

# The use, scope and effectiveness of labour and social provisions and sustainable development aspects in bilateral and regional Free Trade Agreements

## -Executive Summary<sup>1</sup>-

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Since the 1990s, we have seen a proliferation of bilateral trade agreements. Many of these have encompassed topics that are not directly linked to trade, such as political institutions, sustainable development, labour standards or competition policy. The European Union itself is caught up in this trend. It has thus undertaken to promote labour standards and decent work in multilateral and bilateral trade negotiations over and above basic compliance with core labour standards.

The aim of this study is to identify the clauses relative to labour, social practices and sustainable development in bilateral and regional free trade agreements: their scope, implementation and their consequences. We shall discuss the relative merits of the various options.

### 1) Labour and decent work in international declarations and trade agreements

In spite of a lack of consensus among the GATT Contracting Parties on introducing explicit references to core labour standards in the Marrakech Agreements (1994), a certain number of organisations, public and private, have made a commitment to respect Human Rights, comply with core labour standards and promote decent work and sustainable development. The final version of the declaration of the WTO Ministerial Conference (Singapore, December 1996) states that the member countries "*renew our commitment to the observance of internationally recognized core labour standards*", which were subsequently set out in the ILO's "*Declaration on Fundamental Principles and Rights*" (1998) requiring Member States to observe and promote four core standards<sup>2</sup> (eight conventions). At the same time, the ILO has been promoting the concept of "*decent work*" which, in addition to the core labour standards, views this from the perspective of social progress. The "*Decent Work Agenda*" (2000) has been recognised and taken up by the UN Economic and Social Council (ECOSOC) in particular, as well as by the European Union, which has committed to promoting decent work, notably in its trade agreements. The European

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<sup>1</sup> This Executive Summary sets out only to give a concise overview of the Final Report, which should be referred to for detailed information, examples, references, statistics and empirical results.

<sup>2</sup> These are the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the elimination of discrimination in the workplace and the abolition of child labour (age, worst forms).

Council at its meeting in December 2004 stressed the importance of the social aspects of globalisation and has since reasserted this commitment, specifying what it means in more detail.

Insofar as regards multinationals, ethics charters and codes of good practice are the principal reference texts relative to Corporate Social Responsibility (CSR). They generally include an undertaking to observe national laws and ILO agreements, the Universal Declaration of Human Rights or the OECD Guidelines for Multinational Enterprises. Some have negotiated international framework agreements with the unions, often within a specific sector.

Since the early 1990s, the debate over the relationship between trade and labour has undergone certain changes; the options have been specified in line with a more realistic approach. The WTO has now been forced to take a backseat, with the development of bilateral or regional trade agreements, as well as the action taken by other international organisations, regional unions and the undertakings of certain multinational firms.

## **2) Trade, labour and sustainable development**

While not denying the advantages of trade liberalisation in terms of global economic health, the inclusion of provisions relative to labour and sustainable development is aimed at preventing any potentially negative or "undesirable" impact and/or at promoting these objectives and thereby making trade more profitable and, as the case may be, making trade agreements more politically acceptable.

Improving global economic health may well encourage the "endogenous" development of labour standards, but does not exclude the unequal distribution of the profits, either within a country or between different countries. Some individuals (often workers in rural areas or with low qualifications) may even come out as "net losers" (loss of more or less long-term work, drop in real wages, etc.). Furthermore, the pressure of international competition, while it may be good for the consumer and the spending power of workers, may also incite firms or countries to violate national laws and slow down social progress, even if this puts even greater competitive pressure on other countries (*race-to-the-bottom*).

Both theoretical and empirical studies fail to clearly identify and explain these issues in their entirety. Although growing internal inequalities are often identified, in developed and developing countries alike, the systematic undermining of labour standards is not demonstrated, even though there are case studies that may reveal this sort of reaction, especially in export free zones. In spite of the fact that they are inadequately assessed in empirical studies, some of the undesirable effects could even, in certain cases, compromise "sustainable development": child labour instead of education, little incentive for investment and increased productivity.

These comments plead in favour of "well-supported endogenous development", which entails making the most of the implications of trade on growth and social development while

also supporting tighter labour laws and corporate practices through policies designed to achieve more than merely dealing "socially" with those who lose out.

### **3) Labour provisions in bilateral and regional treaties**

Since the signing of the NAFTA Treaty (between the United States, Canada and Mexico) in 1994, numerous regional or bilateral trade treaties have included provisions relative to labour. Nonetheless, only a limited number of countries have been involved, principally the United States and Canada, together with certain regional unions, such as the Mercosur and the EU.

