



Centre for WTO Studies

**Trade and Labour under the WTO and
FTAs**

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TRADE AND LABOUR: AN ASSESSMENT OF RECENT TRENDS

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**ANNEXURE I LABOUR PROVISIONS IN TRADE AGREEMENTS CONCLUDED BY COUNTRIES OTHER THAN
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List of Abbreviations and Acronyms

| | |
|-----------|--|
| CARIFORUM | Caribbean Forum |
| CLS | Core Labour Standards |
| ECE | Evaluation Committee of Experts |
| EPZ | Export Processing Zone |
| EU | European Union |
| GATT | General Agreement on Tariffs and Trade |
| GOI | Government of India |
| GSP | Generalised System of Preferences |
| ILO | International Labour Organisation |
| LAC | Labour Affairs Council |
| NAALC | North American Agreement on Labour Cooperation, 1994 |
| NAFTA | North American Free Trade Agreement |
| NAO | National Administration Office |
| OECD | Organisation for Economic Co-operation and Development |
| PTA | Preferential Trade Agreement |
| SEZ | Special Economic Zone |
| TPA | Trade Promotion Authority |
| WTO | World Trade Organisation |

Introduction

The ‘Trade and Labour’ linkage is a sensitive and controversial issue for many countries. As with the case of linkage of other non-trade issues with trade (such as trade and environment, or trade and intellectual property), the trade and labour debate is characterized by two conflicting strands of thought: one favouring the inclusion of such a linkage in trade negotiations, and the other discrediting and denouncing any kind of linkage.

This divergence of views was most visible during the WTO Ministerial Conference at Singapore in 1996, and again at Seattle in 1999, when developing nations such as Brazil, Egypt, India, and Malaysia vehemently opposed the pressure from the U.S. to include labour standards within the ambit of the WTO.¹ While this resistance has been responsible for lack of any labour standards being incorporated under the WTO, labour provisions are increasingly being incorporated in bilateral and regional preferential trade agreements (referred to in this article as ‘Preferential Trading Agreements’ or PTAs) entered into by the U.S., the EU, New Zealand, and more recently, by developing countries such as Chile as well.

A recent study by the International Labour Organization (ILO) maps some of the recent trends in the nature of labour provisions in PTAs and notes that the use of such provisions has especially increased since the global financial crisis of 2008.² The scope and approach adopted by PTAs varies widely, such as:

- Provisions that commit parties to adhere to certain international labour standards, referring to the ‘Core Labour Standards’ defined in the ILO 1998 Declaration;
- Provisions that commit parties to ILO Conventions generally;
- Provisions that refer to “internationally-recognized workers rights”; and
- A general commitment by parties to enforce labour standards under their own national labour law.

This study seeks to assess and understand: (i) whether trade agreements are the proper instruments to address labour concerns; and (ii) the scope and depth of the trade and labour linkages that have been emerging in PTAs. It is organized into six parts: part I focuses on the literature overview of the various economic and legal strands of the trade and labour debate, part II will discuss the role of the ILO in developing labour standards, part III analyses the outlook of the WTO towards trade and labour standards and the relationship between the

¹ It has been noted that at the Singapore Ministerial in 1996, certain developed countries, notably Australia and Great Britain, Germany and Switzerland, supported the stand of developing countries: See, Arvind Panagariya, *Trade and Labour: A Post-Seattle Analysis*, GLOBALIZATION UNDER THREAT, (Zdenek Drabik ed.) (2001). EU and EFTA countries however are now proponents of the trade and labour linkage.

² Franz Christian Ebert & Anne Posthuma, “Labour Provisions in Trade Arrangements: Current Trends and Perspectives”, International Labour Organization (2011)

WTO and the ILO, part IV will examine the extent to which PTAs have so far incorporated labour standards, part V will focus on private standards on labour, and their implications, and part VI will deal with the challenges on negotiating labour related issues under PTAs.

Part I Existing Debates: A Literature Review

The literature discussing the presence of any linkage between trade and labour issues can be grouped on the basis of the following considerations: the nature of economic relationship between trade and labour standards (the ‘economic dimension’); and the rationale, if any, for incorporation of legal principles addressing labour standards in trade negotiations (the ‘legal and institutional dimension’). There are diametrically opposing views under each category. These are summarized below.

IA Economic Dimension

The discussion on the economic relationship between trade and labour standards is grounded on basically two issues: whether lower labour standards result in an unfair competitive edge, and secondly, whether this unfair advantage would result in a “race to the bottom” of labour standards.³

a) Unfair Competition Argument

Proponents of the trade and labour standards linkage argue that countries with relatively low labour standards would have lower costs of production, which would give them an unfair advantage over countries which provide for higher labour standards. While this competitive advantage may be rewarding in the short-run, it is argued, the overall and long-term effect of low labour standards would result in workplace violations.⁴ It has been observed that lower labour standards are associated with higher trade.⁵ It has also been argued that since labour is a factor of production of goods that are traded internationally, violations of international labour standards should be enforced through imposition of trade sanctions.⁶

³ Matthias Busse, Do Labour Standards Affect Comparative Advantage? Evidence for Labour-intensive Goods, Discussion Paper No. 0142, Centre for International Economic Studies, Adelaide University, 2003, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.15.1580&rep=rep1&type=pdf>; Michael E. Aleo, Comparative Advantage and Labour Protections in Free Trade Agreements: Making Labour Protections in Trade Agreements Practical and Effective, Paper 958, Bepress Legal Series, 2006, available at <http://law.bepress.com/cgi/viewcontent.cgi?article=4613&context=expresso>.

⁴ Jonathan P. Hiatt & Deborah Greenfield, The Importance Of Core Labour Rights In World Development, 26 Mich. J. Int'l L. 39, 48 (2004)

⁵ Clotilde Granger & Jean-Marc Siroen, Core Labour Standards In Trade Agreements From Multilateralism To Bilateralism, available at http://econpapers.repec.org/paper/nerdauphi/urn_3ahdl_3a123456789_2f255.htm

⁶ Daniel S. Ehrenberg, The Labour Link: Applying the International Trading System to Enforce Violations of Forced and Child Labour, 20 Yale J. Int'l L. 361, 364 (1995)

However, there is a significant body of literature that debunks this argument.⁷ An OECD study on the trade and labour linkage has observed that while countries which strengthen their core labour standards can increase economic growth and efficiency by raising skill levels in the work force and by creating an environment which encourages innovation and higher productivity, there is no evidence to suggest that countries with low ‘core labour standards’ enjoy a better export performance.⁸ Proponents of trade liberalization like Paul Krugman regard the demands for incorporation of international labour standards in trade agreements is in fact a protectionist measure in the guise of humanitarian concerns.⁹ This view is linked with the concept of consumer welfare maximisation, which encourages a particular economy to be at its efficient best by producing at minimum possible cost.¹⁰ Some scholars on the basis of economic theory also argue that immediate imposition of international labour standards would lead to reduction in the total economic welfare worldwide including in developing nations, as well as developed and industrialized nations.¹¹ Attaching labour standards to the WTO and trade agreements, it has been argued, will not achieve the goal of better wages or labour standards, nor will it have the desired effect of keeping more jobs in the industrialized countries.¹² On the contrary, such a policy could make things worse for many workers in developing countries.¹³

b) Race to the Bottom Argument

Another argument, often related with the unfair competition argument by proponents of the trade and labour linkage, is that in absence of coercive international labour standards, all the nations of the world would deliberately lower their labour standards, so as to benefit from the resultant comparative advantage. Supporters of trade-labour linkage fear that competition from imports made in low-wage developing countries will lead to loss of jobs for workers in developed countries, and would drive the developed countries to lower their labour standards.¹⁴

The opponents of such a linkage, however, argue that there is no clear basis for this argument, and there is little empirical support for a link between increased world trade and a decline in labour conditions.¹⁵ It has also been argued that mandatory standards will not improve wages and working conditions of workers in poor countries if they raise the cost of

⁷ Richard N. Block, Karen Roberts & Russell Ormiston, *Economic Perspectives On International Labour Standards*, 11 MSU-DCL J. Int'l L. 417, 420 (2002) at 18.

⁸ INTERNATIONAL TRADE AND CORE LABOUR STANDARDS 33 (OECD, 2000)

⁹ Paul Krugman, *Does Third World Growth Hurt First World Prosperity?*, Harvard Business Review, 1994

¹⁰ Richard N. Block, Karen Roberts & Russell Ormiston, *Economic Perspectives On International Labour Standards*, 11 MSU-DCL J. Int'l L. 417, 420 (2002)

¹¹ See, for example, Michael J. Trebilcock & Robert Howse, *Trade Policy & Labour Standards*, 14 Minn. J. Global Trade 261, 268 (2005)

¹² Robert Stern and Katherine Turrell, “Labour Standards and the World Trade Organization” (2003), available at www.wto.org/english/forums_e/ngo_e/labour_standards_e.doc

¹³ Id.

