimination and intimidation through the discriminatory transfer of ten senior leaders of the

⁶⁰ Cf. OECD, First steps towards implementation of OECD/G20 efforts against tax avoidance by multinationals, at <http://www.oecd.org/newsroom/first-steps-towards-implementation-of-oecd-g20-efforts-against-tax-avoidance-by-multinationals.htm> accessed 16 February 2015.

⁶¹ 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". For the functioning of this procedure see <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm>.

Bangladesh Diploma Nurses Association (BDNA) and the proposed transfers of 200 other union members.

- In 2004 the International Textile, Garment & Leather Workers' Federation (ITGLWF) alleged that the 1969 Industrial Relations Ordinance (IRO) 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 unreasonably refused by the Registrar of Trade Unions (RTU); and that seven of the most active workers in the union had been dismissed for anti-union reasons.
- Also in 2004 the ITGLWF alleged that the Government of Bangladesh had violated freedom of association in export processing zones (EPZs).

ii. Ethiopia

- In 2006 the Ethiopian Teachers' Association (ETA) and Education International (EI), supported by the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL), alleged serious violations of the ETA's trade union rights including continuous interference in its internal organization thus preventing it from functioning normally, and interference by way of threats, dismissals, arrest, detention and maltreatment of ETA members.
- The National Confederation of Eritrean Workers (NCEW) alleged non-observance by Ethiopia of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Termination of Employment Convention, 1982 (No.158), made under Article 24 of the ILO Constitution by the NCEW. This representation procedure was closed in 2001.
- In 1996 The International Federation of Commercial, Clerical, Professional and Technical Employees (FIET) and the Confederation of Ethiopian Trade Unions (CETU) complained against the occupation of trade union premises, physical assault on a trade unionist and forced removal of elected trade union leaders.

iii. Ghana

- In 1981, the International Confederation of Free Trade Unions (ICFTU), the Organisations of African Trade Union Unity (OATUU) and various other trade union organisations alleged Government interference in trade union activities, anti-union acts and arrest of national unions' leaders.
- Apart from that old case (and two others, now all closed), Ghana appears to have been subject only to criticism for failures in its reporting and other standards-related obligations.

iv. Madagascar

- 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; violation of the Maritime Code, particularly in regard to articles of agreement approved by the maritime administration, which stipulate that striking is considered to be serious misconduct, punishable by immediate discharge and legal action.

- In 2001 The Federation of Workers' Trade Unions of Madagascar (FISEMA), the Confederation of Christian Trade Unions of Madagascar (SEKRIMA), the Independent Trade Unions of Madagascar (USAM), the Federation of Health Workers' Unions (FSMF), the Federation of Informal Sector Workers' Unions (SEMPTIF TOMAVA) and various other 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.⁶²

v. South Africa⁶³

- The record shows 24 Freedom of Association cases (all closed). One example from 2004 concerns the allegation by the Oil, Chemical General and Allied Workers' Union (OCGAWU) that 963 workers had been dismissed by Volkswagen S.A. for their participation in a strike, on the basis of a narrow interpretation of the Labour Relations Act 1995, which emphasised procedural irregularities over workers' substantive rights and had a disproportionate effect on workers' rights, and of employer interference in the affairs of the trade union of which the 963 workers were then members.
- Direct requests and Observations by the CEACR on the application of the two Forced Labour and the two Child Labour Conventions are awaiting answers from South Africa.⁶⁴
- There are also several Observations made by (international) employers' and workers' organisations based on Article 23.

vi. Switzerland

- Switzerland has two pending Freedom of Association cases, one 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. From a trade union perspective such compensation fails to act as a deterrent, as it should under Convention 98.
- The CEACR also made Observations on the application of Convention C081 (Labour Inspection Convention, 1947) and on the Swiss Penal Code in respect of C182 (Worst Forms of Child Labour Convention, 1999).

vii. Viet Nam

⁶² See NORMLEX at <http://www.ilo.org/dyn/normlex/en/f?p=1000:20010:0::NO> accessed 20 February 2015.

