

The impact of trade and investment agreements on decent work and sustainable development

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Abstract

International trade is frequently assumed to be important for social and economic progress, albeit often coming with social costs. Since 1996 the World Trade Organization (WTO) has seen its role as promoting trade liberalisation. Social issues are left to others, with the ILO assumed to promote labour standards, prioritising a range of issues that include trade union and bargaining rights. Trade has been associated with rapid progress in some countries, but that depends on the role a country plays within global value chains, which in turn depends on its particular history, institutions and government policies. Free trade agreements, ostensibly aimed at overcoming deadlock in WTO negotiations, have increased at a rapid pace. All parties to agreements may expect to benefit, but their aims are often different and their motivations can be as much political as economic. The content of agreements includes tariff reductions and often also ease of access for businesses from the most advanced countries, and the protection of their interests. Investment agreements have frequently given a special privilege to multinational companies, which can take legal action against governments if policy changes threaten to reduce their profits. Detailed comparisons of the effects of trade liberalisation on employment reveal wide variations and do not show maximum liberalisation producing the best results. Labour provisions in agreements – meaning reference to minimum working conditions, terms of employment or workers’ rights – were first pushed for by the USA amidst fears that poor conditions in some countries would be a threat to US jobs. They have increasingly included provision for sanctions, but these have yet to be applied. The EU too has pressed for labour provisions with a wide definition but without means for their enforcement. There is in fact no evidence of any positive benefits from labour provisions. They do not compensate for the possible negative consequences of other elements in trade agreements, which remain the more important issue for assessing free trade agreements and for judging their contribution to a fair globalisation that brings benefits to all participants.

Preface

This study was produced following a request from the ILO Bureau for Workers' Activities in 2015. Free trade agreements (FTAs), both between pairs of countries and across larger groups, had increased rapidly in the preceding years. These seemed to be taking over as a driving force of globalisation from the fully multilateral negotiations in the World Trade Organisation (WTO) that appeared to have reached deadlock. Labour and trade union movements needed to decide how to respond. Any stance, in general and also on specific cases, required a proper understanding of why FTAs were being negotiated and what implications they had for the interests of employees and others.

In response to this need, this work provides an accessible analysis that looks at the growth of FTAs in the context of developments in international economic relations and assesses their effects on labour conditions and in relation to the ILO agenda for decent work. It does not provide precise policy prescriptions, not least because there are substantial differences between agreements and their social and economic impacts. However, it does provide a basis for assessing the broad approaches that labour movements could adopt.

In practice, labour movements have had limited influence over trade agreements, which are generally negotiated behind closed doors, with business interests much more likely to benefit from access to negotiators. Trade unions have reacted to trade liberalisation in different ways, sometimes more and sometimes less positively (Bieler *et al.* 2015).

Somewhat oversimplifying, responses to FTAs could take three possible forms. One is to embrace them wholeheartedly, dismissing fears of the likely effects as exaggerations or trivial in comparison to the benefits that liberalisation can bring. The second is to reject the trend towards liberalisation as too dangerous, too evidently representative of narrow business interests and offering too little for citizens and employees. The third response is to seek changes and modifications to past practice in the hope of developing agreements that will respond to criticism and reflect wider interests and objectives.

The first option amounts to a blanket faith in liberalisation. It has been widely voiced in international forums and was part of the thinking behind the development of the WTO. One example of this perspective is the declaration by Ian Lang, the UK minister responsible for international trade, at the WTO conference in Singapore in December 1996, which rejected arguments for inclusion of a so-called social clause in the organisation's rules. His view was that 'we see no case for taking trade measures in support of social standards.' He looked forward instead to 'global free trade', meaning 'the complete elimination of tariffs, import quotas and voluntary export restraints on world trade in all goods ... the removal of non-tariff barriers, in the field of technical standards, public procurement, and trade documentation and procedures. And ... something very similar across the services sector.'¹ This

1. https://www.wto.org/english/thewto_e/minist_e/min96_e/st9.htm

quote expresses very clearly an outcome desired by many international businesses. It is a view that ignores the costs and dangers of complete liberalisation. It advocates a world in which governments' powers to regulate, in the interests of health, environment, economic and financial stability, and social and employment conditions, would be greatly reduced, if not eliminated.

Full acceptance of all demands of business, usually the strongest voice in trade negotiations, can have serious implications for parts of domestic employment, for public services where they perform roles sought by private business, and for the costs of health treatment where pharmaceutical companies seek the strongest possible protection of their patents. The above fears and a negative assessment of the results to date could justify a rejection of any further liberalisation. The freeing of imports has resulted in job losses in traditional manufacturing in some high-income countries and exacerbated poverty in some low-income countries. Trade and investment agreements, meanwhile, have reduced some of the powers of governments and parliaments to legislate and regulate.

However, a rejection of all measures to increase trade seems as disproportionate as an unqualified embrace of maximum liberalisation. Agreements can be favourable, or highly unfavourable, to some or all participants. In some cases no agreement may be better than the ones that are being, or have been, negotiated, but rejecting all attempts to increase trade would deny the undeniable benefits that international economic integration can bring. Countries at all income levels seek access to markets for their exports and may also benefit from imports and services provided from other countries. The best solution is to try to reduce as much as possible the costs and dangers of international economic integration while maximising the benefits, ensuring that they are felt throughout society and not just by specific interests.

One approach has been to incorporate into FTAs protection for labour rights and other elements that the WTO decided not to cover. This has not been a significant driver for the increase in FTAs – that has resulted more from business trying to push its interests beyond what it could achieve within the WTO – but this increase could be considered an opportunity for including such elements where there is enough political pressure. A much-publicised element here has been the inclusion of labour clauses, first by the USA, then by the EU and a number of other countries. However, these essentially remain an add-on, with the labour interest finding little if any expression in other parts of agreements where business issues and interests continue to dominate. The labour interest is also represented within a rather narrow framework, focusing on standards set by the ILO which represent an acceptable minimum. Even the basic rights that are included are often expressed very timidly.

Studies of the labour provisions in FTAs show little by way of effects, either positive or negative. There have been cases where countries made changes to laws, most frequently as a condition for signing an agreement, but evidence of any changes in actual practice remains sparse. That may partly reflect the form agreements have taken, with very complex mechanisms for applying sanctions in the US cases and no such mechanisms at all in EU agreements. More generally, politicians have shown little interest in pressing labour provisions. For them, trade agreements are about

trade and business, and labour clauses seem to have been accepted more to satisfy political pressures than to ensure actual implementation.

This does not mean, however, that labour clauses are without value. They can serve a useful function in combination with other forces pressing for improvements in labour standards, especially political developments within countries. However, they do not compensate for the many serious concerns regarding trade agreements, such as protected privileges for multinational companies, reduced powers to set regulations, the need to ensure protection for public services, the need to protect the weakest in society and the protection of certain economic activities in the interests of economic and social development. These remain the central themes in the further development of international economic relations and must be addressed if globalisation is to bring benefits to all.

Introduction

It is widely accepted that trade and international integration can deliver benefits. They are credited with driving economic growth and development and helping to improve social conditions. Such assumptions support the pressures for trade liberalisation since 1945, first through the General Agreement on Trade and Tariffs (GATT), then later through the World Trade Organization (WTO), founded in 1995, and also increasingly through multilateral and bilateral trade agreements.

However, although international integration can deliver benefits, unrestrained trade liberalisation has not profited all its participants. There is strong evidence that the opening of economies has been accompanied by rising inequalities within and between countries as production has moved between countries and continents. Benefits are at best very unevenly distributed. A 2014 report of the United Nations Conference on Trade and Development (UNCTAD) – with results confirmed in regular ILO publications (ILO 2015a) – pointed to a growing inequality between countries since 1980, if China is excluded from the calculation. With China, thanks to its rapid growth, population-weighted inequality has reduced. Global development has also been associated with a declining share of wages in world GDP, from 62.5% in 1980 to 54% in 2010. In China the decline from 1990 to 2008 was from 62% to 47%. Inequality within countries likewise increased, as wages did not rise in line with productivity and GDP.²

Increased trade can also lead to very diverse employment outcomes, such as changes in volumes of employment (sometimes increasing and sometimes decreasing), in

2. http://unctad.org/meetings/en/SessionalDocuments/tdb61d7_en.pdf

wage levels (again in both directions) and in employment stability. Liberalisation provides no automatic guarantee of ‘decent’ work (as defined by the ILO and discussed below) and this points to a need, at the very minimum, for accompanying policies to influence the forms that economic integration takes and to ensure that its benefits are adequately shared.

This has been a live issue around the world since the 1990s. The failings of a globalisation that has been built primarily through liberalisation have led in developing countries to a resistance against further opening of their economies. They have also led in developed countries to consumer boycotts, to pressure on multinational companies to guarantee labour conditions in their own and their suppliers’ factories, and to protests at WTO events (Elliott and Freeman 2003).

The WTO gives verbal recognition to the possible negative effects of liberalisation, claiming to be ‘not just about liberalizing trade’ and that ‘in some circumstances its rules support maintaining trade barriers – for example to protect consumers, prevent the spread of disease or protect the environment’ (WTO 2015: 7). However, these principles have been raised only once in a dispute between countries, and that complaint was not upheld (Elliott and Freeman 2003: 92).³

Labour standards were excluded from the WTO agenda shortly after its inception. The strongest argument for a ‘social clause’ came from the USA and France, and reflected fears that lower labour standards in lower-income countries could give exporters an advantage and destroy employment in advanced countries. There was therefore some pressure for WTO rules to allow trade sanctions if countries did not comply with certain standards. However, a number of developing countries – most vocally Brazil, which was later to change its position, Egypt, India, Mexico and Pakistan – were strongly opposed (Lazo 2009: 4), arguing that it would be used as a protectionist measure to undermine the advantage they have from low wages, and thereby block their road to development. Some developed countries were also opposed to labour provisions, as were employers’ organisations. A very small number of trade union organisations from developing countries joined the opposition while the rest supported the inclusion of labour standards (Wilkinson and Hughes 2000; Wilkinson 1999).

At the First WTO Ministerial Conference in Singapore in December 1996 the issue was taken up and addressed in the Ministerial Declaration, which reaffirmed a ‘commitment to the observance of internationally recognized core labour standards’, without clearly specifying what these were. The International Labour Organization (ILO) was identified as ‘the competent body to set and deal with these standards’. The declaration further argued ‘that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards’, while rejecting ‘the use of labour standards for protectionist purposes’

3. This was the so-called ‘shrimp-turtle’ case in 1998 in which the USA was ruled to have acted wrongly in blocking imports of shrimps from a number of Asian countries that had been caught in a way that is illegal in the USA because of the negative effects on a particular kind of turtle. https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm

and agreeing that ‘the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.’⁴

The practical implication of this was that the WTO adhered to a conception of globalisation that was based on liberalisation alone. Labour standards were excluded from its agenda, meaning that they could not be used to impose trade sanctions against a country. The labour area was left to the ILO, a body with some powers of persuasion but no powers for enforcement comparable to those of the WTO. Labour was to be accorded far less protection than commercial interests, investment or even the environment. However, labour standards did not disappear from the international trade agenda; they could hardly be forgotten in view of the strong public awareness around the world of the frequent negative consequences of globalisation. The ILO rather took the opportunity to involve itself more actively in globalisation issues.

Formed in 1919, the ILO has a long history of setting standards, incorporated into 190 conventions. It works by reaching agreements through a tripartite structure of government, employer and worker organisations and persuading countries to adopt its conventions and to translate them into laws. A key step towards playing a role in globalisation issues was its 1998 Declaration on Fundamental Principles and Rights at Work.⁵ This document incorporated eight core conventions covering four areas of trade union and bargaining rights (Conventions 87 and 98), the abolition of forced labour (Conventions 29 and 105), restrictions on child labour (Conventions 138 and 182) and opposition to discrimination at work (Conventions 100 and 111). The declaration was overwhelmingly supported at the 1998 International Labour Conference. Government delegates from 19 countries abstained, those that had frequently and strongly argued that labour rights should be the concern of the ILO and thus excluded from the WTO. Employers’ and workers’ organisations from Burma, Kuwait, Syria and Vietnam joined their governments in abstaining (Elliott and Freeman 2003: 99).

This declaration was important for setting out unambiguously a conception of labour standards that had overwhelming international recognition. It was made clear that these rights were universal, to be applied in all states regardless of the level of development. They could not be avoided on the pretexts of cultural differences or claims that they were veiled protectionist measures. All ILO members, even if they had not ratified these conventions, had an obligation to ‘respect and promote’ the principles and to report each year on the progress made towards their implementation.⁶ It was also significant that first place went to Convention 87, on the freedom of association and protection of the right to organise, and Convention 98, on the right to organise and bargain collectively. This confirmed the essential role of trade unions and employee representation, without which other legal protections for workers are often meaningless.

4. https://www.wto.org/english/thewto_e/minist_e/mino1_e/brief_e/brief16_e.htm

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

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

The ILO developed its 1998 Declaration into the Decent Work Agenda,⁷ setting out four elements of its approach to globalisation: employment creation (to be given a central position in economic and social policies), rights at work, social protection and promoting social dialogue. The subsequent Declaration on Social Justice for a Fair Globalization of 2008⁸ reiterated the key elements, promising that countries would be monitored and evaluated on how far they adopted these principles, and enabling them to seek advice on how to improve their practices. Decent Work was recognised in UN resolutions and incorporated into number 8 of that organisation's 17 Sustainable Development Goals,⁹ approved by all 193 Member States in September 2015 and intended to 'define the world we want – applying to all nations and leaving no one behind.'¹⁰

Nevertheless, business interests and liberalisation remain the dominant drivers of globalisation; albeit with some space left for other issues, including labour standards, to be mentioned in the growing number of bilateral and multilateral trade agreements that have gone beyond the rules laid down by the WTO. That organisation in fact appeared increasingly deadlocked throughout the long-running saga of the so-called Doha Development Round, initiated in 2001, which formally ended without any significant agreement in December 2015.