¹⁴ See discussions in Raj Bhala, *Clarifying the Trade-Labour Link*, 37 Colum. J. Transnat'l L. 11, 17 (1998)

¹⁵ William B. Gould IV, *Labour Law For A Global Economy: The Uneasy Case For International Labour Standards*, 80 Neb. L. Rev. 715, 725-26 (2001)

labour above its level of productivity.¹⁶ In fact, it is argued, that workers may suffer negative consequences when their wages are raised above the market value of their productivity.¹⁷

Hence, according to scholars like Bhagwati, the demand for linkage that reflects these unsupported concerns can then be interpreted legitimately as protectionist.¹⁸ Further, it is also argued that improvements in actual labour conditions may raise productivity, and hence compensation, but the analysis finds no evidence that adoption of international labour standards has produced such improvements.¹⁹

IB Legal and Institutional Dimension

a) Sovereignty Issues

One of the major points of contention in the trade-labour linkage debate is that providing for appropriate labour standards is essentially a function of the state, and imposition of international labour standards is against the concept of state sovereignty. In this sense, trade-labour linkage has also been referred to as a form of political imperialism.²⁰ It has been argued that there is no need for linkage since developing countries may improve their labour standards without endangering their comparative advantage.²¹

The advocates of trade-labour linkage, however, argue that an absolutist concept of national sovereignty is unsustainable in the modern context of integrated world economy.²² It has also been argued that international labour standards, and international trade law could contribute to a modification or a shift in the concept of state sovereignty, and that this would enable better labour protection.²³

¹⁶ Robert Stern and Katherine Turrell, "Labour Standards and the World Trade Organization" (2003), available at www.wto.org/english/forums_e/ngo_e/labour_standards_e.doc. The authors refer to numerous empirical studies which have measured the degree to which workers were displaced when mandated minimum wages were raised by different amounts.

¹⁷ Id.

¹⁸ Jagdish Bhagwati, *Free Trade and Labour* (2001) available at <http://www.uoit.ca/sas/Globalization%20and%20WTO/Free%20Trade%20and%20Labour.pdf>

¹⁹ Robert J. Flanagan, *Labour Standards And International Competitive Advantage* 36 (International Labour Standards Conference, Stanford Law School, May 20, 2002) available at www.iza.org/iza/en/papers/transatlantic/1_flanagan.pdf

²⁰ See, for example, discussions in Christian Barry & Sanjay G. Reddy, *International Trade And Labour Standards: A Proposal For Linkage*, 39 *Cornell Int'l L.J.* 545, 564 (2006)

²¹ Kimberly A. Elliott and Richard B. Freeman, *Can labour standards improve under globalization?*, Washington D.C., Institute for International Economics (2003).

²² Christopher L. Erickson & Daniel J.B. Mitchell, *The American Experience with Labour Standards and Trade Agreements*, 3 *J. Small & Emerging Bus. L.* 41, 43 (1999)

²³ Patrick Macklem, *Labour Law Beyond Borders*, 5 *J. Int'l Econ. L.* 605, 627

b) Incorporation of Labour Standards within the WTO and other Trade Agreements

Those in favour of inclusion of labour standards in trade agreements are of the view that the WTO should incorporate labour standards because labour is a factor of production, and failure by a government to regulate the means by which labour is utilized constitutes a trade distortion.²⁴ A slightly different view, though favouring inclusion, is that though trade sanctions should be viewed as a last resort, labour issues should be considered by the WTO with focus on incentives and preferences to developing nations to promote higher labour standards.²⁵

On the other hand, several scholars have written about the dangers of incorporation of labour standards in the WTO.²⁶ This is largely premised on the fear of the coercive nature of the dealings at the WTO, and also the relative inability of the developing nations, on account of limited resources, to adequately defend their position.²⁷ The use of trade sanctions for imposition of labour standards are not regarded as the best approach to ensure better domestic labour standards.²⁸

Opponents of a trade and labour linkage at the WTO also emphasize that the empirical literature suggests that mandating unsustainably high labour standards will not improve average wages and working conditions in poor countries or even improve trade of developing countries.²⁹ Such mandates can create further inequality, by reducing the number of workers with better pay and working conditions and increasing the number in poorer conditions.³⁰

²⁴ Daniel A. Zaheer, *Breaking The Deadlock: Why And How Developing Countries Should Accept Labour Standards in the WTO*, 9 *Stan. J.L. Bus. & Fin.* 69, 73 (2004)

²⁵ Robert Howse and Makua Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, International Centre for Human Rights and Democratic Development, Canada, available at <http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html#r59>

²⁶ Jagdish Bhagwati, *Trade Liberalisation and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues*, 18 *World Econ.* 745 (1995); Also see T. N. Srinivasan, *International Trade and Labour Standards from an Economic Perspective*, in, *CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION* (Pitou van Dijck & Gerrit Faber eds., 1996).

²⁷ Kaushik Basu, *Compacts, Conventions, and Codes: Initiatives for Higher International Labour Standards*, 34 *Cornell Int'l L.J.* 487, 492 (2001)

²⁸ Keith E. Maskus, *Should Core Labour Standards Be Imposed Through International Trade Policy?* 14 (World Bank, Policy Research Working Paper No. 1817) available at <http://www.worldbank.org/html/dec/Publications/Workpapers/WPS1800series/wps1817/wps1817.pdf>

²⁹ Robert Stern and Katherine Turrell, "Labour Standards and the World Trade Organization" (2003), available at www.wto.org/english/forums_e/ngo_e/labour_standards_e.doc

³⁰ *Id.*

Part II ILO, WTO and Labour Standards

IIA Labour Standards under the International Labour Organization

The International Labour Organization (“ILO”) is a tripartite United Nations agency that is responsible for drawing up and overseeing international labour standards. These standards can be either in form of binding conventions, or non-binding recommendations.³¹

The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, provides that all Member States shall have a commitment to respect and promote principles and rights in four categories” freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation. The Declaration also recognizes that that “... these rights are universal, and that they apply to all people in all States - regardless of the level of economic development”³².

The essence of these core labour standards has been derived from United Nations Universal Declaration of Human Rights in 1948, which is often referred to as reflective of customary international law.

The ILO has also developed a follow up procedure to ensure that the member states which have not ratified the ILO’s Core Labour Standards (‘CLS’) are able fulfill their commitment of ratifying and realizing CLS within their jurisdiction. Such members are required to report to the ILO on an annual basis on the status of the relevant rights and principles within their borders, noting impediments to ratification, and areas where assistance may be required. These reports are reviewed by the Committee of Independent Expert Advisers, and their observations in turn considered by the ILO’s Governing Body. Employers and workers, and other interested organizations are also able to voice their views on the progress made in regards to the CLS by the government of the member states.

The ILO CLS are reflected in the following eight fundamental ILO Conventions.

1. Convention regarding Forced or Compulsory Labour 1930
2. Convention concerning the Abolition of Forced labour 1957
3. Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951

³¹ <http://www.ilo.org/asia/areas/international-labour-standards/lang--en/index.htm>

³² <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm>

4. Convention concerning Freedom of Association and Protection of the Right to Organise, 1948
5. Convention concerning Discrimination in Respect of Employment and Occupation, 1958
6. Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951
7. Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949
8. Convention concerning Minimum Age for Admission to Employment, 1973 and Convention concerning the Prohibition and Immediate Action for the Elimination for the Worst Forms of Child Labour, 1999

Table 1 below provides a snapshot of the number of countries which have ratified each of the conventions dealing with the CLS.³³ The purpose of this Table is to identify those countries which have not ratified some of the Conventions.