⁶³ ILO Member from 1919 to 1966 and since 26 May 1994

⁶⁴ See

http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102888 accessed 11 September 2014.

Viet Nam has been an ILO Member intermittently: from 1950 to 1976, 1980 to 1985 and since 20 May 1992. This might be one of the reasons explaining the relative dearth of labour cases reported to the ILO.

Besides several comments on notification obligations the record shows

- Observations on the application of a Convention (C029, C081, C138, C182)
- Direct requests on the application of a Convention (C014, C029, C081, C138, C182)

Two Observations were made in 2010 by the Vietnam Chamber of Commerce and Industry (VCCI) (Article 22).

Five Freedom of Association cases, all now closed, dealt with violations of trade union rights in the years 1963–74.

5. Conclusions

Three upfront disclaimers may be warranted at this stage of our research.

1. Sustainable employment can mean better jobs, or more jobs, but not necessarily both at the same time. This fact may imply hard choices for governments and employers. In this note, however, we only look at this question in the framework of the *International Polity for Sustainable Employment*. There can be no direct impact on national policy choices as long as even NAFTA which has the most stringent international labour provisions specifies that nothing in this agreement can “empower a Party's authorities to undertake labor law enforcement activities in the territory of another Party” (see Box 1).
2. Scant evidence and mostly anecdotal records disallow probative conclusions for the question of the actual development impact of ILS. For ILO conventions and enforcement mechanisms the impact question cannot be assessed here. The often “best endeavour” nature of labour provisions in RTA and IIA does not in itself offer much scope for shaping national employment policies. As for unilateral measures, three cases of a possibly successful impact are on record here. There are others – but this in itself is no proof that unilateralism will always help ILS observance.
3. The lack of multilaterally constraining and easily enforceable ILS maintains policy space, but it is also a source of rule fragmentation. This probably also allows for competition distortions at the expense of the basically non-displaceable asset i.e. the workforce. Although this paper does not deal with this aspect, it shows that a more coherent and stronger international regulatory framework for national employment policies would definitely smooth the international playing field nowadays biased by competing national policies. Harmonisation 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 harmonisation e.g. of wages cannot lead to the fulfilment of such an objective.

A few general conclusions seem nevertheless to be appropriate.

It is often 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 in-

crease local standards. Such moves, of course, are only sustainable (by way of “more” or “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 national labour relations, at least to my knowledge and in the seven countries under review (similarly for China, see Huang et al 2014). However, a large number of case studies mainly by activist NGOs at least underline the need for scientific studies in all seven countries.

At the same time the sensitivity of social policies in all countries 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 possibly result from different labour standards. Unlike, say, a tariff binding, social standards can therefore hardly be “locked in” alongside commitments to liberalisation of investment and trade. Hence, under these circumstances ILS and even social norms in RTA continue to have only a limited impact on national policies. This is presumably the case both for lowering standards and for increasing them.

- Several studies have found 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). On the other hand, 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 RTAs 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 RTAs (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 vs. more jobs).
- In a few very specific cases, unilateral incentives and sanctions by trading partners, as well as consumer preferences and pressures, can act as pull factors for better if not more jobs. This impact is possibly enhanced by RTA and IIA. However, it should be noted that for a long time many economists have argued that trade sanctions for CLS 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 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 also in poorer countries. Moreover, 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 supervision. 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, gender issues, social coherence and other factors. This being so, the admittedly flimsy evidence gathered here seems to indicate that even “stand-alone” labour chapters in trade and investment treaties

might increase sustainable employment where and when supporting measures, including through unilateral preferences and even sanctions, form a “cocktail” which export-oriented economies will find palatable.

Instead of more affirmative conclusions, four questions are submitted for further studies at the national level:

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 only allowed through a state monopoly? Are social media a significant new channel for stakeholder interaction?
2. What are the reasons, as seen by national 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 harmonised (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 organisations 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? How would “harmonisation” need to be formulated in order to take into account different country situations and choices, and the policy dilemma between “more” and “better” jobs?

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