The Doha Round was billed as bringing benefits to developing countries through better trade conditions. In fact, the deadlock came from conflicting objectives between groups of countries, with the most developed defending their own specific interests. A major issue was the reluctance of the USA, the EU and Japan to end agricultural subsidies while at the same time expecting developing countries to open their own markets to imports. Developed countries were more interested in pressing for liberalisation around the so-called 'Singapore' issues, set out at the WTO Ministerial Conference in Singapore in 1996: competition policy, investment, trade facilitation and government procurement. However, they made no significant progress and these themes were formally struck from the WTO agenda at its Cancun conference in 2004. These countries were also seeking liberalisation of access for service providers and stricter protection of intellectual property rights, issues which most concerned the interests of businesses in developed countries.

With this apparent deadlock in the WTO, issues that could not be agreed upon were increasingly addressed in bilateral and regional trade agreements. These have thereby become a major feature of international economic relations, posing important questions about how, and in whose interests, those relations will develop in the future. By early 2017, 286 Preferential Trade Agreements, meaning agreements that allow some form of preferential treatment to partners beyond

7. <http://www.ilo.org/global/topics/decent-work/lang--en/index.htm>

8. http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf

9. <https://www.unglobalcompact.org/what-is-gc/our-work/sustainable-development/sdgs/17-global-goals#sdg8>

10. <https://www.unglobalcompact.org/what-is-gc/our-work/sustainable-development/sdgs>

existing multilateral rules, were in force and registered by the WTO.¹¹ These include Free Trade Agreements (FTAs), which reduce barriers on both sides, but also some other kinds of agreements providing reductions on trade barriers from one side only. FTAs are nevertheless the more important kind and will therefore be the main focus in this report. In total, trade between parties to such agreements increased from 28.0% of world trade in 1990 to 50.8% in 2008.

FTAs, by-passing the deadlock in the WTO, frequently include the Singapore issues as well as clauses embodying commitments on environmental and labour standards. The latter are however rather weak and extremely difficult to enforce. Alone they are inadequate to counter the potential negative effects of the continuing trend towards ever more liberalisation of international economic relations. They do not amount to acceptance of the ILO's Decent Work Agenda, but they do represent a step towards giving substance to points in that agenda. With FTAs so central to the current politics of international trade it is important to assess their results to date and their possible future development.

For a full assessment of the implications of FTAs, and their labour provisions, for labour, for sustainable development and for a decent work agenda, they need to be set in the context of developments of international economic relations. Setting out this background is the task of Chapter 1, followed in Chapter 2 by a discussion of trade and investment agreements that have developed within that changing global context. Chapter 3 considers the economic and employment effects of trade liberalisation and Chapter 4 takes up the specific theme of labour provisions in trade agreements.

11. <http://rtais.wto.org/UI/PublicAllRTAList.aspx>. The DESTA database (<http://www.designoftradeagreements.org>) records 455 signed between 1990 and 2012 and 790 signed since 1945. Among these many will have been superseded by subsequent agreements. For example, a number of countries in eastern and central Europe signed agreements with the EC in the early 1990s – 1992 was the peak year for the number of agreements signed - and then subsequently joined the EU in 2004.

1.

The changing global context

Trade liberalisation and international economic integration have brought growth, prosperity and employment opportunities, but not at all times and not for all participants. Economies do not always grow. Employment does not always increase, and even where it does the quality of jobs created is highly variable.

The fastest growing countries have rapidly growing exports. UN data show exports equivalent to 29.9% of GDP in 2013 compared with 12.7% in 1960. Exports relative to GDP grew rapidly from 3.2% in South Korea in 1960 to 53.9% in 2013, from 15.6% to 73.6% in Thailand over the same period and from 8.4% to 27.3% in China from 1982 to 2013. These countries also recorded rapid GDP growth (arithmetic averages of 6.6%, 5.5% and 10.1% respectively, 1982-2013) and exported more than they imported, recording average current account surpluses relative to GDP of 2.1%, 2.5% and 4.3%, respectively, over the 2000-2013 period.

This needs to be balanced, however, with cases where opening economies to more trade has had very ambiguous results. Liberalisation in Mexico after 1982 was followed by slower growth than in previous decades and slower than the USA, as well as with persistent balance of payments deficits, while the export-to-GDP ratio grew from 15.3% in 1982 to 31.9% in 2013. In some countries trade has been accompanied by impoverishment and economic instability. Exports relative to GDP have noticeably grown more slowly in those countries classified by the UN as 'least developed' – from 15.1% in 1965 to 26.6% in 2013 – with some recording no growth or even declines. Among these are many countries that could not balance imports

with exports, leading in the worst cases in some countries of sub-Saharan Africa to current account deficits equivalent to up to 40% of GDP.¹²

Thus trade alone is not a universal road to economic growth, let alone to higher employment and decent jobs. As will be argued, other factors – including historical, institutional and policy frameworks – make some countries better able to take advantage of the opportunities presented by globalisation. This is now being recognised in modern theories of international relations.

1.1 Liberalisation and the 'classical' theory of international trade

Globalisation in the years up to 1914 took the form of an exchange between producers of primary products (raw materials and agricultural goods) and manufactured goods. This was in line with classical theories of international trade – coming from the nineteenth century English economist David Ricardo and further developed into the so-called Heckscher-Ohlin model in the 1930s – which saw trade bringing benefits through specialisation in the products countries made best, where they had an absolute or comparative advantage. Those with the natural resources would specialise in raw materials. Those with abundant land and the appropriate climate would specialise in agriculture, as was the case for large parts of North and South America. Those with capital and know-how would specialise in manufactured goods: initially the UK, followed by western Europe and North America.

This was a reasonable description of the first major globalisation wave up to 1914, and the theory was used to justify trade liberalisation and opening up to imports. However, apart from some countries with fabulous wealth from oil and gas extraction, development and prosperity has generally come from developing manufacturing industries, with help from selective protection and state support. Such has been the experience of the USA from the 1820s, Japan in the 1950s and then South Korea and China more recently.

In fact, the classical theory is little help for understanding the modern world. Trade is no longer dominated by exchange between higher-income countries exporting manufactured goods and lower-income countries exporting raw materials. The years after 1945 saw a steady increase in trade in manufactured goods between advanced countries, often backed by direct investment from multinational companies (MNCs). Production and export of basic, and then more sophisticated, manufactured goods subsequently spread beyond Europe and North America. Japan became a major exporter of motor vehicles to Europe from the 1970s and its MNCs also began manufacturing both there and in North America. South Korea later joined this trend, exporting its motor vehicles and then opening manufacturing facilities in the USA in 2005 and in the EU in 2009.

12. From World Bank data, covering all countries, at <http://data.worldbank.org/indicator/BN.CAB.XOKA.GD.ZS>

1.2 The modern world of global value chains

International integration has been undergoing a further transformation, represented by the development of regional and global value chains (GVCs), or supply chains. These are organised by MNCs when a production process can be split into distinct stages. A complete value chain includes activities requiring a variety of skill levels. Be the products motor vehicles, garments or computers, they require inputs at the different stages of research, design, raw materials production and processing, various manufacturing and assembly activities, distribution, marketing and selling. The simplest tasks can be located in the lowest-wage countries while the most complex – typically research, design and some particular production tasks – remain in high-income countries.

Although organised by MNCs, value chains do not necessarily depend on direct investment. When tasks are simple and easy to define, as is the case for parts of the garments and footwear value chains, it is often more advantageous to subcontract to local firms. There are many potential manufacturers in different countries with plenty of available labour and the MNCs can benefit from forcing suppliers to compete with each other, leaving the employees to endure insecure jobs and poor working conditions (UNCTAD 2013: xxiv).

Where tasks are complex, MNCs may keep full control over the production process through foreign direct investment (FDI). This is the case for motor vehicle assembly. The implications for wages and conditions are rather different. Subcontracting can lead to substantial employment, but with low wages and poor working conditions. FDI is the logical option where more skills and stability are required and is therefore likely to be associated with better pay and employment conditions.

The growth of GVCs has transformed the nature of international economic integration. An estimated 60% of world trade is in intermediate goods and services (UNCTAD 2013: 122) and 28% of the gross value of countries' exports comes from their imports. The subdivision of production tasks means that national boundaries may have been crossed several times before the final product emerges. The supreme examples here are electronics and motor vehicles, for which an UNCTAD estimate was 35-45% of foreign value added in exports (UNCTAD 2013: 128). The figure is considerably higher for certain countries and some products. For motor vehicles in Thailand 80% of production was for export while domestic value added constituted only 25% of export value (UNCTAD 2013: 137).

Electronics provides enormous scope for division into separate tasks, with each participating country finding its place according to its technological level. Production of the iPhone in 2008 (Xing and Detert 2010) involved using components from Japan, South Korea, Germany and the USA, contributing respectively 34%, 12%, 17% and 6% of total production costs and feeding into the final assembly by the Taiwanese firm Foxconn in China. That last stage contributed only 3.6% of the total manufacturing cost. Thus the iPhone created some relatively low-skilled employment and some revenue in China while the USA-based firm benefited from a 65% profit margin.

This example illustrates two further points. The published trade balance between China and the USA, based on the values of finished products, gives a deceptive impression. China appears to have a very large surplus, but much of this is built from imported parts and raw materials, including a significant share of imports from the USA. The example also illustrates MNCs' motivations in using GVCs. In this case, final assembly could be undertaken in the USA with only a very small reduction in profit level. Outsourcing was not a response to pressure on profit margins, but rather a means to maximise profits.

In electronics, economic integration may span much of the world. In other sectors production is often integrated within regions, even when the MNCs are from outside that region. Countries of east-central Europe integrated with higher-income EU Member States, with the help of Association Agreements and then full EU membership from 2004. First they exported raw materials and undertook contract work for garment manufacturers. They then moved into motor-vehicle assembly, while MNCs kept the newest products and development stages in western Europe.

Mexico, following the North American Free Trade Agreement (NAFTA, in effect from 1994 and discussed below), integrated with the USA, undertaking simpler manufacturing tasks. 'Factory Asia' took shape with Japan, Korea and Taiwan making sophisticated parts, while China, with an import content of exports of 37% in 2008 (WTO 2011a: 99), assembled and exported to the rest of the world, a role also currently being taken on by Vietnam and India (WEF 2012: 12; WTO 2011a: 76). China's apparently central position as the exporter of finished products does not mean that it controls GVCs. All countries can influence which tasks are located in their territory in so far as they can create the appropriate environment, but the actual organisers remain MNCs, which account for 70% of China's exports (WEF 2012: 12).

1.3 The growing trade in services

Another important development in international economic relations is the growth in trade in services. The value of total commercial services exports in 2010 was 25% of that of goods (WTO 2011b: 18). Services cover extremely varied fields, including transport, banking, insurance, education, consultancy, accounting, health and tourist facilities. Services have been presented as an 'enabler' for integration into GVCs (WEF 2012: 18), making it possible for MNCs to spread production around countries. However, much of the internationalisation of services need have no relevance for manufacturing GVCs.

Measurement is very difficult and statistical data are often limited. However, as Table 1 shows, high-income countries, notably the USA and UK, have surpluses on commercial services, counterbalancing growing deficits on physical goods. When broken down into smaller categories, over 80% of exports of financial services, insurance services and telecommunication services come from North America and

Europe.¹³ Further trade liberalisation in these areas would be most advantageous for businesses in the most developed countries in the world.

Table 1 Shares in world exports and imports of goods and services of leading countries (%), 2010

	Export share	Import share
Goods		
China	10.4	9.1
USA	8.4	12.8
Germany	8.3	6.9
UK	2.7	3.6
Commercial services		
USA	14.1	10.2
Germany	6.3	7.3
UK	6.2	4.5
China	4.6	5.5

Source: WTO 2011b: 33 and 35.

However, liberalisation in these activities is not just about removing barriers to external competition. It is also about service companies wanting to operate within other countries, investing in hotels and tourist facilities, running education and health establishments and pension systems, and providing financial services. These activities encounter barriers to varying degrees from internal regulations and from the existence of public welfare systems. Opening up to foreign competitors is therefore a matter of reducing governments' powers to regulate and control their own economies and social policies. Financial regulation is also a sensitive issue in view of its importance to governments for limiting the dangers and effects of financial crises. Giving foreign businesses the right to compete with, or even take over in full, social services similarly limits the power of states to determine their own welfare policies.

13. https://www.wto.org/english/res_e/statis_e/its2012_e/its12_trade_category_e.htm

2.

The history and development of trade and investment agreements

2.1 The rise of FTAs

Trade liberalisation was the dominant aim behind GATT (formed by 23 countries in 1948), which reduced formal barriers to trade through multilateral negotiation. Their average level prior to GATT was 20-30%. By 2009 it had been reduced to 3% (WTO 2011b: 124), although some significant barriers still remain. In fact, such remaining formal barriers should not be understated; tariffs remain considerable or sometimes very high for some specific goods, mostly in agriculture and a few manufactured products which as a result are traded much less than would otherwise be the case. Examples are motor vehicles for China and Brazil, or agricultural tariffs of almost 50% for South Korea in 2009 (WTO 2011a: 43).