Table 1: Overview of Ratification Status of the ILO Core Conventions

| S. No. | Convention | Number of Countries which have ratified the Convention ³⁴ | Countries which have not ratified the Convention |
|--------|---|--|--|
| 1. | Forced Labour Convention (No. 29) | 175 | Korea, Maldives, Marshal Island, United States, Somalia, Tuvalu, China, etc. |
| 2 | Abolition of Forced Labour Convention (No.105) | 171 | Japan, Korea, Lao People's Democratic, Solomon Islands, Vietnam Maldives, Marshal Island, Somalia, Tuvalu China, etc. |
| 3 | Equal Remuneration Convention (No.100) | 168 | Bahrain, Brunei Darussalam, Kuwait, Liberia, Maldives, Marshal Island, Myanmar, Qatar, Oman, Somalia, Tuvalu, United States, etc. |
| 4 | Discrimination (Employment Occupation) Convention (No.111) | 168 | Brunei Darussalam Maldives Marshal Island, Solomon Islands, Tuvalu, United States, etc. |
| 5 | Freedom of Association and Protection of Right to Organise Convention (No.87) | 150 | Bahrain, Brazil, China, Jordan Iraq, India, Iran, Brunei Darussalam, Kenya, Korea, Maldives, Marshal Island, Malaysia, Thailand, United States, Vietnam, Nepal, New Zealand, Qatar, Saudi Arabia etc |
| 6 | Right to Organise and Collective Bargaining Convention (No.98) | 160 | Bahrain, Brunei Darussalam, Canada, China, Iran, Korea, Lao People's Democratic Republic, Maldives, Marshal Island, Mexico, India, Oman, Qatar, Saudi Arabia, Thailand, United States, Vietnam, etc. |
| 7 | Minimum Age Convention (No.138) | 161 | Bahrain, Bangladesh, Iran, Maldives, Marshall Islands, Mexico, Myanmar, India, New Zealand, Saudi Arabia, Solomon Islands, |

³³ <http://www.ilo.org/ilolex/english/docs/declworld.htm>

³⁴ Total number of countries is 183. Please see <http://www.ilo.org/ilolex/english/docs/declworld.htm>

| S. No. | Convention | Number of Countries which have ratified the Convention ³⁴ | Countries which have not ratified the Convention |
|--------|---|--|---|
| | | | United States, etc. |
| 8 | Worst forms of Child Labour Convention (No.182) | 174 | Croatia, Eretria, Maldives, Marshal Island, India, Myanmar, Solomon Islands, Tuvalu, etc. |

It is interesting to note that even though the U.S. insists on incorporation of stringent labour provision in the PTAs, it has not ratified: (i) Convention on the Right to Organise and Collective Bargaining; (ii) the Convention on Freedom of Association and Protection of the Right to Organise; (iii) Convention on Equal Remuneration; (iv) Convention on Discrimination, or (v) Convention on the Worst Forms of Child Labour, and (vi) Convention on Minimum Age. It has only ratified the Convention on Abolition of Forced Labour Convention, and Worst forms of Child Labour Convention.

Developing countries like India have similarly ratified some, but not all of the ILO conventions reflecting CLS. For eg. India has ratified both of the core ILO Conventions on discrimination and on forced labour. However, it has not ratified the conventions pertaining to: (i) freedom of association and the effective recognition of the right to collective bargaining; and (ii) effective abolition of child labour. In relation to the CLS not ratified by India, its approach has been that it shall generally to ratify a Convention when it is ascertained that the applicable laws and practices are in conformity with the relevant ILO Convention. India's official position is that it is "[a]... *better course of action [is] to proceed with progressive implementation of the standards, leave the formal ratification for consideration at a later stage when it becomes practicable.*"³⁵ Even in relation to the Conventions which have not been ratified by India, it has generally voted in favour of the Conventions reserving its position as far as its future ratification is concerned.³⁶

II B WTO and Labour Standards

At the WTO, as discussed in the introduction to this paper, there has been strong opposition to the linkage of labour standards to trade.

The Singapore Ministerial Declaration in 1996, as discussed earlier, unequivocally rejected the use of labour standards for protectionist purposes. Specifically, the Singapore Ministerial Declaration stated that: "*economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use*

³⁵ <http://labour.nic.in/ilas/indiaandilo.htm>

³⁶ <http://labour.nic.in/ilas/indiaandilo.htm>. Also see <http://jurisonline.in/2009/05/impact-of-ilo-on-labour-laws-in-india/>

of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.” With this in view, the WTO and ILO Secretariats were asked to continue their existing collaboration. The debate on linking labour standards with trade under the WTO however, continues. The WTO Secretariat has summarized the key issues as follows, and also acknowledged that there exist wide differences in outlook of countries towards these questions:³⁷

- ***The analytical question:*** *If a country has lower standards for labour rights, do its exports gain an unfair advantage? Would this force all countries to lower their standards (the “race to the bottom”)?*
- ***The response question:*** *If there is a “race to the bottom”, should countries only trade with those that have similar labour standards?*
- ***The question of rules:*** *Should WTO rules explicitly allow governments to take trade action as a means of putting pressure on other countries to comply?*
- ***The institutional question:*** *Is the WTO the proper place to discuss and set rules on labour or to enforce them, including those of the ILO?*

There is also no specific reference under the WTO Agreements to labour related standards, except for a general exception to GATT obligations under Article XX(e), which allows countries to deviate from GATT obligations in respect of products of prison labour.

It is also significant to note that the possibility of applying Article XX(d) on “measures necessary to secure compliance with laws or regulations not inconsistent with the GATT” to labour standards was discussed during the negotiations of the Havana Charter, but rejected.

IIC ILO & WTO: Relationship

In terms of the institutional mechanism, the WTO and the ILO have engaged in dialogue and discussion, and continue to do so. The WTO Secretariat attends sessions of the ILO Governing Body as an observer, and also routinely participates in meetings of the Governing Body's Working Party on the Social Dimension of Globalization. Both the organisations have also collaborated in the context of work undertaken between 2002-2004 by the World Commission on the Social Dimension of Globalization (an initiative of the ILO). The WTO Secretariat participates in follow-up mechanisms to the World Commission, including attendance at meetings of the ILO's Policy Coherence Initiative. The WTO Secretariat also attends conferences and seminars organized by the ILO, when issues of relevance to the WTO are discussed.³⁸ The ILO, however, does not as yet have observer status at the WTO.

³⁷ http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm

³⁸ http://www.wto.org/english/thewto_e/coher_e/wto_ilo_e.htm

The first formal outcome of the WTO-ILO collaboration was a study published in 2009, which examined the impact of globalization on informal employment.³⁹ The premise of the study is that globalization and particularly trade has the potential to raise global welfare, and to improve employment outcomes, a fact borne in various previous studies. The study starts with this basis, and then proceeds to a discussion on how developing countries with a significant number of persons employed in the informal sector, with limited job security and social protection, would need to consider re-examining their labour policies in order to maximize the benefits of globalization.

It is important to note that the WTO-ILO study does not prescribe or suggest that trade be used as a tool for enforcement of labour standards. Neither does it allude to any of the theories of proponents of the trade-labour linkage, such as ‘race to the bottom’, etc. There is nothing in this study to suggest any agenda or move towards recommending labour standards as part of trade agreements. The focus of the study was limited to examining the impact of expanding economic opportunities in the informal sector, wherein workers are less protected, remain more vulnerable to sudden changes in market conditions and have to accept severe cuts in their wages. Its recommendations focused on improvement of conditions and incentivising the informal sector to ensure that they can be part of the formal economy.

IID ILO Study on Labour Provisions in Trade Agreements

As discussed in part IIA above, the ILO Declaration on Fundamental Principles and Rights at Work in 1998 stresses that labour standards are not to be used for protectionist trade purposes. The ILO has not taken any formal position beyond this on the labour and trade linkage. However, it is interesting to note a recent discussion paper published by ILO’s autonomous facility, which deals with the issue of Labour provisions in Trade Agreements.⁴⁰ The paper maps the trends in several recent PTAs. While it studies that have concluded that the impact of PTAs such as the NAFTA, which have elaborate labour provisions, has been rather limited,⁴¹ it nevertheless concludes that labour provisions in PTAs offer a number of possibilities to promote labour standards through mechanisms for international economic governance. Such a conclusion would be considered controversial by several developing countries such as India, which have been traditionally opposed to the trade and labour linkage. The paper is silent on the controversial aspects of the trade and labour linkage, including the concerns of developing countries with regard to protectionism, and with regard to the basic question of whether trade is the proper instrument to address labour concerns.

³⁹ Joint Study of the ILO and WTO, “Globalization and Informal Jobs in Developing Economies” (2009)

⁴⁰ “Labour provisions in Trade Arrangements: Current Trends and Perspectives”, Discussion Paper published by the International Labour Organization and International Institute for Labour Studies. (2011) (Prepared by Franz C. Elbert and Anne Posthuma). Available at http://www.ilo.org/public/english/bureau/inst/download/dp205_2010.pdf.

⁴¹ Id., p.24.

While there has been no official comment by the ILO on the ILIS paper, it remains to be seen whether the paper could potentially influence future developments.

Part III Labour Provisions in Preferential Trading Agreements

Labour rights have been finding reflection in regional and bilateral PTAs beginning with the U.S. negotiation of the North American Free Trade Agreement (“NAFTA”) with Mexico and Canada in the early 1990s. The NAFTA included a side agreement to protect worker rights, as well as the environment. Every U.S. PTA since then has incorporated legally binding and enforceable provisions on labour rights in the text of the agreement. These provisions in U.S. PTAs generally refer to stringent international standards or ILO’s core labour standards. Additionally, U.S. and Canadian PTAs also often refer, to “acceptable conditions of work” relating to wages, hours, and health and safety.