The US-Cambodia Agreement (1999), limited to the textile industry, thus linked access to U.S. markets to compliance with certain standards. The agreement with Jordan (2000) introduced a section on labour which was to become a benchmark for subsequent agreements (Singapore, Chile, Australia, Morocco, CAFTA, Bahrain, Oman and Peru, etc.). Canada signed a supplementary agreement to the free trade treaty with Chile (1997) and Costa Rica. The Treaty of Asunción, which established the Mercosur, was extended by a declaration on labour. The agreement between Japan and the Philippines introduces respect for workers rights and condemns social dumping. European agreements have to integrate a section on labour and sustainable development. Agreements related to the Generalised System of Preferences introduce clauses relative to labour and include the options of imposing sanctions or providing incentives (GSP +).

The introduction of such provisions takes various forms and covers different aspects of social practice and labour laws. In addition to simply being mentioned in the preamble, they may be covered in a separate section (United States and the European Union) or in an agreement annexed to the treaty (NAFTA and Canada). They are included in different ways in agreements not only between countries but also in the case of a single country (United States). No standard model can be identified when we review these agreements.

The most commonly included provisions are: an explicit reference to the 4 core labour standards (with or without referring to the ILO), their extension to other aspects of decent work (acceptable working conditions, minimum wage, working hours, health and safety in the workplace, etc.), the existence of a procedure for settling disputes and/or imposing sanctions, and cooperation procedures. GSP agreements are generally broader, more restrictive and tend to be unilateral rather than bilateral treaties. It is quite common for treaties to include a two-fold undertaking not to undermine the standards for the purpose of boosting competitiveness and not to use compliance with labour standards for protectionist ends.

### **4) Inclusion, mechanisms and impact of labour provisions in bilateral and regional trade agreements**

It is not easy to assess the impact of the provisions relative to labour and sustainable development. Indeed, the majority of agreements that include such provisions are too recent for us to be able to stand back and assess them adequately. Furthermore, it would be arbitrary to

attribute any improvement (or deterioration) in social practices to such provisions alone. This study therefore focuses on the earliest agreements: the supplementary agreement to NAFTA (NAALC), the supplementary agreement to the-Canada-Chile free trade agreement (CCALC), the US-Cambodia textile agreement and the US-Jordan agreement.

Examining these texts reveals that positive incentives are more effective than negative incentives. The success of the US-Cambodia agreement, although it is geared to a very specific sector, is due to the incentives included (export quotas in proportion to compliance with labour standards) and to ILO monitoring. Generally speaking, "positive" incentives foster closer links between the public and private sectors. The dissuasive power of sanctions still needs to be assessed, however, and their application to firms, rather than to nations, has not been tested (except within the framework of the US-Cambodia agreements). The agreements between Canada and Chile and between the US and Jordan demonstrated the extent to which system of penalties is dependent on political will, even in the presence of an independent arbitration body. This political impetus therefore presupposes the proactive involvement of non-governmental organisations (NGOs), labour and management, and national government bodies. To date, monitoring procedures are generally limited, even though many reports stress their importance. Labour and management and civil society all want a greater role in the procedures. The treaty between Cambodia and United States thus confers upon the ILO the task of monitoring application of labour standards in the textile industries, together with the proposed incentive measures. In the United States, Congress, in liaison with the Administration (especially with the Department of Labour), has authority in monitoring application by the players involved. In Europe, many SIAs mention the implementation of specific procedures. ]

The provisions thus prove to be a factor in improving conditions when they integrate several forms of pressure. In fact, the trade agreements establish the legal standards that serve as benchmarks for the unions. They lend legitimacy to civil society initiatives that generate media pressure and help change government and corporate behaviour.

## **5) The position of players and stakeholders**

A number of "structuring" divides may be identified.

The first is the divide that separates North from South. On the one hand, the unions, NGOs and members of parliament in the North (US and EU) uphold the observance of internationally recognised values and interpret certain violations of workers rights as a form of unfair competition. Insofar as the countries concerned by the agreements have subscribed to diverse agreements or declarations and are committed to promoting human rights, their inclusion in trade agreements seems to be legitimate. On the other hand, certain governments in the South and certain NGOs advocate the need for differential treatment. They are concerned about the existence of restrictive provisions that serve to mask "disguised protectionism" on the part of the North.

The second divide opposes a legal approach against an economic approach. The former is mainly concerned with the effectiveness of the measures adopted, without examining *ex-ante* their economic validity in any depth. The debate thus focuses on the legal scope of the agreements. Some unions and NGOs thus consider that the 1998 Declaration marked a regression in labour law, reducing it to eight conventions. The economic approach operates upstream and is concerned with the relevance of social provisions: possible counter-productive effects of sanctions, nature of the relation between trade and workers rights.

While the positions originally taken by the unions and certain policy-makers tended to be trade-centred and protective, they have since evolved to take a more specific, and notably sector-oriented, approach to the effects of international competition on labour, and toward a more comprehensive conception of the promotion of Human Rights and a new approach to globalisation which must be accompanied by national or international policies.