GATT was replaced in 1994 by the WTO, a body with powers of dispute resolution for when one country is judged to be transgressing rules. It can decide on sanctions, effectively limiting the power of governments to take decisions once they have signed up to WTO membership. This change reflected dissatisfaction with the GATT process from different sides that pointed to the need for a stronger body with a wider mandate.

However, it proved impossible to reach major further agreements in the WTO, so attention subsequently turned towards FTAs. Table 2 and Figure 1 show the numbers of trade agreements (including FTAs and Generalised System of Preferences agreements, discussed below) signed in different time periods and involving very varied numbers of countries, of which there were 286 in force and registered with the WTO at the start of 2017. The number of countries involved in

an agreement varies, with some, such as the EU treaties, including all Members States (currently 28).

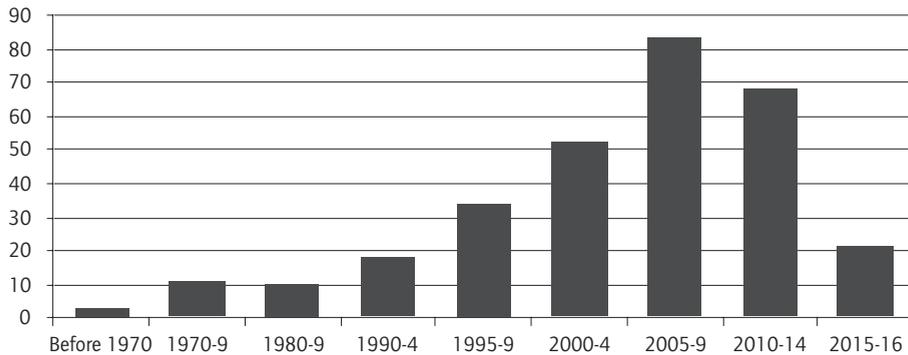
At first, participation in FTAs was an activity for richer countries. It then spread, both through agreements linking developed and developing countries and through agreements between countries of the global south. Table 3 shows the involvement of several different countries by numbers of agreements, demonstrating how FTAs have spread across the world. Some countries have taken very little part in the process, although by early 2017 only four countries were not at all involved in an agreement of any sort, as recorded by the WTO (Democratic Republic of Congo, Somalia, South Sudan and Mauritania). Integration is frequently limited to particular regional configurations and many countries are also involved in regional trade agreements (Table 4 covers the prominent ones). It should be emphasised that the presence of such an agreement on its own proves little, as their content varies as greatly as their impact. Some are of very little practical significance while some have important implications for the countries involved.

Table 2 Trade agreements signed in different periods

Before 1970	3
1970-9	11
1980-9	10
1990-4	18
1995-9	34
2000-4	52
2005-9	83
2010-14	68
2015-16	21

Source: WTO Database, <http://rtais.wto.org/UI/PublicSearchByCrResult.aspx>.

Figure 1 Trade agreements signed in different periods



Source: as Table 2.

Table 3 Numbers of trade agreements signed by selected countries and blocs and in force in February 2017

Country	Number of agreements	Comment
European Union	38	Geographically diverse, but only Korea in South or East Asia.
Switzerland	30	Geographically wide, nearly all through EFTA.
Chile	27	Geographically wide, including USA, EU and EFTA.
India	17	Mostly regional, plus Mercosur.
China	15	Regional, plus Iceland and Switzerland.
Mexico	15	Regional, plus EU and EFTA.
USA	14	Limited to neighbouring countries and those of strategic interest (Israel, Jordan).
Thailand	11	Regional.
New Zealand	11	Regional.
Brazil	5	South America; no recent agreements.
South Africa	5	Including EFTA and EU.
Nigeria	2	No agreements since 1993.

Source: as Table 2.

Note: EFTA and Mercosur are explained in Table 4.

Table 4 Selected regional trade agreements

Start date	Coverage	Members
European Union (EU)		
1958 (further agreements as more members joined)	goods and services	Austria; Belgium; Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; Slovak Republic; Slovenia; Spain; Sweden; United Kingdom
European Free Trade Association (EFTA)		
1960	goods and services	Iceland; Liechtenstein; Norway; Switzerland
North American Free Trade Agreement (NAFTA)		
1994	goods and services	Canada; Mexico; United States of America
Southern Common Market (Mercosur/Mercosul) ¹⁴		
1991	goods and services	Argentina; Brazil; Paraguay; Uruguay
Association of Southeast Asian Nations (ASEAN) Free Trade Area (AFTA)		
1992	goods and services	Brunei Darussalam; Cambodia; Indonesia; Lao People's Democratic Republic; Malaysia; Myanmar; Philippines; Singapore; Thailand; Vietnam
Common Market of Eastern and Southern Africa (COMESA)		
1994	goods	Burundi; Comoros; DR Congo; Djibouti; Egypt; Eritrea; Ethiopia; Kenya; Libyan Arab Jamahiriya; Madagascar; Malawi; Mauritius; Rwanda; Seychelles; Sudan; Swaziland; Uganda; Zambia; Zimbabwe

Source: as Table 2.

14. The full title is abbreviated to Mercosur in Spanish and Mercosul in Portuguese. Mercosur is used alone in the subsequent text.

A WTO analysis of Preferential Trade Agreements identifies a starting point in the creation of the European Economic Community in 1957 and the subsequent development of a customs union. The motivation was as much political as economic: to entrench European cooperation after the experience of two world wars. The European example provided a stimulus to attempts at integration in Africa, the Caribbean, Central and South America (WTO 2011: 52), but these early attempts were neither lasting nor significant.

Europe continued to be the leading force throughout the 1980s and into the 1990s, creating its internal single market in 1992. Formal tariff barriers had been eliminated by 1968, so attention shifted to so-called non-tariff barriers, meaning technical regulations and standards, including packaging, marking and labelling requirements. The single market also established uniform rules of origin which were important for achieving closer integration of production across existing frontiers.

Western European integration was not governed solely by a business agenda. It included insistence on various common elements in Member States' labour law, and the risk of significant social costs from economic integration was dealt with through the development of a regional policy that could redistribute resources towards less wealthy regions. References to employment conditions were to be included in some subsequent EU bilateral trade agreements with other countries, but in much weaker forms that included neither the same level of detail nor means for enforcement when compared with the situation for EU members.

Closer European integration coincided with, and sometimes stimulated, renewed interest in large-scale agreements in other parts of the world. The USA developed agreements with its nearest neighbours, expanding its US-Canada free trade area (formed in 1988) into NAFTA in 1994, and including Mexico. This included areas that were new to US agreements investment: services trade, intellectual property and government procurement; themes that were to be pressed without success through GATT and the WTO.

Elsewhere in the world the agreements reflected political motivations rather than precise assessments of specific economic benefits. A prime example was Mercosur which developed from a 1985 agreement between Argentina and Brazil aimed at improving relations between the two biggest South American countries as they emerged from dictatorships. It was not built from strong pre-existing economic relations; nevertheless, Mercosur was founded in 1991 with the aim of becoming a full customs union. It linked Argentina, Brazil, Paraguay and Uruguay, and then Venezuela from 2012 after Paraguay had its membership suspended (WTO 2011: 53). Even then, the Brazilian government presented the agreement as a political and strategic integration project in which the trade aspect was added to other spheres 'of equal or higher importance.'¹⁵ Consolidation of the customs union proved difficult, particularly for arguably its most important element, the motor-vehicle industry (discussed below).

15. http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=6347:mercosur-en&catid=143&lang=en&Itemid=434

Other agreements – notably between groups of African and Asian countries – were also founded on general hopes that cooperation would help development, and acquired economic content only gradually. Thus ASEAN, linking South-East Asian countries, was established in 1967. Economic cooperation was formally added in 1977, but offered little that was new. In 1992 members decided on a free-trade area. This coincided with a huge increase in parts and components trade among members and exports to countries outside the agreement, driven by Japanese MNCs. Thus it is likely that the agreement helped make possible the integration of its members into GVCs.

2.2 A new wave of FTAs

The negotiation of large regional agreements, driven in part by the USA and the EU but with greater involvement from Asia in initiation, suggests a new wave of interest. This has been accompanied by an evolution in content and precision. As a rule, wealthier countries have more comprehensive agreements which are more likely to include issues from beyond the current WTO agenda. Multilateral agreements also tend to be more extensive (Kohl *et al.* 2016: 103).

Thus the USA and EU have continued to use large regional agreements to drive the world-trade agenda on the issues most important to their MNCs. The supreme examples of this are the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP, under negotiation between the EU and USA since 2013). US proposals for these two big agreements spanned the maximum previously achieved in terms of areas covered and on some issues went beyond any previous agreement.

Discussions on TPP started in 2002 as an Asian project. The USA joined negotiations in 2008, which were pushed forward by President Obama in line with his so-called ‘pivot to Asia’. By 2015 12 countries had reached agreement: Singapore, Brunei, New Zealand, Chile, the United States, Australia, Peru, Vietnam, Malaysia, Mexico, Canada and Japan. China was not party to the agreement. The USA could be pleased to have included services, intellectual property rights and issues of domestic liberalisation (even if not always in the maximum form it would have liked) as well as the investor-state dispute settlement (ISDS) system of investment protection, discussed below.

The USA was motivated by both business interests and considerations of global politics. Rivalry with China figured in both of these factors. On 5 October 2015, after agreement on TPP had been reached but there was expectation of a difficult ratification process, Obama declared: ‘we can’t let countries like China write the rules of the global economy. We should write those rules, opening new markets to American products while setting high standards for protecting workers and preserving our environment.’¹⁶ The agenda behind this centred on other countries allowing an ‘equal playing field’ for US business. That meant giving maximum

16. <https://www.whitehouse.gov/the-press-office/2015/10/05/statement-president-trans-pacific-partnership>

protection to foreign multinational companies, restricting the powers of state-owned businesses, liberalising access for service companies and providing strong protection for patents and trademarks, under the heading of intellectual property rights. The decision of US President Trump to withdraw from TPP leaves things unclear as to how these business interests will be pursued in the future. His decision may turn out to mark a major break or only a temporary pause in the established trend.

China's involvement in FTAs dates from an agreement with ASEAN in 2002 to create the ASEAN-China Free Trade Area (ACFTA) which came fully into effect in 2010 with very substantial reductions in tariffs between partners. China also supported, and took part in negotiations for, the so-called Regional Comprehensive Economic Partnership, led by ASEAN with others encouraged to join. Negotiations started in 2002 with the intention of bringing together in a free-trade agreement countries that already had bilateral agreements with ASEAN (Australia, China, India, Japan, South Korea and New Zealand). The agreement was seen as a rival to TPP, in which China and India were not taking part.

Should agreement be reached, it is likely to differ from TPP due to China and India's currently smaller interest in protecting patents or in free access for services. However, it would be an exaggeration to regard China as aiming to write the world's trade rules. It is pursuing its own interests, facilitating participation in complex value chains and ensuring access to external markets, but avoiding where possible liberalisation of imports that compete with domestic production.

2.3 The themes covered in agreements

Modern agreements contain detail that is typically negotiated in a process lasting several years with little or no public involvement but with input from business interests. There are common elements in many agreements, but also some differences of detail that remain very difficult to explain (WTO 2011b: 136) and would seem to confirm active negotiating rather than just a copy-and-paste process from previous agreements.

Trade liberalisation by tariff reductions is the basic element in FTAs. They are not lowered by much beyond what has already been agreed through the WTO, and frequently continue to exclude some sensitive agriculture and food products (WTO 2011: 61). As a result, FTAs are estimated to reduce average trade-weighted tariffs from 3% to 2% (WTO 2011: 73). Nevertheless, in complex production chains where borders are crossed several times before the final product emerges, relatively low tariff levels can escalate into a significant sum.

Much of what the different interests argue for is not achieved in FTAs, or achieved only in part and with general and non-enforceable provisions. Nevertheless, business is reassured that a partner country is committed in a formal treaty to a liberalising agenda and to respecting foreign companies. MNCs can be more confident in investing, or subcontracting parts of their value chains, and can expect

diplomatic support should they feel threatened (OECD *et al.* 2014: 42). Therefore, for the enormous number of items included in agreements that go beyond tariff reductions, the parties frequently agree only to make a 'best endeavour' to implement appropriate legislative changes, with no penalties for putting these off into the indefinite future. However, those items least likely to embody legal enforceability are also the least relevant to identifiable business interests. Among them are such themes as human rights, political dialogue, illicit drugs, money laundering, cultural cooperation and education and training. The important motivations behind FTAs are to be found in the enforceable items. Those with the strongest probability of enforcement rules are movement of capital, competition policy, intellectual property rights and investment (these are also the items that are most likely to be present in an agreement), and to a lesser extent labour market regulation and visa and asylum policies (WTO 2011: 132).

Competition policy was the most frequent item going beyond the existing WTO agenda in FTAs in the WTO's analysis (WTO 2011: 132), appearing 90 times with almost 70 enforceable. It has great practical significance for certain sectors. Thus, there are often specific provisions for telecommunications, potentially opening access to foreign companies, and for restricting both state aid and the activities of state-owned enterprises, thereby opening more space for private providers. Similarly, movement of capital, intellectual property rights and investment protection are all key themes for MNCs.