As discussed in Part II of this report as of 2009, a recent ILO study by the ILO in 2011 notes that 37 out of 186 PTAs have included 17 conditional elements which have greater legally binding value, whereas around 20 PTAs have broadly worded promotional labour provisions. Conditional provisions are the hallmark of PTAs entered into by the US and Canada. PTAs entered into by the EU contain promotional elements. In addition, there are broadly worded provisions pertaining to labour standards which have been incorporated into a few PTAs entered into by developing countries such as China, Chile, Philippines, and Thailand. In such instances, the PTA partner has been a developed country (such as New Zealand or Japan). There are however a few PTAs between developing countries, such as Chile-China, and Taiwan-China-Nicaragua which contain broad promotional elements.

The focus of this part is on labour related provisions in PTAs entered into by the U.S. and the EU. Annexure I to this paper provides an overview of the kind of labour provisions that have been included in PTAs other than the US and EU.

IIIA U.S. Approach to Labour Provisions in PTAs

As mentioned earlier, labour provisions are present in all PTAs entered into by the U.S. since 1994, when the NAFTA/NAALC was concluded. In a number of PTAs entered into by the U.S., the approach is to require PTA parties to “*enforce their own laws*”. This fairly innocuous requirement is however, typically preceded by requirements during the negotiating

stages of a PTA, whereby changes to labour reforms are required to be undertaken as a pre-condition to PTA negotiations. Therefore, countries such as Bahrain, Chile, Morocco and Guatemala are reported to have undertaken major labour law reforms in anticipation of concluding a PTA with the U.S.⁴²

U.S.'s motivation for requiring elaborate provisions in its PTAs, however, is not reflected in its ratification of ILO standards. Despite being the one of the strongest proponents of trade-labour standards linkage, and the foremost promoter of inclusion of coercive labour standards chapters in its PTAs, as discussed in Part II, the U.S. itself has not ratified several ILO conventions relating to the 'core labour standards'. As noted earlier, the U.S. has not ratified the core ILO conventions dealing with freedom of association, the right to bargain collectively, non-discrimination in the workplace, and child labour in general.⁴³

The difference in domestic labour standards of the U.S, and those enshrined in the core conventions is the chief reason for its non-ratification.⁴⁴ There are several shortcomings in the domestic labour law in U.S., which would need amendments if the standards mentioned in the core ILO conventions are to be complied with.⁴⁵ In fact, the U.S. has adopted a rigid policy towards ratification of ILO conventions, which impose several prerequisites ensuring that no ILO convention is to be ratified if it is a conflict with any of the state or federal labour laws.⁴⁶ This has been viewed as "*American Exceptionalism*", which signifies the reluctance of the U.S. government to amend its domestic laws pursuant to ratification of international treaties.⁴⁷

As far as the inclusion of labour standards in PTAs is concerned, the U.S. has followed an approach which is conducive to its domestic labour laws and policies. All the labour chapters in PTAs concluded by U.S. provide a definition of labour standards, which is slightly different from requirement of the ILO 'core labour standards'. Rather than referring to the standards of the ILO Conventions, (which would have been only possible after ratifications of these Conventions), the standards adopted by the U.S. in its PTAs are closely linked to the non-binding *1998 ILO Declaration on Fundamental Principles and Rights at Work*, which have been further modified and tailored to fit U.S. needs (for instance, the PTAs do not provide for elimination of workplace discrimination, which is a ILO core labour standard that

⁴² Kimberly Ann Elliott, "Labour Rights", Handbook on Preferential Trade Agreements (World Bank, 2011)

⁴³ Phillip Alston, *Core labour standards and the transformation of the international labour rights regime*, E.J.I.L. 2004, 15(3), 457-521, 469 (2004)

⁴⁴ Arvind Panagariya, *Labor Standards and Trade Sanctions: Right End Wrong Means*, Towards An Agenda for Research on International Economic Integration and Labor Markets, International Conference, January 15-16, 2001, East-West Center, Hawaii, available at <http://www.columbia.edu/~ap2231/Policy%20Papers/Hawaii3-AP.pdf>

⁴⁵ See INTERNATIONALLY RECOGNISED CORE LABOUR STANDARDS IN THE UNITED STATES OF AMERICA, ITUC REPORT FOR THE WTO GENERAL COUNCIL REVIEW OF THE TRADE POLICIES OF THE UNITED STATES OF AMERICA (Geneva, 29 September and 1 October 2010), available at www.ituc-csi.org/IMG/pdf/final_US_CLS_2010.pdf

⁴⁶ Lance A. Compa and Deborah Greenfield, *A Question of Timing*, Articles & Chapters. Paper 178, (2007) available at <http://digitalcommons.ilr.cornell.edu/articles/178>

⁴⁷ *Id.*

has not been ratified by the U.S.).⁴⁸ Further, as discussed above, one of the key features of the labour chapters has been emphasis on enforcement of domestic laws.⁴⁹ This also explains the U.S. policy of promoting labour standards modelled on its own laws and regulation giving little importance to the ILO conventions. Another significant aspect of the U.S. PTAs is their provisions on enforcement which range from fines to trade sanctions, or both.

Within US PTAs there are some differences in the nature of labour related provisions that have been included. An overview of the same is provided below. We will first discuss the overall categorization of US PTAs and then provide an overview of the key provisions of the PTAs pertaining to: (i) obligations relating to labour standards; (ii) provisions relating to labour cooperation and procedural guarantees; (iii) institutional mechanism in relation to the labour provisions; (iv) dispute settlement in relation to labour; and (v) enforcement action.

U.S. PTAs: Categorization

For the purpose of comparative analysis of the various PTAs by the U.S., these PTAs can be divided into the following three categories:

- (i) Approach under the NAFTA-NAALC: provides the most detailed and elaborate provisions on labour.;
- (ii) Pre-2007 PTAs: was a simpler approach that listed fewer labour standards and the ‘*strive to ensure*’ approach towards ILO’s core labour standards; and
- (iii) Post-2007 PTAs more stringent, and requires a PTA member to ‘*ensure respect*’ for ILO’s standards.

Table 2 provides a snapshot of the approach in U.S. PTAs in these three categories.

⁴⁸ See Steve Charnovitz, *The ILO Convention on Freedom of Association and its Future in The United States*, Editorial Comment, 102 Am. J. Int’l L. 90, (2008)

⁴⁹ U.S.-Jordan, art. 6.4.1.(a); U.S.-Singapore, art. 17.2.1.(a) , U.S.-Chile, art. 18.2.1.(a); U.S.-Australia, art. 18.2.1.(a); U.S.-CAFTA-DR, art. 16.2.1.(a); U.S.-Morocco, art. 16.2.1.(a); U.S.-Oman, art. 16.2.1.(a); U.S.-Bahrain art. 16.2.1.(a)

Table 2: Labour Provisions in US PTAs⁵⁰

| Name and date of entry into force of the trade agreements | Reference to ILO instruments | Scope and content of labour provisions | Enforcement mechanisms |
|---|--|---|---|
| NAFTA/NAALC (1994) | No | Strive for a high level of national labour laws in the area of CLS, as well as minimum working conditions** and migrant rights Enforcement of labour laws in these areas** | Fines up to US \$20 million/0.07 of total trade volume (goods) (only in the case of non-application of national labour law in the field of child labour, occupational safety and health and minimum wage) |
| Trade Agreement with Jordan (2001) | ILO 1998 Declaration | “Strive to ensure” CLS (except non-discrimination and minimum working conditions) Enforcement of labour laws in these areas *** No encouragement of trade or foreign direct investment through weakening labour laws. | Regular trade sanctions under the regular dispute settlement mechanism of the agreement |
| Trade Agreements with Chile (2004), Singapore (2004), Australia (2005), Morocco (2006), Bahrain (2006), Central America-Dominican Republic (CAFTA-DR) (2006), Oman (2009) | ILO 1998 Declaration, Convention No. 182** | “Strive to ensure” CLA (except non-discrimination) and minimum working conditions Enforcement of labour laws in these areas ** No encouragement of trade or investment through weakening of labour law in contravention of the labour principles contained in the agreement | Fines up to US \$15 million in the case of non-application of national labour law in these areas (to be paid into a special labour rights fund) |
| Trade Agreements with Peru (2009), Panama, Colombia, and the Republic of Korea (not yet into force) | ILO 1998 Declaration, Convention No. 182* | Ensure respect of CLS as contained in the ILO Declaration, and enforcement of related national laws ** No weakening of labour law in a manner affecting trade or investment if this contravenes CLS | Regular trade sanctions or monetary assessment under the regular dispute settlement mechanism of the agreement |

Notes on the Table:

* *Promoting compliance with Convention No. 182 is mentioned as a possible priority for labour cooperation.*

The United States–Australia Trade Agreement does not refer to this Convention.