The agendas of the USA and EU are also made clear from their attempts to initiate further international agreements and their negotiating positions in TPP, the Comprehensive Economic and Trade Agreement (CETA, linking the EU and Canada) and TTIP (Myant 2015). The following four themes appear as important indicators of priorities in those countries' agendas (investment provisions are discussed later in a separate section):

- (1) A major theme has been *making regulations compatible wherever possible*. This includes regulation of financial systems, of food and pharmaceutical safety, of dangerous chemicals and of safety standards for consumer products, notably motor vehicles. Common sets of rules would make trade easier and reduce the costs of satisfying differing sets of rules. However, the different regulatory systems, notably between the EU and USA, make it very difficult to achieve compatibility.

The method frequently favoured for this has been mutual recognition. This is administratively simpler than negotiating common standards from scratch, but it opens the door to a race to the bottom. Where differences are significant, production tends to move to wherever standards are more easily met. The alternative is the creation of machinery for examining existing regulations and checking new ones before they are introduced. This seemed a likely outcome from TTIP negotiations, should they ever be completed, with bodies to be set up on each side of the Atlantic to check on the justifiability of both existing and proposed regulations.

This approach may have very little impact if there is strong opposition to weakening existing regulatory systems. On the other hand, a strong business input alongside a more general political agenda for reducing regulations could lead both to substantial changes to existing regulations and to doubts, fears and delays on the part of governments, discouraging proposals for new regulations. The sectors likely to be the most affected are those for which public provision and regulation are most important, including mineral extraction, chemicals, pharmaceuticals and health services.

It should be noted that these trade agreements are not presented as a means to raise standards of protection for consumers or employees. Regulation mostly appears as a potential cost. Despite the enormous and demonstrable social benefits from many regulations – including protection against toxic chemicals, carcinogens, dangerous car exhaust emissions, reckless banking practices and sources of global warming (Myant and O'Brien 2015) – the agenda is not about setting higher standards in these areas.

- (2) *Services* remain a prominent theme. Having failed to achieve its aims through the WTO, the USA, with EU support, has pressed for the development of an international treaty (the Trade in Services Agreement, TISA) bringing together 23 parties in secret negotiations that began in 2012. There was no participation from China, India, Brazil or any mainland African country. These latter countries, as indicated above, are not major exporters of services and do not stand to gain from liberalisation of access for foreign service companies into their markets. Secrecy of negotiations has been breached most completely by Wikileaks (see also Gould 2014), making it possible to identify negotiating positions which unashamedly represent the views of particular businesses, without any reference to issues of sustainable development or employment rights. The negotiating group has signalled its narrow and exclusive agenda by referring to themselves as the 'Really Good Friends of Services'.

There is a clear aim to level down service sector regulation. An important issue here is the 'negative list', in which any activity that is not exempt from liberalisation cannot in the future be protected; nor can new areas be added to the list as they develop, even if possible negative effects are discovered. There are further proposals for a 'necessity' test, whereby the justification for a regulation can be challenged and evaluated by an arbitral panel, which could potentially overrule a national parliamentary decision. Thus, for example, rules on the sale of tobacco and alcohol or on urban planning could be challenged and overturned if they conflict with a particular business interest. The US ambitions also appeared to include freezing financial regulation regimes at their existing levels and opening access to private companies in areas dominated by public services.

The status of public services is an issue of major controversy. The EU position has been that public services should be excluded, but the exact definition is crucial in this case. The WTO's General Agreement on Trade in Services

refers to services provided ‘neither on a commercial basis nor in competition with other suppliers’¹⁷. This leaves a vague boundary, for example regarding private schools and hospitals. Much of social provision involves a mix of public and private provision, with governments setting the rules. There are proposals within TISA negotiations that would allow challenges to public provision and that would prevent renationalisation of activities once any private provider had been allowed in. Thus a secretly negotiated agreement on services could result in a progressive restriction on the decision-making power of public authorities regarding public service provision where they may not wish to follow the logic of free market rules alone.

- (3) The issues relating to *intellectual property rights* are the acceptance of rules and their enforcement by domestic authorities. The important themes in practice are trademarks, copyrights and patents. The last of these is most relevant to pharmaceutical companies, and the USA argued through TPP negotiations for the longest possible lifetime for patents, maximising both revenue to the companies and costs to consumers. Concessions had to be made to Australia, a country concerned about costs to its health service, but arguably the biggest losers are lower-income countries that cannot afford expensive medicines.
- (4) *Opening access in public procurements* would advantage multinational companies. This would limit governments’ ability to favour domestic producers and to set conditions concerning labour or other standards for firms that they buy from. On this issue, however, the USA is less consistent with its liberalising agenda, defending its ‘Buy American’ policy of favouring US companies.

2.4 FTAs and value chains

The former WTO Director General Pascal Lamy argued that FTAs are ‘driven by the logic of vertically integrated international production structures’ (WTO 2011: 3). They open the way for ‘deeper’ economic integration, (WTO 2011: 45), exploiting the benefits of supply-chain activities; the implication being that they should offer substantial benefits in terms of economic development. Two reservations need to be acknowledged here. The first is that many items in FTAs have no obvious connection to that objective. The second is that, although there is evidence of supply-chain activity increasing both before and after some agreements, other factors, including development of the necessary infrastructure, are also likely to be important. Some, but not all, elements in FTAs appear to be a precondition for participation in complex value chains, but they are far from a sufficient condition on their own.

Key issues of concern for value-chain development, frequently addressed in regional agreements, are tariffs and rules of origin. These become important when

17. https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm

several frontiers are crossed during a production process. Rules of origin, relating to the permissible imported content of a product before it can count as domestically produced, can create administrative complexity and affect the number of times duties have to be paid. These differ between agreements so that the proliferation of FTAs has created a ‘spaghetti bowl’, or in the Asian context a ‘noodle bowl’, of links within which rules differ, albeit to an extent that is not clear. Survey evidence does show firms frequently quoting rules of origin as a complicating factor, discouraging them from taking advantage of the greater scope for trade that should be facilitated by an FTA (WTO 2011: 85). However, evidence from Asian firms suggests that lack of knowledge and the small amount to be gained are more important reasons for not taking advantage of FTAs (Kawai and Wignaraja 2014: 18–21).

Two further prominent areas in recent and pending FTAs cited as relevant to GVCs are intellectual property rights and investment protection. The former should be particularly relevant for companies planning to undertake high-level research in another country, but that is of little practical significance for most of the investment undertaken by MNCs in lower- and middle-income countries. Companies have typically been reluctant to spread research beyond the highest-income countries. Investment protection, as argued below, is also not the key issue in decisions on location of production.

Thus FTAs can offer benefits to both sides, even if they are at very different levels of development, but only some elements are important to participation in value chains. Many items are of value to only a limited range of interests in both developed and developing countries and can pose serious threats where they reduce governments’ powers to provide public services, to regulate their economies and to pursue policies of their choice. This is exemplified by the form taken by investment agreements, as discussed in the next section.

2.5 The growth in investment agreements

International Investment Agreements (IIAs) followed a different course of development to agreements on trade, but more recently they have increasingly been put together in combined trade and investment agreements. The first Bilateral Investment Treaty (BIT) was signed between Germany and Pakistan in 1959, after which this became the main instrument beyond the national level protecting investment against expropriation and nationalisation.

The important development was the inclusion of the ISDS system for the first time in the Indonesia-Netherlands treaty of 1968. With that, as shown in Table 5 and Figure 2, the signing of BITs, overwhelmingly with ISDS included, gathered pace. The total in March 2017 was 2,964 bilateral treaties signed, with 2,329 in force, and a further 368 treaties signed (297 of them in force) that contained investment provisions, considerably higher than the number of FTAs.¹⁸ Many developing

18. All data from <http://investmentpolicyhub.unctad.org>

countries have become sceptical, but the USA and the EU have pressed for inclusion of ISDS in treaties, and now directly in FTAs, as indicated in the negotiations of TPP and TTIP.

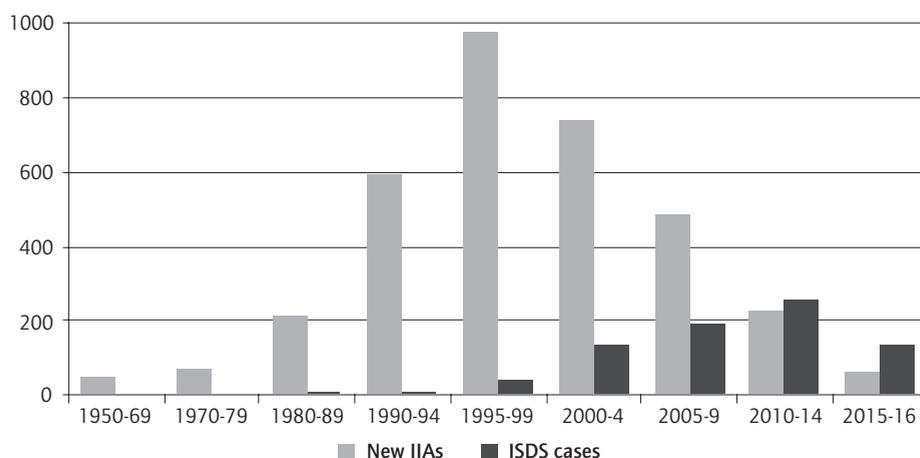
Table 5 Evolution of International Investment Agreements and ISDS cases

	1950-69	1970-79	1980-89	1990-94	1995-99	2000-4	2005-9	2010-14	2015-16
New IIAs	52	73	214	594	976	740	489	228	64
Total IIAs		125	339	933	1909	2649	3138	3366	3430
ISDS cases	0	0	1	3	39	134	190	259	136

Source: <http://investmentpolicyhub.unctad.org>

Note: data on agreements show all that have been signed, including those no longer valid and those not yet in force

Figure 2 Evolution of International Investment Agreements and ISDS cases



Source: as Table 5.

Three initial points should be made about BITs:

- (1) The first is that they have not developed as treaties promoting investment linked to sustainable development, and in fact have very little relevance to this agenda. Nor do they emphasise the responsibilities of investors. The phraseology and general provisions in some treaties may suggest otherwise, but the only enforceable issue has been the protection of multinational companies' commercial interests. They alone can sue, and they cannot be sued under these treaties.
- (2) ISDS is the key, and the most controversial, issue in BITs. It has a purportedly rational core as a protection against arbitrary expropriation or nationalisation, but it has developed to give MNCs much more power than initially predicted, and it is that development that has driven the growth in BITs. The first award to a company under this mechanism was in 1990, and was followed by a rapidly growing number of cases; by March 2017, 767

had been brought. Of these, 80% were brought by investors in developed countries and 70% were brought against developing countries.¹⁹

- (3) While MNCs quickly noticed the benefits of ISDS, participants in developing and then transition countries that signed up generally had no awareness of what it would lead to. The point was eloquently made by Pakistan's Attorney General in 2006, Makhdoom Ali Khan. Initially, he said, investment treaties had been viewed as 'photo-op' agreements. The treaties had been 'signed without any knowledge of their implications', but 'when you are hit by the first investor-state arbitration you realize' that it is something akin to a judicial review of domestic actions; 'in many ways, the foreign investor is seeking an international arbitral review of sorts of government conduct on important public policy issues - issues which, until recently, were immune from any non-domestic scrutiny.'²⁰

The exact terms of ISDS differ between treaties, but the essential features are similar. Private foreign investors, but not domestic firms, can claim compensation from a state if its decisions are judged to have been commercially harmful to them. Under existing inter-state agreements, a company can demand compensation through a specially created arbitration tribunal made up of three legal experts who, under the terms of most agreements, are chosen from an approved list held by a World Bank body. The discussions are secret, but detailed justifications for decisions are frequently published. There is no right of appeal on the content of the judgement so that even 'manifest errors of law' cannot be corrected (UNCTAD 2015: 150).

2.6 How ISDS has worked

The wealth of past examples makes it possible to see how ISDS works in practice. The following points emerge:

- (1) The experts are not professional judges and work both as advocates and tribunal members. The number available is small and they earn fees attractive enough to give them an interest in cases being brought, which is more likely if many are resolved in favour of the MNCs. They operate with a narrow concept of legality, taking no account of social or other conditions, of reasonable economic policies, or of governments' rights to change policies. The only question for them is the possible harm to the commercial interests of a private company, judgement on which takes precedence over all other issues.
- (2) The language used in treaties plus the absence of an appeals mechanism gives them a flexibility that has led to unanticipated and inconsistent interpretations by arbitral tribunals (UNCTAD 2015: 126). A key feature is a vague and imprecise notion of 'fair and equitable treatment', present in

19. For a map and data on ISDS cases, see <https://github.com/OneWorldData/ISDS/tree/master/tables>

20. http://www.iisd.org/itn/wp-content/uploads/2010/10/itn_dec1_2006.pdf

almost all treaties, which means that companies can claim damages if they believe they have not been treated the same way as another company. Thus, for example, an oil company can complain of tax changes that are applied to their sector only and not to all companies. The vagueness of the notion encourages companies to start cases and also encourages governments to be cautious when facing MNCs.