** *For the purposes of this table, the term “minimum working conditions” is used to describe minimum standards regarding hours of work, minimum wages and occupational safety and health.*

*** *This applies to the extent that it “affects trade” or is (in the case of NAALC) “trade-related”.*

⁵⁰ Adapted from: Franz C. Elbert and Anne Posthuma “Labour provisions in Trade Arrangements: Current Trends and Perspectives”, Discussion Paper published by the International Labour Organization and International Institute for Labour Studies. (2011)

Labour Cooperation Mechanism and Procedural Guarantees in US PTAs

Another interesting feature of US PTAs is the presence of clear procedural guarantees and obligations to ensure cooperation in relation to labour standards. All the U.S. PTAs, except the U.S.-Jordan PTA, make provision for procedural guarantees and public awareness about labour standards. All the PTAs, except U.S.-Jordan and U.S.-Australia, provide for a Labour Cooperation Mechanism. The standard provision on Labour Cooperation is same in all the PTAs and is extracted below:

Labour Cooperation Provision

“Recognizing that cooperation provides enhanced opportunities for the Parties to promote respect for the principles embodied in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998), compliance with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999), and to advance other common commitments, the Parties hereby establish a Labour Cooperation Mechanism.”

The provisions on the working and implementation of the Labour Cooperation Mechanism are almost identical in all the PTAs which include undertaking of cooperative activities related to fundamental rights of the worker, child labour, social protections, labour relations etc. The work of Labour Cooperation Mechanism is to be undertaken in form of exchange of information, publication of labour related data; and periodic review sessions by the respective labour ministries of the parties.

Institutional Mechanism

All U.S. PTAs have institutional mechanisms to monitor and administer the PTA. The NAALC has the most elaborate institutional mechanism, while the other PTAs have a simpler mechanism.

The institutional set-up under the NAALC comprises of:

- A Commission for supervising the implementation of the Agreement. The Commission comprises of a Ministerial Council and the Secretariat.⁵¹
- There are detailed provisions relating to appointment and other criteria for the staff of the Secretariat.
- There is a National Administration Office (“NAO”) at the federal level of each Party, which serves as a *contact point* between the Party’s governmental agencies, NAO of other parties and the Secretariat.⁵²

⁵¹ The chief functions of the Council include: overseeing the implementation of the agreement; facilitate Party-to-Party consultations and address questions and differences that may arise between the Parties regarding the interpretation or application of the Agreement; directing the work of the Secretariat, committees, working groups etc.; develop the technical assistance program and establishing priorities for cooperative action; approving the annual budget and the plan of activities. The Secretariat is required to assist the Council.

⁵² *Id.*, art. 16.

The institutional set up provided in later PTAs is not as detailed as the NAALC. A few examples are provided below:

- U.S.-Jordan PTA: A Joint Committee is established to oversee that the Parties shall consider cooperation opportunities between the parties to improve labour standards.
- U.S.-Morocco PTA provides that each Party shall designate an office within its labour ministry that shall serve as a contact point with the other Party and the public for purposes of implementation.
- U.S. PTAs with Singapore, Australia, Bahrain and Oman provide that the Joint Committee may establish a Subcommittee on Labour Affairs consisting of officials of the labour ministry and other appropriate agencies or ministries of each Party to meet at such times as they deem appropriate to discuss matters related to the implementation of the provisions of the labour chapter.
- U.S.-Chile PTA and the U.S.-CAFTA-DR makes provision for the establishment of the Labour Affairs Council (LAC) comprising of cabinet level or equivalent representatives of the parties or their designees.

Dispute Settlement

The NAALC has the most detailed provisions on dispute settlement regarding labour provisions in the PTA. It provides that the parties shall make every attempt through cooperation and consultations to resolve any matter that might affect its operation.⁵³ If a matter has not been resolved after ministerial consultations any consulting Party may request in writing the establishment of an Evaluation Committee of Experts (ECE).⁵⁴ The ECE's evaluation report is presented to the Council, which thereafter considers the matter.⁵⁵ If after the Council considers the matter, and it remains unresolved between the Parties, then the Council may approve setting up of an Arbitral Panel. The Agreement makes detailed provisions for establishment and selection of the Arbitral Panel, qualifications of the panelists procedural rules etc.

In subsequently concluded PTAs, any dispute arising out of the labour provisions are subject to the general Dispute Settlement Mechanism of the PTA. This mechanism is more or less similar in all the PTAs with the referral of the matter to a Panel, report by the Panel to the Joint Committee, and then enforcement actions.

The U.S.-CAFTA-DR, in addition to the general dispute settlement mechanism, provides a distinct dispute settlement process within the labour chapter. A Party cannot pursue the dispute settlement process given in the dispute settlement section of the Agreement until it has exhausted the dispute settlement process outlined in the labour section of the agreement.

⁵³ NAALC, art. 20.

⁵⁴ *Id.*, art. 23

⁵⁵ *Id.*, art. 26.

Enforcement Action

Enforcement actions are illustrated in the last column in Table I above. This ranges from USD 20 million under the NAALC, to fines up to USD 15 million under other PTAs, to agreements, which leave open the issue of trade sanctions to be decided by the dispute settlement mechanism.

The U.S.-Jordan PTA is the only one in which the parties exchanged side letters that explicitly prohibited trade sanctions. However, it left open the issue that other measures may be pursued in the event of non-compliance.

The US-Cambodia Textile Agreement: an experience with positive incentives

The approach taken with the US-Cambodia Textile Agreement has been considered innovative for a number of reasons. An important feature was the alignment of government and business interests through the use of positive incentives: verified compliance with labour standards was rewarded with increased export quotas. The ILO was tasked with monitoring compliance, as a pre-condition for obtaining export license to the U.S. The ILIS/ILO paper cites several studies which have concluded that the Agreement has translated into a virtuous cycle “between improvements in labour conditions, growth of exports and employment creation”.⁵⁶

IIIB EU’s Approach to Labour Provisions in PTAs

EU’s approach in its PTAs is to focus more generally on social development objectives within a cooperative framework. EU agreements recognise and promote social rights and cooperation, including specific issues such as gender and health. Till recently, EU did not pursue a trade sanctions-based approach to social and labour standards. In fact, the approach adopted by EU’s till the conclusion of the EC-Cariforum PTA in 2008, was to refer to broad principles of human rights. The Cariforum Agreement was the first PTA entered into by the EU, which included several provisions on labour rights in the Preamble and the chapter dealing with Investment. Additionally Chapter 5 of the PTA titled ‘Social Aspects’ deals specifically with labour related concerns. A similar approach was followed subsequently in EU’s PTA with Korea.

Table 3 summarizes the broad approach followed by the EU.

Table 3:

⁵⁶ ILIS/ILO Discussion Paper (2011), p.33

Different types of labour provisions in EU trade agreements⁵⁷

| Name and date of entry into force of the trade agreements | Reference to ILO instruments | Scope of provisions | Enforcement action |
|---|---|--|--|
| Trade Agreements on with the Palestinian Authority(1997), Morocco(2000), Israel (2000), Algeria (2005), Cameroon (2009) | No | Cooperation and/or dialogue on selected issues related to labour standards | |
| Trade Agreement with Chile (2003) | ILO Declaration on Fundamental Principles and Rights at Work, 1998 | Commitment to give priority to the respect for basic social rights, including through the promotion of ILO Fundamental Conventions and social dialogue Cooperation on various labour and social issues | |
| Trade Agreements with South Africa (2000), ACP Countries (2003)* | ILO Declaration on Fundamental Principles and Rights at Work, 1998 | Reaffirms the parties' commitment to the ILO CLS Cooperation on various labour and/or social issues | |
| Trade Agreement with the EU-CARIFORUM (2008) | ILO Declaration on Fundamental Principles and Rights at Work, 1998; ILO Core Labour Standards, Internationally recognized labour standards | Commitment to (i) ensuring compliance with ILO CLS, (ii) not weakening or failing to apply national labour legislation to encourage trade or investment | Consultation and Monitoring framework with stakeholder participation, optional ILO consultation Framework for amicable solution of differences If the dispute cannot be solved through consultation, appropriate measures <i>other than</i> trade sanctions may be considered. |
| EU-Korea (2011) | High levels of labour protection consistent with international standards' Reference to ILO's Decent Work Standards. | Commitments to consult and cooperate on trade-related labour and employment issues of mutual interest. | Government to Government consultations; Reference to the Committee on Trade and Sustainable Development; Panel of Experts for making recommendations. No resort to dispute resolution provisions of the |

⁵⁷ Adapted from: Franz C. Elbert and Anne Posthuma "Labour provisions in Trade Arrangements: Current Trends and Perspectives", Discussion Paper published by the International Labour Organization and International Institute for Labour Studies. (2011)

| Name and date of entry into force of the trade agreements | Reference to ILO instruments | Scope of provisions | Enforcement action |
|---|------------------------------|---------------------|--------------------|
| | | | FTA. |

*Notes: * This agreement has not been notified to the WTO and is therefore not taken into account in the above statistics.*

We discuss in some more detail below the approaches in EU’s PTAs with Cariforum and Korea, which are likely to be relied on in their newer PTAs.

EU’s Approach under the Cariforum PTA

Key elements are highlighted below:

- The parties reaffirmed the ILO Core Standards (freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of the worst forms of child labour and non-discrimination in respect to employment);
- The parties recognized the value of greater policy coherence between trade policies, on the one hand, and employment and social policies on the other. They also recognized the close relationship between decent work conditions and economic efficiency;
- The parties recognized the rights of Cariforum States to regulate in order to establish their own social regulations and labour standards in line with their own social development priorities;
- Each party also ensures that its own social and labour regulations and policies provide for and encourage high levels of social and labour standards consistent with ILO standards; and
- Complaints related to this chapter are to be investigated under the normal dispute settlement procedures of the agreement, but “compensation or trade remedies [may not] be invoked against a Party’s wishes”. In other words, although the provision is nominally enforceable, it carries no penalties for violations, other than scrutiny. As this agreement is quite recent, it is not yet known how it will be implemented or whether technical assistance will be provided to improve labour standards.

EU’s Approach under the Korea PTA

Following EU-Cariforum PTA, the EU-Korea PTA also has provisions on labour in the chapter on ‘Trade and Sustainable Development’. The key difference is a move to a slightly stronger enforcement mechanism as described below. The main elements under EU-Korea are as follows:

- Reiteration of ILO standards on Decent Work and international standards;
- A commitment to effectively enforce labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties;

- Recognition of relevant international standards, guidelines or recommendations in implementing measures aimed at protecting ‘social conditions’; and
- Any disputes are to be resolved by a Panel of Experts. The Parties are required to make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter. The implementation of the recommendations of the Panel of Experts shall be monitored by the Committee on Trade and Sustainable Development.

IIIC Labour Provisions in PTAs: Implementation Experience

As discussed in Part I of this report, scholars from economic and legal fields have diverse views on the utility of incorporating labour provisions in trade agreements. Opponents of this linkage have emphasized that empirical literature points to the fact that mandating unsustainably high labour standards will not improve average wages and working conditions in poor countries, or even improve trade of developing countries.⁵⁸ Such mandates can create further inequality, by reducing the number of workers with better pay and working conditions and increasing the number in poorer conditions.⁵⁹

The ILS/ILO discussion paper discussed in Part II of this report, states that there is no empirical evidence on impact of labour provisions on trade. It however argues that the existence of sanctions for non-compliance with labour provisions in themselves provide a disincentive to violate labour standards, and hence “sanction-based labour provisions are a potentially powerful instrument.”⁶⁰ It also states that in most cases, governments tend to resolve differences through dialogue and discussion, instead of resorting to enforcement action. The paper however notes that for the first time in the history of trade agreements, the U.S. government has filed a complaint against Guatemala under the US-CAFTA-DR PTA. This was based on a complaint filed against the Guatemalan government by six Guatemalan trade unions, and AFL-CIO, which is a federation of US labour unions, regarding cases of anti-union violence. A second case was also reportedly filed by a coalition of Costa Rican and North American trade unions against State interference by Costa Rica in trade union affairs. This issue was however settled and was not taken up as a dispute.

⁵⁸ Robert Stern and Katherine Turrell, “Labour Standards and the World Trade Organization” (2003), available at www.wto.org/english/forums_e/ngo_e/labour_standards_e.doc

⁵⁹ Id.

⁶⁰ Supra n. 39, p.21

Part IV Private Standards relating to Labour

A significant development in the recent past is the emergence of labour related standards being imposed by private bodies and companies, which impact trade. Global brand producers, and retailers increasingly require their suppliers from developing countries such as India to comply with certain social, environmental and safety norms. These norms are increasingly referred to as ‘private standards’. As private standards are voluntary in nature, there are no specific legal norms on the basis of which they can be tested. However, the increasing application of such standards could raise potential trade-restrictive and protectionist concerns. Furthermore, multiplicity of labels has also reportedly generated numerous claims and counter-claims in recent times.⁶¹

Development of International Standards on Social Labeling: ISO Experience

The International Organization for Standardization (ISO) is an international federation of standardizing bodies from 159 countries. The Bureau of Indian Standards (BIS) is a ISO member. The ISO is engaged in development of voluntary standards. These standards frequently become benchmarks for development of regulatory requirements and standards developed by governments, as well as good practice among businesses. ISO standards for instance have been adopted by private companies in supply chain requirements.

ISO requirements for voting and adoption of standards are based on a complex set of principles. A standard is adopted by the ISO as an international standard if two-third members are in favour, and the negative is not more than one-fourth.

With regard to labour related requirements, a significant ISO standard is the International Guidance Standard on Organisational Social Responsibility, *ISO 26000*, which was adopted in September 2010. It comprises of seven substantive principles which address: *accountability; transparency; ethical behaviour; respect for stakeholder interests; respect for the rule of law; respect for international norms of behaviour; and respect for human rights.*

The main concern with this standard is that it could inadvertently further the global squeeze on small producers if they are unable to meet the aspirations of its guidance.⁶² A number of working group experts from developing countries, including India have reportedly assessed that there are risks in ISO 26000 becoming a protectionist tool that could be interpreted so as to limit market access for products from developing countries by raising the bar on social responsibility practices.⁶³

⁶¹ ILO/IPEC Paper, “The Impact of Social Labeling on Child Labour in India’s Carpet Industry” (2000)

⁶² Halina Ward, *The ISO 26000 international guidance standard on social responsibility: implications for public policy and transnational democracy*, Foundation for Democracy and Sustainable Development (2010)

⁶³ Id. Also see, “India Opposes Move to Link CSR and Trade”, *The Economic Times* (5 May 2010), <http://m.economictimes.com/PDAET/articleshow/5891434.cms>

In this regard it is important to note that while ISO standards do not have legally binding value, ISO standards have been considered relevant for determining ‘international standards’ for the purposes of WTO’s Agreement on Technical Barriers to Trade (“TBT Agreement”). The TBT Agreement requires parties to base their technical regulations on ‘international standards’, and WTO jurisprudence has acknowledged that such standards would include those developed by the ISO. One of the principles of ISO 26000 is as follows:

“In its purchasing decisions, an organization should take into account the environmental, social and ethical performance of the products or services being procured, over their entire life cycles. Where possible, it should give preference to products or services with minimized impacts, making use of reliable and effective, independently verified labelling schemes or other verification schemes, such as eco-labelling; or auditing activities.”

To the extent that these (and other) references within ISO 26000 may be said to amount to guidelines on ‘products or related process and production methods’, these clauses could fall within the definition of a ‘standard’ under the TBT Agreement. In this regard it is interesting to note that the ISO 26000 contains a clarification that it only “contains voluntary guidance, not requirements, and therefore is not for use as a certification standard.” This reference in itself is vague, since for WTO purposes a ‘standard’ by its very nature, is *voluntary*. The focus of the TBT Agreement is that when Governments base their regulations on ‘international standards’ (which would include ISO), it would give it a higher degree of legitimacy. In what manner will this be reconciled with ISO 26000’s clarification as stated above in a potential WTO dispute, remains to be tested.

In this regard, it is also important to note that representatives of certain countries such as United States, Cuba, India, Turkey and Luxembourg had voted against ISO 26000. The Standard was approved according to ISO’s rules with 93% of the eligible votes to be counted in favour. Eleven ISO members abstained, and those votes were not counted. Of the 71 voting, 66 were in favour of adoption, 5 members submitted negative votes, while China had initially raised concerns, it finally voted in favour of the standard.

The WTO Appellate Body has also held that to qualify as an international standard, these do not need to have been adopted by ‘consensus’, and if the rules of the standard-making organization allow for majority voting, this is sufficient.⁶⁴ This broad principle however, in the case of ISO 26000, would need to be tested against the ISO’s own clarification that it is not meant, in the first place, to be used as a ‘certification standard’.

Corporate Codes of Conduct

Another development relating to private labour standards that impacts trade is corporate codes of conduct. These refer to companies’ policy statements that define ethical standards

⁶⁴ *European Communities-Trade Description of Sardines*, WT/DS231/AB/R

for their conduct. There is a fair amount of variance in the ways these codes are drafted; but most codes cover similar ground.

These are completely voluntary and the implementation of such codes depends on the concerned company. They can take a number of formats, and may address any issue, including worker's rights (particularly child labour, freedom of association, forced labor, and freedom from discrimination), health and safety issues, environmental concerns, compensation, migrant labor issues, human rights, security arrangements, community engagement, ethical conduct, good governance, and rule of law, which is one of the most common methods adopted. Apart from this, there are also human rights and environmental risk assessments, monitoring systems, management standards, and the engagement of external stakeholders in dialogue and decision-making processes.