- (3) Companies frequently claim compensation for changes in government policies. There were some remarkable cases after countries that had signed a number of ISDS agreements joined the EU and were obliged to work by its rules. Romania and Poland had to pay compensation to investors, in the former case for applying EU rules on investment subsidies and in the latter for applying EU rules on pharmaceutical authorisation (Joumard 2016: 110). In 2012 the French utility Veolia took action against Egypt after the municipal authority in Alexandria, which had agreed to maintain a low wage level, followed Egyptian law in applying a newly introduced minimum wage.²¹
- (4) Companies do not require a treaty between their home country and the target country if they can use subsidiaries in a third country to initiate action. In 2011 the US tobacco firm Philip Morris, using its Hong Kong subsidiary, took action against the Australian government for anti-smoking measures,²² finally losing the judgement in 2015. In September 2013 the Canadian company Lone Pine Resources even used the ISDS clause in NAFTA to enable its US subsidiary to claim damages from Canada after the Quebec government imposed a moratorium on fracking following fears over the environmental implications of this method of oil and gas extraction.²³
- (5) Financial and banking regulation can be constrained by ISDS. The Chinese insurance company Ping An took action against the Belgian government, which had taken over the failed Fortis insurance company in which the Chinese firm had a share. The Japanese investment bank Nomura, using a subsidiary in the Netherlands, sued the Czech government in 2006 for taking over without compensation a failed bank, set to lose its licence to operate, in which the Japanese company had a share. The tribunal agreed that this was unfair treatment as subsidies had been given, albeit in different circumstances and at a different time, to domestically owned banks.²⁴
- (6) Healthcare is not excluded from ISDS. A reform in Slovakia in 2004 allowed private profit-making insurance companies into the previously public healthcare system. Subsequent reforms in 2007 and 2009 aimed to remove the profit motive from health provision. In 2014 the Dutch insurance company Achmea II won a tribunal case for compensation.²⁵

21. <https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/12/15>

22. <https://www.ag.gov.au/tobaccoplainpackaging>

23. <http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf>

24. <http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>

25. <http://opil.ouplaw.com/view/10.1093/law/iic/647-2014.case.1/IIC647%282014%29D.pdf>

- (7) MNCs can make substantial gains from states, including estimates of what future profits they might be losing. The cases take a long time to settle but, of those completed by early 2017, 36% had been settled in favour of states, 27% in favour of investors and 24% between the parties without requiring a formal judgement.²⁶ The average amount awarded in 2015 in cases for which results were known was \$575 million (UNCTAD 2015: 148). The largest ever award was \$40 billion in July 2014 against the Russian Federation for the alleged indirect expropriation of Yukos, an oil company originally from Russia that was registered in Cyprus. There are also substantial legal costs. Evidently, countries can stand to lose a great deal.
- (8) The victims have rarely been the world's more powerful countries and are often those in the weakest position at the time. The USA has never lost a case. The inclusion of ISDS in NAFTA put it at some risk but of the 37 cases concluded by the end of 2015, Canada lost six, Mexico five and the USA none (Joumard 2016: 102). China too is not among the countries sceptical of ISDS. It has yet to lose a case, while its own companies have actively sought compensation in a few other countries.

Thus ISDS gives a clear advantage to foreign over domestic companies, particularly to companies from already powerful countries, and the implication of past judgements has been that the burden of proof rests very heavily with the government to demonstrate that it has not treated a foreign company unfairly.

2.7 What has ISDS led to?

Available evidence suggests that ISDS is not important in the promotion of investment. A summary of available studies (UNCTAD 2014) suggests that it is at best one of several determinants of FDI, with other factors much more important. It is not a 'substitute for sound domestic policies, regulatory and institutional frameworks' (UNCTAD 2014: 1). A study of the effects of ISDS in TTIP, commissioned by the UK government, concluded that there was no evidence at all that MNCs are discouraged from investing in that country by any feelings of legal uncertainty (Poulsen *et al.* 2013).

However, ISDS is important in terms of restricting governments' ability to regulate and to provide public services. The evidence is clear from all types of countries, including highly developed ones. Thus, through NAFTA, US firms have taken action against Canada on changes to tax laws, access for health care companies in Canada's health system, energy and mining regulation and product safety (Poulsen *et al.* 2013).

Even if often unsuccessful, MNCs' actions make parliaments and governments more cautious over new regulatory measures and less likely to oppose deregulatory or privatisation measures or to reverse those that have already been adopted. There is

26. <http://investmentpolicyhub.unctad.org>

very clear evidence of ‘regulatory chill’ – meaning that governments refrain from new regulatory measures when confronted by threats from multinational companies – after investment treaties are signed (Tienhaara 2011). This is especially relevant in public services, in finance and in activities with substantial environmental effects, such as mineral extraction. Not surprisingly, a number of countries – including Australia, South Africa, Ecuador, Bolivia, Venezuela and Indonesia – have refused to sign agreements with ISDS clauses or cancelled existing agreements when they can (Eberhardt 2014: 112-113; ILO 2016: 27-29).

Over the period 2014-2018, 1,500 agreements with ISDS provisions will have reached the age at which they can be terminated at any time. The extent of opposition to ISDS from countries that have suffered from its consequences have led UNCTAD to suggest that ‘[T]he question is not about *whether* to reform or not, but about the *what, how* and *extent* of such reform’ (UNCTAD 2015: 120). Reform could then take four possible forms, all of which either exist in current agreements or are under discussion.

One direction is to tighten wording and specify obligations more precisely. ‘Fair and equitable treatment’, for example, could be replaced with a list of precisely what is not permitted. Requirements for openness of tribunals could be made clearer. The loser could be required to pay all costs and maximum penalties could be specified. There could be more safeguards on governments’ right to regulate or to set public policy objectives. There could be clear provisions allowing governments to pursue sustainable development objectives and there could be stipulations for ‘responsible’ investment (UNCTAD 2015: 126). However, as long as the decision is taken by a tribunal answerable to no one and able to make whatever judgement it likes, the fundamental weaknesses of the system would still remain.

Another line of reform would be the creation of a standing international investment court. The EU, after conceding a public consultation on TTIP negotiations in 2014 which brought almost 150,000 critical comments on ISDS²⁷, proposed such a system in its negotiations with the USA²⁸ and it was quickly incorporated into the draft agreement with Canada being negotiated at the time. Under this proposal, the arbitrators are professional judges, selected on a random basis for each case, and there is a right of appeal to another group of judges. This could be expected to alter somewhat the balance of power between MNCs and states, but it would still be up to those judges to decide what constitutes legitimate regulation and policy changes and what can be interpreted as illegitimate action against a multinational company. National laws, governments and parliaments could still be overruled by an outside body. Moreover, generalising such a system would require complex negotiations over how such a court should be constituted and financed.

A simpler alternative to ISDS would be state-to-state arbitration, as practiced in the WTO and as already exists in a very few investment agreements. This would greatly reduce the imbalance in favour of MNCs, as the company’s home country – it could

27. http://europa.eu/rapid/press-release_IP-15-3201_en.htm

28. http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

presumably have only one – would need to be convinced to press a case. This is the current situation with labour issues (the limited results are referred to in Chapter 4). An even simpler option would be to use domestic dispute mechanisms only. The MNC would have access to courts in the country in which it operates, exactly like any domestically owned firm. This would give governments and parliaments freedom to set policies in their own countries. It is, in fact, quite a common way for countries to regulate foreign investment and has been the most prevalent approach among the world's most economically powerful countries as well as between those of much less economic significance. Indeed, if all 193 United Nations members were to enter into a BIT with all other members the total number in early 2017 would not have been 3,430 but instead 18,528.

3.

The consequences of trade liberalisation for decent work and sustainable development

3.1 Economic consequences of trade liberalisation

Despite assertions from political leaders that trade agreements will lead to more trade and hence more prosperity and employment, the studies that they rely on by academics and consultancy firms show very modest benefits. In fact, the claim that opening economies leads to growth has been hotly disputed (Elliot and Freeman 2003: 14-15). A famous study on the effects of joining GATT and the WTO showed no difference in trade, let alone GDP, between countries that did join and those that did not (Rose 2004).

The standard approach has been to use a so-called Computable General Equilibrium model. The assumption is that a trade agreement leads to more exports and imports of goods already traded, with no significant economic disruption and full employment throughout. If this is all that happens, then the effects of trade liberalisation on GDP levels, in a world where formal barriers are already low, should be positive but small, as indeed studies tend to predict. A European Commission-commissioned study forecast a one-off gain for Europe from TTIP of 0.48% of GDP after 20 years. Even that estimate, equivalent to no more than a cup of coffee per person per week, required a number of guesses and assumptions (Myant and O'Brien, 2015).

This method overlooks both the negative and positive effects of trade liberalisation. On the negative side there can be substantial disruption if domestic producers fail in the face of international competition. This applies for lower-income countries where freeing of imports has often been devastating to agriculture and parts of the manufacturing industry, while new export activities do not always appear. It

applies also in higher-income countries where established industries have been hit by imports from low-wage countries.

On the positive side, big benefits come not so much from small increases in the exports of goods already being produced as from the possibilities of new development from integration into GVCs. However, trade barriers are only one of a number of factors here and not the most important one; this is a very consistent conclusion of studies by international agencies and bodies (WEF 2012; WTO 2011a; UNCTAD 2013; OECD *et al.* 2014). Participation in GVCs, and participation in activities that provide the best employment and income opportunities, depends on physical infrastructure: ‘ports and canals, airports, roads and a wide range of information and communication technologies’ (Gereffi 2015: 6). Good transport, logistics and also speedy administrative procedures appear to be the vital ingredients (OECD *et al.* 2014: 28; WTO 2011a: 33). A trade agreement can therefore only bring benefits as and when other conditions are met.

The benefits of GVC participation also depend on the kinds of activities undertaken and vary enormously between the different stages, with the biggest advantages for those countries best placed to undertake the highest-level activities (OECD *et al.* 2014: 4), as illustrated by the iPhone example. Maximising the benefits from GVC participation, and moving into higher-level tasks, requires an educated, qualified and skilled labour force and an infrastructure of local firms; one necessary element to make these things possible is committed state support (Gereffi *et al.* 2011: 120; OECD *et al.* 2014: 27; UNCTAD 2013: 182-183). Recognition of the factors making possible participation in GVCs has two further implications.

The first is that GVC participation is likely to require imports of necessary inputs, but complete import liberalisation restricts the development of local production which can be a precondition for higher-level activities within GVCs. This implies the need for accompanying policies and selective protection, as part of a strategy for economic upgrading. Indeed, experience shows that, where other conditions are favourable, inputs are still imported despite significant tariffs.

The second implication is that trade liberalisation alone brings no benefits unless other preconditions are present or are being created. In fact, comparing cases of countries with and without trade agreements has led to ‘highly variable and often economically implausible estimates generated over 45 years from 1962-2007’ (Bergstrand *et al.* 2013: 2), ranging from 12% to 285% increases in trade (from Cipollina and Salvatici 2010, summarising from previous studies). Apart from differences in the content of agreements, much of this variation is likely to stem from the factors referred to above (the economic environment, and institutional development and policy frameworks) that are more important than formal barriers to trade. These differ so widely that any attempt to predict the effects of one trade agreement based on past experience of previous agreements is likely to be of limited value.

3.2 The employment effects of trade liberalisation

Trade liberalisation can also have very varied employment effects. For a meaningful comparative picture, as argued by Jansen *et al.* (2011), it is necessary:

- to look at effects across sectors, in particular those with growing exports, those affected by increased imports and those not directly involved in international trade;
- in all of these, to look beyond broad numbers of employees, also taking account of pay, conditions and employment security, all of which can be changed by the effects of international trade;
- to look at specificities of institutional settings, taking account of how far these allow for adaptation of skills, for movement between activities and for protection of those in employment;
- to avoid the assumptions implicit in standard economic theory that all employment is formal and that alternative regular employment will always be available for those forced out from declining activities.

This last point on informal employment warrants some clarification. The term covers a diverse range of forms such as home working, casual employment and own-account work – none of them based on a formal employment contract – which are estimated to apply to 80% of employees in low-income countries, compared with 40% in middle-income countries and 15% in high-income countries, albeit with significant variation within those groupings (Sinha 2011: 158). The informal economy is often the refuge for those excluded from, or who have never had access to, regular, formal employment, particularly in countries with absent or inadequate social security provision. It is the home for less skilled and less educated workers and the nature of the employment relationship leaves them with limited means to acquire higher skills. They are adaptable only to other irregular, low-skill activities. Thus an economy with a large amount of informal employment is also an economy with a low ability to modernise and to adapt to the needs of modern economic activities.

3.3 Employment effects in exporting sectors

Exporting sectors could be expected to benefit from expanded business opportunities, but this does not always mean high employment. Moreover, even when employment increases, that does not necessarily translate into decent employment. Garment production has provided more employment in many lower-income countries, but abundant labour means that recorded average wages, at least in some periods when measurement was possible, have frequently fallen (Bernhardt and Milburg 2011; Bernhardt 2013). The garment industry in Bangladesh provided about 80% of the country's export earnings and counted about 4 million employees, 7% of total employment. These are mostly migrants from poor and landless families in rural areas. Women constitute about 80% and the majority are young, non-unionised and experiencing wage labour for the first time (Gereffi *et al.* 2011: 103). This could be seen as a social advance, but it leaves employees with insecure wages and limited

job prospects (UNCTAD 2013: 158-9). Without support for improving skill levels – and there is a shortage of skilled workers and supervisors (Gereffi *et al.* 2011: 105) – there is little chance of moving up the value chain, which means advancing beyond the simplest production tasks to take on activities that bring higher earnings.

Evidence from countries with considerably better labour conditions in garment production than Bangladesh also shows employment increasing. However, there are also pressures to lower wages and for a dualisation of labour forces, with irregular workers in subcontracted factories forced to endure insecurity when demand levels fluctuate. Thus, those in the weakest bargaining position, with the least representation and working where legal protections are likely to be ignored, may see a weakening of their social position; such is the case in Romania, where an established industry has been incorporated into European value chains (Plank *et al.* 2012: 15-16; Planck and Staritz 2016). There is a process of upgrading for a few and of downgrading for irregular workers, who are paid well below the legal minimum wage and brought in to work only when needed (Barrientos *et al.* 2011: 332).

3.4 Employment in sectors competing with imports

Sectors unable to compete with imports can expect to see reduced employment. Such has been the fate of much of manufacturing in high-income countries, albeit also partly exacerbated by a decline in employment due to higher productivity in remaining activities. Evidence shows that it can be very difficult to find alternative employment. Individuals rarely come back to the same sort of job, even when there are often substantial public programmes for retraining and alternative job creation.

There has also been employment decline in simpler manufacturing tasks thanks to trade liberalisation in numerous African and Latin American countries where jobs lost to imports were not balanced by a growth in employment in export sectors (summarised in War on Want 2009: 5-13). This applied to garment production with the phasing out of the Multi Fibre Agreement (MFA) from 1995 to 2005. This agreement had protected developed countries from cheap imports coming from developing countries after 1974. The least developed countries benefited because they were assigned quotas and MNCs could locate production in countries with so-called ‘quota space’, meaning that their total exports had yet to reach the permitted limits. The MFA was replaced by WTO terms from 2005, albeit with some special agreements to help some of the least developed countries in central America and Africa (Gereffi *et al.* 2011: 80).

The biggest winner out of this was China, increasing its proportion of world garment exports from 18.3% in 2000 to 36.9% in 2010 (WEF 2012: 27), with gains also for low-cost Asian producers, notably Bangladesh and Vietnam. The big losers were in sub-Saharan African countries (McMillan and Verduzco 2011: 30, 37, 54) which, although offering low wage levels, failed to provide the necessary physical infrastructure and political and social stability. China was able to succeed despite very substantial wage increases – nominal wages nearly tripled between 2003 and 2009 following a tightening of labour legislation and pressure from labour

shortages (Bernhardt 2013: no page number) – thanks to investment in machinery, skills and expertise.

In lower-income countries without universal social security systems or government support for the development of new employment opportunities, those who lose out from trade either move into informal employment or subsistence agriculture, or emigrate. The implications of this extend beyond the sectors threatened by imports, worsening employment conditions across the whole economy. Thus, for example, imports of food can put small farmers at risk and leave them with little alternative to accepting insecure, informal employment wherever available, including providing a pool of cheap and casual labour for export sectors.

Trade liberalisation can also have conflicting implications for women's employment. On the one hand, women are frequently less well placed to take advantage of new, higher-skill jobs offered by MNCs. Thus, in East Asia, moving to more skill-intensive manufacturing has been associated with a 'defeminisation' of the labour force (Berik 2011: 190). On the other hand, increased job opportunities in low-skilled manufacturing has frequently led to greater employment opportunities for women, albeit leaving them with poor working conditions and weak bargaining power (Berik 2011: 197-198).

3.5 The example of NAFTA

The complex economic and employment effects of trade liberalisation can be illustrated with the case of NAFTA. The governments of the USA, Mexico and Canada jointly claimed in 1999 that NAFTA 'fuels economic growth and dynamic trade, stimulates investment while creating productive partnerships, works for small and medium-sized businesses and provides fairness and certainty', with 'greater job opportunities in North America' (quoted in Audley *et al.* 2004: 5). The last of these claims in particular is not confirmed by available evidence.

Numerous attempts have been made in different periods to assess the effects of NAFTA, none able to be precise. It is difficult to distinguish the effects of NAFTA from the many other developments taking place, or to be certain of the 'counterfactual', i.e. of what would have happened had there been no agreement. Nevertheless, some general points can be made.

NAFTA's effects on the USA and Canada have been small when set against other changes that have taken place. There are estimates that half a million US jobs were lost by September 2003, half of them as a direct result of production transferring to Mexico (Audley 2004: 28). Another estimate suggested 682,900 job losses by 2010 (Scott 2011). However, this was at a time of expanding employment across the USA as a whole – it rose by 19% from 1994 to the pre-crisis peak year of 2007 – and declining employment in parts of manufacturing could also be attributed to productivity increases. Mexico was also only one of several trading partners increasing exports at the time: US trade deficits were consistently bigger with China and also with Germany and Japan. Moreover, defenders of NAFTA have argued

that higher living standards thanks to imports cheaper than domestic production may have contributed to growth and hence employment creation.

NAFTA was much more important for Mexico because it affected a greater proportion of Mexico's trade, facilitating a big increase in exports to the USA, and led to greater structural changes in the Mexican economy. Remarkably, economic growth was slower after 1982, the year which roughly marks the end of the protectionist import-substitution strategy pursued in the previous decades (Puyana 2011: 12). Mexico's economic performance was also poor relative to other Latin American comparators, notably Chile, Brazil and Peru.

Liberalisation in Mexico was undertaken unilaterally from 1985-87, then linked to NAFTA terms from 1994, culminating in full trade liberalisation with the USA in 2006. Barriers had already been low before 1994, with an average Mexican tariff of 10% and an average US tariff of 2.1%, incidentally further suggesting that the impact on the USA was likely to have been small. Mexico was making the bigger change, following the liberalising preferences of its political elites (Puyana 2010: 6) who, convinced of the general benefits of free trade, wanted to rule out any possibility of a return to an import-substitution strategy.

This left the Mexican economy more export-oriented and import-dependent. Exports as a share of GDP rose from 10.4% in 1981 to 32.4% in 2014, initially with a rapid rise in garment production, especially in the so-called maquiladora factories which imported 97% of their inputs and exported their finished products (Audley *et al.* 2004: 16). Other export sectors also had very high import contents, leaving little scope for domestic suppliers to survive or for new ones to appear. Mexico was becoming dependent on a very narrow export base, organised by US MNCs, selling overwhelmingly to the USA and relying on cheap labour with weak protection.

Mexico could join value chains, but could not ensure that production stayed in the country or that more complex activities be developed. Unlike China, there was very little government support to prevent the collapse of sectors that could have broadened the base of the economy, and much of garment production was moved to that country by US MNCs from 2004 (Bernhardt 2013: no page number). Mexico fell from being the world's fourth biggest garment exporter in 2000 to fifteenth place in 2014, with an export value roughly 3% of China's; this despite a narrowing wage gap such that Mexican wages in 2015 were only 29% above the Chinese level (Gereffi 2015: 17).

An exception to this extreme mobility in production was the automotive industry.²⁹ Production increased from 1 million vehicles pre-NAFTA, mostly for the domestic market, to 3.2 million in 2015, with 82% for export, mostly to the USA. This brought employment, but high productivity has meant that motor vehicles have not been a massive job creator. Vehicle assembly plus component production accounted for 1.2% of total employment in 2014 (7.6% of manufacturing employment). Average hourly wage rates in vehicle assembly plants were good by Mexican standards – 90%

²⁹ Information that follows is either directly from, or calculated from information in, Swiecki and Menk 2016.

above the Mexican manufacturing average – but slightly below the manufacturing average in component production which was a much larger employer. Moreover, average pay for manufacturing remained broadly stagnant and only 14% of the US average in 2014. Mexico remained a very desirable location for multinational vehicle manufacturers, who were able to access the US market and increasingly other markets as Mexico entered trade agreements with other parts of the world. However, the benefits were shared by at best a small part of the labour force.

The big loser was agriculture, due to very unequal trading relations. US corn exports to Mexico were subsidised, with prices estimated to be 30% below the costs of production in 1999-2001 (Audley *et al.* 2004: 17). The result was rural impoverishment and emigration to the USA, also encouraged by stagnating Mexican pay levels – average real wages in 2008 were below their 1994 level (Puyana 2010: 4) – and the widening wage gap between the two countries. Remittances were equivalent to 2.7% of GDP (Puyana 2010: 52), which helped to keep in check the current account deficits. The promise in the USA that NAFTA would lead to jobs in Mexico and hence to less emigration was not fulfilled. Unfavourable developments were not due to NAFTA alone, but it did not live up to promises of ensuring growth and prosperity.

Not all countries have followed the same road as Mexico towards international integration. One alternative was chosen by Brazil, which also abandoned a rigorous import-substitution strategy but used its position within Mercosur to develop a partially protected market for motor vehicles. This involved high tariffs on finished vehicles (35% plus various non-tariff barriers) and varying tariff levels on components (2 to 18%), while finished products were exported within the substantial Latin American market (Gereffi 2015: 11-12; O’Keefe and Haar 2001; Trade SIA EU-Mercosur Partners 2007).

China also retained relatively high tariffs on finished manufactured goods – 30% on televisions, 25% on motor vehicles, 18.5% on garments and 23% on footwear, up to 2015 – but far lower ones on components. Thus it integrated its economy into GVCs without losing the ability to protect domestic production or to begin to move upwards in value chains. Its participation in trade agreements was on terms that enabled it to support domestic producers.

4.

Labour provisions in trade agreements

4.1 The growth in labour provisions

The number of bilateral and regional trade agreements including labour provisions increased from four in 1995 to 76 in 2015. They vary in form and in the range of issues included. Increasingly, they contain some degree of commitment to specific labour standards, means for dialogue and cooperation on employment standards between the parties to agreements, commitments on capacity-building (often meaning expansions in labour inspectorates) and frameworks for settling disputes.

Alongside these common features there have been two broad approaches (cf Lazo 2009: vii). The agreements signed by the USA and Canada include provisions for cooperation and consultation, supplemented with powers for enforcement. Agreements signed by the EU, New Zealand and increasingly also the global South have come to contain often detailed provisions for cooperation, monitoring and dispute settlement, but rarely provision for sanctions. Table 6 sets out the key elements in four agreements, two signed by the USA and two by the EU, indicating both their differences and their evolution over time. Although their provisions were representative of the times in which they were signed, more recent agreements have not been fundamentally different.

Table 6 Labour provisions in selected US and EU FTAs

Country	NAFTA- NAALC, 1994	US-Peru, 2009	EU-Cariforum, 2008	EU-South Korea, 2011
Standards specified	'[S]trive to improve' unspecified fundamental principles at work.	Ensure respect for rights contained in ILO 1998 Declaration.	Reference to obligations under 1998 Declaration.	Reference to 1998 Declaration.
Actions to take/ actions ruled out	Required to enforce national law in specified areas.	Required to enforce national law and no weakening in the interests of encouraging trade and investment, both in specified areas.	Enforce national labour law (where trade-related), no weakening of national laws.	Work towards ratification of relevant ILO conventions. Apply laws and no weakening in interests of trade and investment.
Cooperation mechanisms	Labour commission with representation from the three countries.	Bilateral labour body; complaints made by governments.	Bilateral consultation and cooperation with civil society involvement.	Cooperation and dialogue, involving civil society; optional ILO consultation.
Trade unions able to raise issues	Yes, but have to be taken forward through complex procedure by government.	Yes, but have to be taken forward through complex procedure by government.	Yes, in bilateral consultations.	Yes, in bilateral consultations.
Disputes and sanctions	Ultimate resort to an arbitration panel, and fines for non-application of national labour law in specified areas.	Arbitration panel can impose fines and trade sanctions.	No enforcement.	No enforcement.

Source: adapted from information in ILO 2015b.

The conclusion from this chapter is that labour provisions have so far achieved very little. They began as, and have remained, a supplement to trade agreements which are motivated primarily by the aim of gaining or broadening access to markets for business. They have not enabled trade unions to emerge as significant social partners where they were previously marginal and nor have they fostered significant progress towards the aims of the ILO's Decent Work Agenda. Nor, despite initial fears from many developing countries, have they become a form of veiled protectionism blocking imports from low-wage countries. At best, they are a small addition to other pressures for the improvement of labour standards, helping in a few countries towards the acceptance of some ILO standards, but with little general impact on labour standards in practice.

4.2 USA - the pioneer for labour provisions

The USA has been the most active driver for the inclusion of labour clauses in FTAs. Of its 15 agreements with 21 other countries (as of 2017) all except its very first one with Israel signed in 1985 and one with Vietnam signed in 2000 contain labour

provisions. This outcome, and the limitations of those agreements, were the result of the US political process.

Business interests were the driving force behind the form taken by FTAs, but the advocates of these agreements had to deal with protectionist sentiments – strengthened by fears of unfair competition from businesses employing cheap labour to do the jobs previously done by US workers – and with public awareness of the appalling conditions endured by many workers producing for export in developing countries. To ensure that FTAs passed the US legislative process they needed support from legislators friendly to the US trade unions. This resulted in the inclusion of labour provisions, albeit not exactly in the form that trade unions had wanted.

Indeed, the USA starts with somewhat weakened moral authority in this area as it has ratified only 14 of the ILO's 189 conventions, including only two of its eight core labour standards (against forced labour and against the worst forms of child labour). It has not ratified Conventions 87 and 98 on freedom of association and collective bargaining. Agreements signed after NAFTA-NAALC have nevertheless included references to the ILO 1998 Declaration, with later ones including commitments to incorporate these principles into national laws. The USA is thus setting as conditions for others ILO conventions that it has not itself signed. Presumably the assumption is that economically and diplomatically weaker partners in trade agreements will not take action against the USA.

International comparisons suggest that US practice is not as bad as its laws might suggest, but a number of laws and practices in parts of the USA restricting trade unions and rights to collective bargaining do fall short of ILO standards. The Penn State University (USA) database on trade union rights also shows evidence of violations in practice.³⁰ Furthermore, the half-hearted nature of US commitment to improved labour standards can be demonstrated in the cases referred to below.