The World Bank estimates that there may now be an estimated 1,000 codes in existence today, developed by individual multinational firms on a voluntary basis.⁶⁵ A few examples include: Apple Supplier Code of Conduct,⁶⁶ Gap Inc Code of Vendor Conduct,⁶⁷ Nike's code of conduct,⁶⁸ Bayer Code of Conduct⁶⁹ and Body Shop Code of Conduct.⁷⁰ The following table summarizes some of the elements in relation to these codes of conduct.

Enforcement Across the Supply Chain

Gap Inc.

Gap Inc. monitors the facilities which produce branded apparel through a set of Social Responsibility Specialists.⁷¹

Levi Strauss

In 1991, Levi Strauss established a 'Sourcing Guidelines Working Group' for overseas suppliers which developed an internal monitoring and enforcement system. The Business Suppliers were rated as one in three categories: (i) Contractors who are indifferent or unwilling were terminated; (ii) Contractors who can possibly improve were given a plan and a time-table; and (iii) Contractors who do what they can are encouraged to do more.

Levi Strauss also developed 'Country Assessment Guidelines'. Levi Strauss attempted to check the use of prison labour in its facilities in China and Burma, and finally completely withdrew from both countries.⁷²

⁶⁵ The World Bank Group, "Company Codes of Conduct and International Standards: An Analytical Comparison" (Oct. 2003), available at

http://siteresources.worldbank.org/INTPSD/Resources/CSR/Company_Codes_of_Conduct.pdf

⁶⁶ http://images.apple.com/supplierresponsibility/pdf/Supplier_Code_of_Conduct_V3_1.pdf.

⁶⁷ <http://www.itglwf.org/lang/en/documents/GapCodeofConduct.pdf>

⁶⁸ http://www.itglwf.org/lang/en/documents/Nike_Code_of_Conduct.pdf

⁶⁹ <http://baybuy.co.in/Supplier%20Code%20of%20Conduct.pdf>.

⁷⁰ <http://www.thebodyshop.com/en/ww/services/pdfs/AboutUs/THEBODYSHOPCODEOFCONDUCTforsuppliers.pdf>.

⁷¹ FAQs, GAP Incorporated, available online at <http://www.gapinc.com/content/csr/html/topnavtoolbar/faq.html>, last visited on 29 November 2011. See also Oberkofler, Monica (2008) "Examining the Role of Companies in the Realization of Human Rights: The Case of Gap Inc." 26 Berkeley Journal of International Law 392.

⁷² A Baby-Step to Global Labor Reform: Corporate Codes of Conduct and the Child: Frederick B. Jonassen

Nike

All potential suppliers of Nike must undergo three kinds of audit: (i) Basic environmental, safety and health audit (SHAPE); (ii) Management and Working Conditions Audit (M-Audit) and (iii) Periodic Inspections by the Fair Labor Association (FLA).⁷³

Independent Monitoring is conducted by a multi-stakeholder initiative because Nike is a member of this association and is hence subject to yearly inspections.⁷⁴

Shell

Shell's General Business Principles ("SGBP") state that there will be a Standard clause in its contracts with distilleries prohibiting the use of child labor on the part of its suppliers.⁷⁵

Corporate codes of conduct appear benign from a trade perspective. As with private standards, the main concerns with such codes of conduct would however become relevant if these are sought to be made applicable as mandatory requirements, or are sought to be enforced through trade related measures. No PTA as of now endorses or requires adherence to any specific corporate codes. Nevertheless, it is important to note trends in recent PTAs that the EU has entered into. It's PTAs with Korea and Cariforum refer to the importance of corporate social responsibility (CSR) and obligations of the parties to promote trade in goods that have been produced by facilities that adhere to CSR principles. To the extent that adherence to specific international CSR standards becomes obligatory, there is a potential risk in how these standards could relate to trade.

⁷³ Locke, Richard and Qin, Fei (2006) 'Does Monitoring Improve Labor Standards? Lessons from Nike' A Working Paper of the Corporate Social Responsibility Initiative, MIT, available online at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_24_locke.pdf, last visited on 29 November 2011, Page 12.

⁷⁴ Locke, Richard and Qin, Fei (2006) 'Does Monitoring Improve Labor Standards? Lessons from Nike' A Working Paper of the Corporate Social Responsibility Initiative, MIT, available online at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_24_locke.pdf, last visited on 29 November 2011, Page 13. Also see, Locke, Richard and Kochan, Thomas (2007) "Beyond corporate codes of conduct: Work organization and labour standards at Nike's suppliers" 146 International Labour Review 1.

⁷⁵ Shell, Business and Child Labour: A Management Primer, available online at http://www.shell.com/static/envirosoc-en/downloads/management_primers/business_and_child_labour_primer.pdf, last visited on 29 November 2011, Page 24.

Part V Conclusions and Recommendations

On the basis of the discussions in this paper, we have summarized below the key findings and recommendations for developing countries that emerge from such findings.

Key Findings

1. The 'Trade and Labour' linkage is a sensitive and controversial issue for many countries, particularly developing countries.. There are both proponents and opponents to the debate. Existing literature indicates that: (a) there is no link in increased world trade and decline in labour conditions; (b) mandating high labour standards will not improve average wages and working conditions in developing countries, and (c) nor will low labour standards provide developing countries with an unfair advantage in their export trade or drive FDI.
2. At the WTO, the Singapore Ministerial Declaration in 1996 dealt with the trade and labour relationship. Two key elements of the Declaration were:
 - *Rejection of any use of labour standards for protectionist purposes, and*
 - *Acknowledgement of the key issue that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question under the WTO agreements.*
3. The International Labour Organization (ILO) has eight Core Labour standards (CLS), pertaining to the following categories:
 - (i) *Freedom of association and the effective recognition of the right to collective bargaining;*
 - (ii) *Elimination of all forms of forced or compulsory labour;*
 - (iii) *Effective abolition of child labour; and*
 - (iv) *Elimination of discrimination in respect of employment and occupation.*

Developed countries such as the U.S. as well as developing countries like India, have not as yet ratified all the CLS conventions. The approach taken by most countries is to ratify the conventions only when their regulatory framework can be said to be completely compliant with these conventions. The ILO has its own mechanism for monitoring of these standards by all countries, including systems to assess status of ratifications and implementation of these conventions.

4. In terms of the institutional mechanism on trade and labour, the WTO and the ILO engage in dialogue and discussion. The first formal outcome of the WTO-ILO collaboration was a study published in 2009, which examined the impact of globalization on informal employment. Its focus was on the vulnerability of the

informal sector, and the need to ensure that improvement of their condition in the labour market. The study, however, did not recommend any trade and labour linkage.

5. A recent Discussion Paper for the ILO on ‘Labour Provisions in Trade Agreements’ however, has a few controversial conclusions. The paper acknowledges that the practical implications of labour provisions in preferential trade agreements (“PTAs”) have been highly limited. It nevertheless concludes that use of labour provisions in trade agreements provides a number of possibilities to “promote labour standards” through “international economic governance.” The paper however does not deal with the sensitivities and controversies regarding the trade and labour linkage, including the concerns of developing countries with regard to protectionism. It also does not seek to assess the basic issue of whether trade is the proper instrument to address labour concerns.
6. Labour rights have been finding reflection in PTAs beginning with the North American Free Trade Agreement (NAFTA) between U.S., Mexico and Canada in 1994. Subsequently, all U.S. PTAs and those entered into by many other countries, have incorporated provisions on labour standards.
7. There are two broad categories of provisions relating to labour standards in PTAs:
 - Conditional elements: These contain legally enforceable provisions accompanied by incentives, sanction mechanisms as well as dialogue and monitoring.
 - Promotional elements: These focus mainly on supervision and/or capacity building provisions in relation to labour.
8. The ILO Discussion Paper referred to earlier states that as of 2009, 37 out of 186 PTAs have included 17 conditional and 20 promotional labour provisions. Conditional provisions are the hallmark of PTAs entered into by the US and Canada. PTAs entered into by the EU and a few recent ones entered into by developing countries such as Chile, China, Philippines and Thailand contain promotional elements. The EU however seems to be shifting more to stronger enforceable provisions in its recent PTAs with Korea and Cariforum. The main difference between US and EU PTAs however is that the former seeks to use trade sanctions and fines as an enforcement measure for labour provisions in the PTA; whereas enforcement under EU PTAs contemplates measures other than trade sanctions.
9. The U.S. has had the most aggressive approach towards including labour provisions under PTAs. Initially the reference was to international labour standards generally, however, recent US PTAs refer to ILO’s ‘core labour standards’ as well as other international labour standards. As mentioned earlier, enforcement provisions in

relation to labour standards in US PTAs includes the possible use of trade sanctions and fines.