4.3 The US Generalised System of Preferences

The Generalised System of Preferences (GSP) developed from the 1970s, undergoing change and modification along the way. Under this system, high-income countries can give preferential treatment to imports from certain developing countries. As it is a unilateral measure, it is relatively simple to add further requirements of the exporting country, and both the USA and the EU have, since 1984 and 1995 respectively, included employment law requirements. Moreover, as GSP is a unilateral privilege, it can be withdrawn without going through a complex arbitration procedure and therefore, in theory at least, very quickly.

The US version, which has evolved little from its initial form, includes requirements of 'taking steps' to achieve 'internationally recognized worker rights', but avoided reference to ILO conventions. The US administration has followed up a number

30. <http://lser.la.psu.edu/gwr/tur-indicators>

of complaints and undertaken investigations. Preferences were withdrawn in 13 cases over the 1985–2007 period (Ebert and Posthuma 2011: 21), with withdrawal used for smaller and poorer countries, ones with little diplomatic weight and little economic significance to the USA. Indeed, withdrawal has typically been linked to other foreign policy considerations (Elliot and Freeman 2003: 84), suggesting that labour rights have not been the priority.

There are claims of some countries improving workers' conditions when threatened with withdrawal of GSP, but these positive results depended on the presence of strong domestic social partners, the economic dependence of that country on exports to the USA and, above all, available technical capacity, meaning the existence of administrative agencies that can enforce labour codes (Ebert and Posthuma 2011: 24; Elliott and Freeman 2003: 75 and 158). The best that can be said, therefore, is that GSP may have contributed to some improvements in countries particularly dependent on the USA.

A recent illustration of the US approach was the suspension of GSP for Bangladesh in June 2013 following the collapse of the Rana Plaza building in Dacca in April of that year, which led to the deaths of over 1,100 textile workers. In the words of US President Obama, steps had not been taken to protect 'internationally recognized worker rights'. US unions had been calling for the suspension of GSP for Bangladesh since 2007. The building that collapsed had been in a demonstrably unstable state but, with no trade union representation, workers were intimidated into continuing working despite an order from the government inspectorate to abandon the building.³¹ However, the US action was of little practical significance as it continued to impose high duties on textile imports from Bangladesh. Suspension of the EU's GSP, as discussed below, would have had a much bigger impact.

4.4 USA and NAFTA

The starting point for significant labour provisions in FTAs was NAFTA, which came into force in 1994 with its associated agreement on labour cooperation (North American Agreement on Labour Cooperation, NAALC).³² This was 'at once innovative and frustratingly limited' (Vogt 2014: 122). It was innovative in being a commitment to much more than just trade liberalisation, promoting employment issues to a level of unprecedented prominence.

However, the frustration was related to its limited means for turning rhetoric into reality. Structures were created for consultation, mutual advice and mutual evaluation. Trade unions could be involved, but any complaints they made were only effective if taken forward by a government authority. The range of issues that could be brought before a tribunal (a panel to be made up of five members taken from a prepared list) leading to the possibility of sanctions, was limited to safety and

31. <https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment>

32. <http://www.labour.gc.ca/eng/relations/international/agreements/naalc.shtml#naalc>

health, minimum wages and child labour. Collective rights were an issue only for ministerial consultation. There was no requirement to meet any minimum standard in a country's laws, so that countries were only obliged to implement laws that they already had. For a complaint to lead to sanctions, it had to be demonstrated that actions had an impact on trade, meaning that the same issues outside exporting sectors could not be penalised. Failure to implement a decision from the arbitration panel led to a fine, not to trade sanctions as in commercial disputes.

Despite these weaknesses, NAALC has been the main source of disputes in FTAs, accounting for over 40 by 2015 against only 6 under other agreements. Of these, two were against Canada, 13 against the USA and 26 against Mexico (ILO 2015b: 45). The issues raised included freedom of association and occupational safety and health (against Canada), issues regarding migrant workers (against the USA) and issues regarding freedom of association, occupational safety and health and minimum working conditions (against Mexico).

The disputes procedure proved to be very slow, taking four years by 2003 (ILO 2015b: 45). There were very few discernible results. A somewhat exceptional success was a Mexican government prohibition of pre-recruitment pregnancy testing in federal government posts. Another was advancement towards union recognition for some migrant workers in Washington State (ILO 2015b: 59). All cases of dispute in NAALC were resolved without using an arbitration panel and indeed that would probably have achieved little as cases were not obviously related to trade. The main enforcement tool in practice has been public censure, following the development of activist campaigns and work from labour advocates (Ebert and Posthuma 2011: 24).

The three countries involved in NAALC were able to settle disputes more amicably because they each were responsive to diplomatic pressure and potential bad publicity. They were of different sizes and diplomatic weight, but the inequality was not so great as to rule out making complaints against each other. Disputes through NAALC were one additional pressure alongside activities of other domestic groups and organisations. Indeed, it has been argued that the main benefits have been seen in less tangible areas, such as in encouraging international contacts and mutual learning between employee representatives and in involving NGOs and other organisations in employment issues.

There is little justification to the idea that consultation is all that matters, as this underestimates the importance of dispute procedures and the threat of penalties. Conferences, workshops and research activities have in some cases been judged to bring benefits, but experience suggests that such contacts work best when dealing with specific cases (Ebert and Posthuma 2011: 26-27). An ultimate threat of sanctions is a necessary factor. Generally, the important conclusion is that tangible effects from NAALC have been very small and the weakness of impact has probably contributed to a declining number of complaints over time.

4.5 Cambodia – an exceptional case

The difficulty of finding the conditions in which labour provisions can be effective is also illustrated by the rather exceptional case of the US-Cambodia textile agreement which ran from 1999 to 2005 and can claim positive results in terms of labour conditions and labour representation (Elliott and Freeman 2003: 116-119; ILO 2016: 94-97). This was a very specific agreement relating only to the garment sector, which was important both because of its role in the country's specific stage of economic development and because of the public awareness in the USA of poor labour conditions in garment production in such countries. The terms of the agreement enabled the USA to allow an increase in Cambodia's export quota to the USA if it complied with its own laws and internationally recognised labour standards. A further increase in the quota was allowed in 1999 in exchange for Cambodia accepting factory-level ILO monitoring, a feature unique to this agreement, which the US government financed.

There is evidence of positive changes from the programme, including greater scope for trade union activity, while conditions in other sectors did not show similar improvement. Therefore, in this case a material incentive proved effective. However, there were strong criticisms from other countries that were concerned at the precedent of linking trade to labour conditions. More seriously, it was a programme with a limited lifespan as it depended on an arrangement similar to the Multi-Fibre Arrangement which set export quotas for developing countries and expired in 2005. Nevertheless, some innovative features could be replicated, such as the more active involvement of the ILO, a feature in some subsequent US agreements.

4.6 US agreements after NAALC

In later agreements the USA strengthened the clarity of labour provisions, the potential for enforcement and the cooperation elements. A template for further trade agreements of 10 May 2007 included important commitments to 'adopt and maintain' rights from the ILO 1998 Declaration and an acceptance that all issues could go to a dispute settlement procedure that would be the same as that for commercial disputes. However, the US authorities remained reluctant to enter into disputes, as reflected in the extraordinarily small number, only six outside of NAALC. These included cases of alleged systematic failure to enforce domestic labour standards (Vogt 2014: 136-9; ILO 2015b: 51) in Guatemala, Peru, the Dominican Republic and Honduras, state interference in a union's affairs in Costa Rica, and large-scale anti-union actions in Bahrain.

The Guatemala case is the only one to have led to the creation of an arbitration panel. Coming under the Dominican Republic-Central America FTA (CAFTA-DR), it originated from a complaint in 2008 by US and Guatemalan trade unions that national laws were inadequate for ensuring internationally recognised labour rights and, more specifically, that there had been numerous cases of dismissals for union activities and two assassinations that had not been seriously investigated. Investigations by the US authorities and by the ILO broadly upheld the unions'

complaints. The USA requested the establishment of an arbitration panel in August 2011 which was then suspended as the Guatemalan government was persuaded to accept an 18-point action plan in April 2013 with commitments to expand and reinforce its labour inspectorate and to improve implementation of its laws. Implementation was judged by the US side to be inadequate and an arbitration panel was formed following a US request, and hearings held through 2015 (seven years after the initial complaint) at which the Guatemalan government admitted only to delays in taking action and to some ‘honest mistakes’. The panel failed to reach a verdict during that year. In the meantime, the ILO continued to hear complaints of impossibly stringent conditions for registering trade unions and of further unresolved murders of trade union activists (another 18 from June 2013 to June 2016), with convictions, the employers’ representatives acknowledged, ‘few and far between.’³³

4.7 Before the USA sign an agreement

US legislators have also tried to influence labour rights by refusing to ratify an agreement until certain terms are met. There is evidence that countries may have undertaken improvements even prior to negotiations, hoping thereby to be viewed more favourably from the US side (Kim 2012). There were also cases of the US Congress setting prior conditions that led to gradual improvements, notably in Bahrain, Morocco and Oman (Kim 2012: 11-13), with acceptance of the right to form trade unions in the last of these. However, this approach was applied inconsistently, only to smaller and weaker potential partners and, visibly, not to South Korea, a country presumably important enough to the USA to be able to ignore such pressure.

An extreme case was Colombia, for which the US Congress delayed ratification of a FTA – it was agreed in February 2006 and came into force in 2012 – until concerns over trade union rights were addressed. These were not trivial matters. The number of trade unionists murdered between 1986 and 2011 was reported to be close to 3,000 (Vogt 2014: 132), with only a small minority of murders ever being resolved. This became an issue in US politics, with demands from the American Federation of Labour - Congress of Industrial Organizations (AFL-CIO), human rights NGOs and members of congress for a significant reduction in anti-trade union violence prior to ratification. An ILO mission confirmed the depth of the problems and the Obama administration produced the Colombia Action Plan in April 2011, which set out required concrete steps to change laws, improve labour inspectorates and provide protection to trade unionists.

Although there was said to be a ‘binding’ road map, the US side did not insist on implementation before the trade agreement came into force in May 2012. By then, according to US President Obama, ‘important steps to fulfil the Action Plan’ (Vogt

33. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_489124.pdf

2014: 134) had been taken. A number of promised changes had been made to laws, but some, notably those relating to the enforcement of trade union rights, were not implemented. Colombian trade unions continued to complain of disappointing results even after formal changes in laws, blaming an absence of political will for weak implementation. They reported continuing intimidation and 105 homicides of union activists between April 2011 and March 2015 (ENS 2015: 50).

The USA seemed to have learned from these experiences, insisting alongside TPP specific agreements that included pre-ratification action plans with Vietnam, Malaysia and Brunei. These were to be legally binding and subject to dispute settlement, including the possibility of tariff reduction suspensions. The countries in question were required to ratify ILO conventions where they had not already done so and to make changes to their laws to allow freedom of association and collective bargaining. Vietnam was already seeking to reform while Malaysia ratified TPP without implementing the points in the agreement with the USA. It remains to be seen whether Vietnam will undertake promised reforms and, particularly in view of the Trump administration's loss of interest in TPP, how the USA will react should countries fail to implement agreements.

4.8 EU agreements

The EU, with 38 external agreements covering 79 countries, followed the USA with the inclusion of labour provisions, although they figured in only eight FTAs by 2017. One likely reason for this difference is the weaker influence of trade unions on EU politics. Approval even from the European parliament was not required until 2009 and trade agreements were not at that time issues attracting much public attention, although that changed rather dramatically with controversies over agreements with Canada and the USA.

The agenda in negotiations has been set by the European Commission and, despite a formal commitment to involve 'civil society', consultations have been with those parties the Commission wants to hear from, meaning overwhelmingly business interests. The result appears paradoxical. In its internal organisation, where labour's voice can be more effective, the EU appears as the best example of including workers' rights in a process of economic integration (Lazo 2009: 16). In external agreements, however, there are few binding requirements and a remarkable willingness to water down commitment even to core ILO conventions in the interest of agreement on points considered more important.

Nevertheless, in terms of everything apart from implementation and enforcement, EU agreements appear to have gone beyond their US counterparts. The 1998 ILO Declaration was included for the first time in the agreement with South Africa signed in 1999, albeit with obligations only to 'seek to ensure' or 'strive to' maintain and improve levels of labour protection. The EU-Korea agreement of 2011, following pressure from the European parliament, included a 'sustainable development' chapter which incorporated commitments relating to labour. Within this, the parties agreed to enforce those ILO conventions they had already signed. Korea had

not signed Conventions 87 and 98 and was therefore making no commitment on freedom of association or collective bargaining.

The agreement included commitment to an annual ‘civil society forum’, including trade union representatives.³⁴ It was claimed as a success by the European Commission, with just the fact that meetings took place apparently demonstrating that the agreement’s ‘provisions are having a positive impact to promote sustainable development’. Indeed, holding the meetings at all presented a challenge in view of the Korean government’s initial desire to exclude a major trade union federation. Reports of the meetings show that it was a framework within which the Korean government could reaffirm that it was making ‘efforts to ratify more [ILO] conventions’,³⁵ without clarifying what these efforts were and without any commitment to demonstrate results.

The Korean government faced scrutiny and condemnation in ILO bodies for measures that reduced union bargaining rights and for large-scale victimisation of union officials and delegates. The European trade union representatives in the civil society dialogue structure took these points up with the relevant EU Commissioner, whose response was to make no official complaint but to continue with the established dialogue mechanism. A further request for action came from the union representatives in December 2016, complaining that nothing had been done in relation to ‘the deregistration and dissolution of the Korean Teachers Union, the refusal to register the Korean Government Employees Union, the mass dismissal and jailing of members of the Korean Railway Union, and the illegal raid on the headquarters of the Korean Confederation of Trade Unions.’³⁶ This followed condemnations of the Korean government and recommendations for policy changes from ILO and United Nations bodies, both of which appeared more capable of undertaking investigations, reaching clear conclusions and proposing a way forward than the structures created from the FTA.

A major research project providing a wide-ranging assessment of labour provisions in EU trade agreements suggests that there are very good reasons why they have not achieved, and probably also will not achieve, anything significant.³⁷ From the start, employment issues were a low priority area in negotiations, meaning that commitments to ILO core conventions were weakened in the interests of agreement on commercial issues, and there was no question of offending negotiating partners with provisions for sanctions. Labour provisions were something that had to be agreed to, rather than a firm commitment at the political level. The mechanism of civil society dialogue also meant that discussions were kept at a distance from actual policymakers, who could consequently ignore labour issues as something to be dealt with elsewhere. For them it appeared self-evident that trade agreements were about commercial issues.

34. <http://ec.europa.eu/trade/policy/policy-making/sustainable-development/>

35. http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152981.pdf

36. <http://bit.ly/2oIkOxb>

37. Summarised at <http://www.geog.qmul.ac.uk/docs/research/193222.pdf>

It remains an open question as to what extent the possibility of sanctions would have made these labour provisions more effective. In general, the EU remains timid in pressing issues, for example making no comment on Guatemala despite the evidence and the actions of the USA (Van den Putte *et al.* 2015). Declarations of good intent, dialogue and persuasion avoid jeopardising commercial relations, but there is yet to be any evidence of what they can achieve.

4.9 The EU versions of GSP

The picture is similar for the EU approach to GSP. A 1999 amendment required beneficiaries of GSP to adopt and apply in their domestic laws ILO Conventions 87 and 98. This led to an increase in the ratification of ILO conventions, even if not all were incorporated into domestic law, but improvements in practice nevertheless remain to be proven. An amendment in 2008 made action dependent on the result of ILO monitoring, strengthening the apparent objectivity of the judgement, but also requiring a longer and slower process.

A further change in 2008 was the creation of the so-called GSP+, open to countries that ‘ratified and effectively implemented’ a list of 27 international conventions, spanning labour, corruption prevention and other issues.³⁸ This was seen as combining carrot with stick: encouraging partners to undertake genuine improvements while also having the means to sanction those that violated the principles of the conventions. However, Colombia, Guatemala, Georgia and El Salvador were admitted to GSP+ despite not implementing the required conventions (Ebert 2009: 23-24). Thus it would appear that the opportunity to influence countries through GSP+ was passed over despite apparently strong initial commitments.

Even more than the USA, the EU has been reluctant to press complaints, let alone impose the sanction of withdrawal of preferences (Ebert 2009: 39). Priority goes to negotiating, persuading and using diplomatic pressure. An important case illustrating this was Bangladesh after the Rana Plaza catastrophe. Unlike the USA, the EU did not suspend GSP. Instead, it applied pressure that led the Bangladesh government to agree to work to improve labour representation, including making changes in laws to make it easier to form trade unions. Positive results were reported from factory inspections, with some closed for unsafe conditions (ILO 2016: 99). However, despite this, and despite ratification of ILO Conventions 87 and 98, reports of substantial abuses and seriously inadequate safety provisions have continued.³⁹ Concerns were voiced by the ILO and a High-Level Tripartite mission from that organisation in April 2016 reported a return to conditions of extreme difficulty in registering trade union organisations, including bureaucratic barriers and the intimidation of activists.⁴⁰ Workers’ representatives subsequently reported to the ILO Committee on the Application of Standards that the situation had ‘nearly

38. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:211:0001:0039:EN:PDF>

39. <https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment>

40. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_488339.pdf

returned to the pre-Rana Plaza days'. The EU representative did not dispute this but only reiterated the 'commitment to continuing its intensive cooperation with the government' to 'ensure a sound industrial relations system premised on respect for freedom of association.'⁴¹

Sanctions have only been applied by the EU in the quite exceptional cases of Burma (Myanmar) in 1997, over the extensive use of forced labour (as also identified in ILO reports), and Belarus in 2007, over freedom of association. Both were effectively pariah states as far as the EU was concerned, and withdrawal of GSP was merely one more element of pressure that was not initially motivated by concerns over labour rights; it also appears to have been of 'very limited effectiveness' (Zhou and Cuyvers 2011: 63).

4.10 South-South agreements

A growing number of regional and bilateral agreements between countries in the global South have incorporated references to labour issues, although their likely effects are generally weaker than those of agreements involving North America or the EU. Only the Chile-Turkey agreement of 2011 and the Taiwan-Nicaragua agreement of 2008 include provision for enforcement through trade sanctions.

Regional agreements have included at best very limited labour provisions. Mercusor established a monitoring body including representatives from governments, employers and workers which fell dormant from 2005 (ILO 2015b: 76). ASEAN was established in 1992 without labour provisions, but member states adopted a separate action plan on safety and health in 2007 (Ebert and Posthuma 2011: 17). Three regional agreements in Africa include references to cooperation on labour law, but set no minimum standards and do not even require countries not to weaken labour law in the interests of trade and investment.

The spread of bilateral agreements and the inclusion of labour provisions within them has been pushed forward very actively by New Zealand and Chile. The former country, signing 10 agreements by 2015, persuaded unlikely partners, notably China and Singapore, to include such clauses by adopting a very flexible approach. Its agreement with China, signed in 2008, reaffirmed the ILO 1998 Declaration, but did not require its implementation. The strongest commitment seemed to be to refrain from weakening existing labour laws in the interests of trade, a point which need pose no problems for China.

The Chilean government, meanwhile, became an advocate of labour provisions as democracy was restored in the early 1990s. Trade unions supported this policy direction and the new regime was keen to restore its international reputation – it had suffered withdrawal of US GSP preferences in 1987 for failure to grant

41. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_489124.pdf

‘internationally recognised workers’ rights’ – and to formulate an acceptable internal legal framework (Lazo 2009: 24-26). It was also keen to follow the example of NAALC, in which it had been unable to participate, including a similar conflict resolution procedure in its 1996 agreement with Canada (the first of 27 FTAs signed by 2017), as well as in an agreement with Mexico signed in 2001. An agreement with the USA in 2003 included the possibility of trade sanctions, a point supported by trade unions and acceptable to the Chilean government. An agreement with China in 2005 indirectly included a labour provision, by making reference to an accompanying memorandum of understanding that set out an aim of cooperation (Lazo 2009: 13).

It should be added that none of these South-South agreements have led to dispute procedures and there is no evidence of any impact. The Chilean case could nevertheless support an argument that labour provisions in trade agreements are one more factor encouraging a government to use an ILO framework if it wants to develop better conditions for employees. It stands out as an example of a country seeking outside advice once it was committed to improving its practices, notably trying to learn from the EU on how to improve safety and health at work (Postnikov and Bastiaens 2015).

4.11 Conclusions

Labour provisions have been included in FTAs for long enough to allow for conclusions to be drawn on their results and potential. These can be summarised in three main points:

- (1) The effects of labour provisions have been very limited. When their inclusion is pressed by a powerful partner they can have some impact in encouraging the formal recognition of international labour standards and in reducing some of the worst abuses in practice, but changes in actual employment conditions are at best very rare. An ILO study revealed the slow and tortuous nature of the process that can lead to positive changes, from acceptance of ILO conventions, their incorporation into domestic laws, creation of capacity to ensure implementation, implementation itself, and changes in employment rights and then working conditions (ILO 2016: 74).

An attempt within the ILO study to find statistical relationships between the presence of labour provisions and various labour market outcomes revealed very little. One exception was a correlation with women’s participation in the labour market, but there was no evidence of a causal relationship. Nor was there evidence of any change taking place after agreements were signed, as the comparison was only between different countries at a set point in time. It would seem most likely that the correlation simply reflects the plausible fact that countries with high female participation, such as much of Europe, are also likely to accept labour provisions in trade countries.

Unfortunately, that one correlation has been taken up by politicians in an effort to claim that existing labour provisions are enough to achieve some results. Thus, EU Commissioner Marianne Thyssen, speaking in December 2016, reported that ‘the ILO research provides an encouraging message for women too’ by easing labour market access and helping narrow the gender wage gap.⁴² The ILO study should not be taken as evidence to support such a claim and the case studies investigated in that publication in fact confirm the absence of evidence that labour provisions have made any difference to employment relations. The one exception is the Cambodian garment case, where the agreement differed radically from FTAs and was therefore not included in the statistical study.

- (2) Labour provisions are most effective when they act as an additional support to trends that are led predominantly by internal forces, as in Chile. They can help to bolster such democratic development, providing clarity on standards and laws that should be adopted. However, they have yet to show results when confronting lack of will, indifference or hostility from a government.
- (3) A key difference between agreements is the provision for sanctions, including in some cases those as powerful as for commercial aspects of agreements. Their effectiveness remains unclear, not least because there is as yet no case of their successful application. They are not a substitute for consultation, cooperation, advice and capacity-building, but appear as a last resort without which persuasion need have no impact. Indeed, signs of improvement, even if only the approval of conventions and passing of laws, are visible only where some kind of sanction is available.

42. https://ec.europa.eu/commission/commissioners/2014-alternative-2019/thyssen/announcements/speech-labour-provisions-trade-agreements-ilo-seminar-brussels_en

Conclusion

This analysis of trade and investment agreements has shown that there have been both gainers and losers, both opportunities and dangers. International economic integration has enabled rapid growth in output and employment in some countries, but even in these countries the benefits of such economic development have not reached all social groups. Even where employment opportunities have been created they are often of low quality, with poor recognition of employees' interests. Current trends are not ensuring the sort of globalisation advocated in the ILO's Decent Work agenda or in the United Nations' Sustainable Development Goals.

A significant driver of globalisation has been the growth in trade and investment agreements, which has accelerated since the 1990s. This trend may be interrupted by the rise of politicians advocating, in various forms, greater protectionism, notably President Trump in the USA, and raising the prospect of an end to free trade agreements, even those signed some time ago. Another example is the UK decision to leave the EU, although advocates of that move have apparent hopes of new agreements with a different range of countries, including the USA. Neither of these developments seem to reflect the natural interests of business in the two countries which, as argued in previous sections, have been well represented in the negotiation of trade and investment agreements. Nor do they seem to be part of a coherent strategy to further other social interests, let alone advance the decent work agenda. In fact, the disruption of established economic links, and the subsequent weakening of regional integration with its associated value chains, threatens an economic disruption that could set that agenda back even further.

Trade and investment agreements may therefore remain a fact of economic life for years to come. Trade unions and others will need to find a means to react, and the first step is to understand why these agreements have developed and what they offer, in terms of both dangers and opportunities. The preceding analysis suggests the following general points:

- (1) Agreements are driven primarily by business interests. This is often compatible with promoting economic and social development, but by no means always. Pressures from specific business interests have involved threats to socially useful regulations which protect consumers, the environment and employees. Proposals for a 'negative list', meaning that new areas could be regulated only with the greatest difficulty, amount to severe restrictions on governments' and parliaments' abilities to legislate. Protection of intellectual property rights has a clearly rational purpose, but is also a threat to the widespread availability of, in particular, pharmaceutical products. The ISDS system of investment protection is currently the most extreme form of excessive business power, giving multinational companies powers to sue governments over policy changes that threaten their profits. Exemption of public services from trade and investment agreements offers a partial solution to some of the dangers, but can only be partial because not only traditional public services are under threat and public services themselves are difficult to define.
- (2) An agenda of unrestrained liberalisation involves the tacit assumption that the interests of employees and society in general will automatically be advanced under a free market system. However, experience does not confirm this. Even where trade brings growth, it does not guarantee decent work. Moreover, casual, precarious, and in many countries also informal employment does not promote the development of skills and workers' initiative. It makes it harder to move up in value chains towards more complex and better-paying tasks. There is therefore a need to promote labour standards and skills development. Strong labour provisions within trade agreements – and to judge from the poor results they should be considerably stronger than those agreed at present – would be one element towards achieving this. However, they cannot be more than a complement to measures implemented within countries to allow employee representation and promote employee advancement.
- (3) Advocates of FTAs have promised substantial economic benefits, although strictly speaking the benefits they offer are very limited. They contribute to only one of the preconditions for development, namely easier access to markets. Other essential preconditions include transport and other infrastructure, education and skills development, and policies to encourage and promote development of particular activities. Much of this is beyond the scope of trade agreements. This therefore implies the need for other policies to promote development, including in some cases policies to protect activities that would otherwise be hampered by competition from imports. In short, sustainable development cannot be based on liberalisation alone.

Thus, in conclusion, the future of trade and investment agreements remains uncertain. However, to ensure that they play a positive role in globalisation it needs to be recognised that these agreements embody serious dangers due to the potential for excessive business power, that they provide no guarantee of good employment conditions and, above all, that they are inadequate without an accompanying strategy for economic and social development. However, with greater openness in the negotiating process, and greater input from a wide range of interests, it is to be hoped that they can be adapted to avoid the greatest dangers and thereby play a more positive role in the future.

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