10. EU's approach initially was to make a broad reference to human rights. However, beginning from the PTA with Cariforum in 2008, there has been a significant shift from mere reference to 'human rights' to clearer and enforceable provisions on labour, including dispute settlement. The EU-Korea PTA for instance provides for a panel of experts which would look into labour specific disputes. This trend is likely to evolve further and continue. EU's PTAs with Cariforum and Korea also make specific reference to the ILO's core labour standards.
11. A significant development in the recent past is the emergence of private labour related standards being imposed by private bodies and companies, which impact trade. Global brand producers and retailers increasingly require their suppliers from developing countries such as India to comply with certain social, environmental and safety norms. Because private standards are voluntary in nature, there are no specific legal norms on the basis of which they can be tested. However, the increasing application of such standards could raise potential trade-restrictive concerns. Furthermore, multiplicity of labels has also reportedly generated numerous claims and counter-claims in recent times.
12. The other concern with private standards, and especially corporate codes of conduct, is their incidental reference in PTAs. EU's PTAs with Korea and Cariforum, for example, highlight the need for parties to promote trade in goods that have been produced by facilities that adhere to principles of corporate social responsibility. To the extent that adherence to specific international CSR standards becomes obligatory, there is a potential risk in how these standards could relate to trade.
13. A controversial development regarding standards is ISO's International Guidance Standard on Organisational Social Responsibility, *ISO 26000*, which was adopted in September 2010. It comprises of seven substantive principles which address: *accountability; transparency; ethical behaviour; respect for stakeholder interests; respect for the rule of law; respect for international norms of behaviour; and respect for human rights.*
14. A number of experts from both developing countries like India are of the opinion that there are risks in ISO 26000 becoming a protectionist tool that could be interpreted so as to limit market access for products from developing countries by raising the bar on social responsibility practices. Even though countries such as United States, Cuba, India, Turkey and Luxembourg, India and a few other countries voted against the ISO standard, the standard was 'adopted' by majority of the ISO membership. A negative vote, (unlike a reservation under international law), does not grant the country which has made the negative vote, immunity from action.

15. The ISO has clarified that ISO 20006 “contains voluntary guidance, not requirements, and therefore is not for use as a certification standard.” This reference in itself is vague, and it is not clear how this statement would be interpreted in a potential WTO dispute. The WTO’s TBT Agreement requires parties to base their technical regulations on ‘international standards’, and WTO jurisprudence has acknowledged that such standards would include those developed by the ISO. WTO jurisprudence has also stated that such standards need not be adopted by consensus.
16. Private standards relating to labour, even though said to be ‘voluntary’, leave little choice for exporters in specific sector, and in effect become mandatory compliance requirements. Issues impacting specific industry sectors because of use of these private standards may need to be raised at the WTO TBT Committee for greater discussion.

Key Recommendations

In view of the key findings as highlighted above, the key recommendations from this paper for developing countries can be summarized as follows:

1. ***Maintain opposition to the Trade and Labour linkage:*** While all countries (including the countries which have not ratified the CLS) should take steps towards promoting labour welfare, there are no reasons why developing countries should agree to linkage of labour issues in trade agreements. There is sufficient literature and evidence to show that increased labour will not result in decline in labour conditions; on the contrary greater economic development through expanding trade opportunities would actually result in better conditions for labour as well.
2. ***With regard to the ILO-WTO relationship, it is important to emphasize that in view of the empirical findings that exist, it is illogical for the ILO to consider that labour standards should be considered in trade agreements.*** As discussed in this paper, a recent ILIS/ILO Discussion Paper takes a stand for the first time that labour provisions in PTAs “offer a number of possibilities to promote labour standards through mechanisms for international economic governance”. This finding is however not supported by other findings under the same study. Developing countries should take this opportunity to send their comments on the paper to highlight that labour issues should be considered through distinct autonomous instruments, and not under trade agreements. This is important in order to ensure that this paper does not become the basis for policy formulation by the ILO.
3. ***With regard to PTA negotiations, ensuring Preparedness and Assessing Likelihood of Trading Partner raising Labour issues.*** If despite opposition, a trading partner insists on labour provisions, then negotiators would need to assess, based on PTAs

previously entered into by the other trading partner, the kind of provisions that are likely to be discussed, and the position that would need to be taken in relation to the same. Such reasoned approaches would be critical in any potential PTAs especially with the US, EU and New Zealand.

4. ***Explore possibilities for flexibilities.*** The likelihood and nature of labour provisions that a PTA partner may suggest would need to be examined. Flexibilities offered in other PTAs entered into by such partner, should be explored to the fullest. To the extent that labour related concerns can be addressed through bilateral discussions and side agreements, these should be explored, rather than making labour provisions a condition of the PTA itself.
5. ***Key Issues while Discussing Labour Provisions.*** Key issues while negotiating labour provisions in a PTA would include an understanding of: (a) the nature of legal obligations emerging from provisions relating to labour under a PTA; (b) the potential economic costs of specific labour requirements, including requirements to maintain specific regulatory standards; (c) areas where technical assistance and capacity building would be necessary in ensuring compliance with the obligations; (d) the nature and extent of financial assistance required; and (e) the nature of dispute settlement and enforcement mechanisms.
6. ***Preference for Promotional, non-binding commitments.*** Broad promotional language with reference to labour standards, rather than binding or conditional terms, could be considered. It may be advisable to ensure that dispute settlement and enforcement mechanisms would not be made applicable to labour provisions of PTAs. Promotional elements could include agreements to cooperate on labour related issues, formulation of programmes for financial assistance and capacity building. Funding for rehabilitation of children engaged in work, and education for children could be envisaged and implemented through such programmes.
7. ***Making Labour related provisions conditional on positive assistance.*** Specific obligations relating to labour should be made conditional on actual development assistance and capacity building provided by the PTA partner.
8. ***Clarifications required regarding ISO 26000.*** Several developing countries including India have raised several pertinent points and concerns regarding the possibility that ISO 26000 may result in legitimising protectionist measures. While the ISO has clarified that this standard is not to be used as the basis as a ‘certification standard’, the relevance and impact of such a statement for the purposes of the WTO TBT Agreement is not clear. In view of the wide scope of coverage of ISO 26000 on ‘social responsibility’ related concerns, it may be important to raise this at the WTO’s TBT Committee in order to have clarity on any potential impact of this standard on market access.

- 9. *Raising concerns on Private Standards.*** Exporters in different sectors often find the imposition of private labelling requirements act as a barrier on market access. The mandatory application of these requirements as a condition for effective market access, should be raised at the WTO's TBT Committee discussions.

Furthermore, to the extent feasible, the integration of these programmes with other private programmes should be explored by governments of the developing countries in order to minimize the requirements to comply with multiple labelling requirements.

Annexure I Labour provisions in trade agreements concluded by countries other than the U.S. and the EU

Source: Franz C. Elbert and Anne Posthuma "Labour provisions in Trade Arrangements: Current Trends and Perspectives", Discussion Paper published by the International Labour Organization and International Institute for Labour Studies (2011)

| Name and entry into force of trade agreement | Reference to ILO instruments | Commitment to certain minimum labour standards | Not encourage trade or investment through weakening labour laws | Cooperation on labour issues | Specific institutions | Consultation mechanisms in case of differences |
|--|------------------------------|--|---|------------------------------|-----------------------------------|--|
| New Zealand-Thailand Trade Agreement * (2005) | 1998 Declaration | Yes | Yes | Yes | Labour Committee | Yes |
| Chile-China Trade Agreement* (2006) | No ** | No | No | Yes | No | No |
| Trans-Pacific Partnership Agreement* (2006)**** | 1998 Declaration | Yes | Yes | Yes | National contact points | Yes |
| New Zealand-China Trade Agreement* (2008) | 1998 Declaration | No | Yes | Yes | No (but senior official meetings) | No (but discussions of labour issues of mutual concern possible) |
| Japan-Philippines Trade Agreement (2006) | No | No | Yes | No | No | Yes** |
| Taiwan, China-Nicaragua Trade Agreement (2008) | No | Yes | Yes | Yes | Labour Affairs Committee | Yes*** |
| Japan-Switzerland Trade Agreement (2009) | No | No | Yes | No | No | Yes*** |
| New Zealand-China Trade Agreement * (to enter into fore in 2011) | 1998 Declaration | No | Yes | Yes | National contact points | Yes |

* The labour provisions are contained in a labour side arrangement or memorandum of understanding.

** However, the preamble of this agreement refers to objectives of the ILO.

*** The labour provisions of this agreement are subject to the regular dispute settlement mechanism, which may as a last resort entail the suspension of trade benefits.

**** Parties to this Agreement are: Brunei Darussalam, Chile, New Zealand, and Singapore.

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