Dialogue between North and South cannot avoid the question of double asymmetry: on the one side, easier compliance with decent work standards as applied in the Northern nations, which perpetuates accusations of Northern protectionism and, on the other side, the South's demand to continue benefiting from differential treatment in the case of the most vulnerable sectors and compliance with standards, which makes the South liable to the same accusation of protectionism.

Respecting national sovereignty insofar as regards labour laws as asserted by countries in the South, as well as by certain countries in the North (low rate of ratification of ILO conventions by the United States, for example) is thus a response to a country's legitimate desire for non-interference but also renders their undertakings not to abuse labour law for the purposes of competitiveness and to promote compliance with labour law barely credible.

As the debate has developed, a certain antagonism between the various stakeholders has become apparent in defining the standards, monitoring their implementation and being involved in assistance programmes. Thus, employers associations tend to focus on Corporate Social Responsibility (CSR) which, while satisfying one of civil society's demands, leaves them with a great deal of autonomy. The unions want to conserve the tripartism approach, which is not part of the traditional practice among NGOs, which in turn are competing against national organisations insofar as regards monitoring the agreements and assistance. Parliaments occasionally appear to act as a filtered relay for civil society, which is critical of the initiatives taken by the Executive.

## **6) Proposals and assessment of the different options available for integrating labour standards, social aspects and sustainable development in future regional and bilateral trade agreements.**

Once the parties have committed to liberalising their reciprocal trading, it only remains for them to define the emphasis to be placed on provisions relative to decent work and sustainable development. This will depend upon the various objectives defined by the negotiating parties

and, in certain cases, on the priority given to these objectives. The targeted provisions are an integral part of the overall trade negotiations. Thus, the demand of a developed country (United States or the European Union) to include provisions relative to sanctions is bound to be opposed by a developing country, which might, nonetheless, agree to such provisions in exchange for additional concessions in other areas (for example, in the textile or agricultural sectors, access to developing countries' markets, or a financial commitment on the part of the developed country to promote workers' rights). Including provisions relative to decent work and sustainable development may therefore involve an opportunity cost requiring the Parties to prioritise their objectives and the instruments defined for achieving them.

The debate is often obscured by the different objectives that may be assigned to the provisions relative to labour and sustainable development and which call for instruments that may be contradictory at times, or complementary at other times. Four "optional" objectives may be identified, which may be incorporated in various ways in trade agreements: protect fair trade; prevent undesirable effects on employment and sustainable development; uphold universal values; promote decent work and sustainable development.

The objective of **protecting trade**, often accused of being "*disguised protectionism*", is aimed at protecting national firms from corporate practices considered to be "*unfair*". This type of clause is included in many bilateral agreements. In a context where public opinion is increasingly suspicious of market liberalisation, which is seen as the cause of pressure on jobs, spending power and widening inequality, the introduction of such clauses provides a certain guarantee and promotes political support for pursuing the liberalisation process. Subscribing to this objective suggests the need for a special section on labour law, including a phrase such as "*dismantling labour law and practices for the purposes of competitive advantage*", based on recognition of national law which must, therefore, be sufficiently developed to cover export free zones. For this clause to be credible, a sanction procedure is necessary, in the form of a fine or supplementary duties, such as "antidumping" duties, which may subsequently be paid out to companies that abide by the standards or paid into a fund set up to improve compliance. One alternative may entail one Party having access to the other Party's internal procedures.

The objective of **compensation and adjustment** is to minimise the effects of free trade that are considered as undesirable, mainly in order to prevent free trade arrangements being challenged by certain stakeholders (unions, NGOs and Parliament, etc.).

Apart from the special procedures for the most sensitive sectors, the provisions aimed at mitigating the negative impact of free trade on certain categories of workers could be included in the special section related to labour law, extending the scope of SIAs and providing for (and effectively implementing) *ex post* studies, and setting out a trade adjustment programme that includes, where appropriate, financial commitments and assistance from the developed country. The procedures for settling disputes and sanctions do not apply in this case.

The **universal values** objective introduces an ethical approach: avoid trade with countries that fail to meet their international undertakings regarding human rights (labour-related and

other rights). Some NGOs campaign for these values to be upheld regardless of a country's level of development. Subscribing to this objective implies defining the nature of "*universal*" rights, the level to which they should be upheld and any applicable sanctions (in the preamble and/or a special section). Their legitimacy implies close reference to any international texts that the Parties have already agreed to abide by. The credibility of such undertakings implies a need to set out a "*sanctions*" procedure, defined here in the broadest sense of the term, and which may include incentives ("*positive sanctions*") and monitoring reports, liable to foster peer group pressure or mobilise support among civil society, especially labour and management. The procedure may make a distinction between violations of fundamental labour rights, which come under State responsibility, and violations for which employers are accountable. Income from any fines may be reallocated to fund programmes to improve working conditions. Monitoring will have more credibility if it is carried out by experts that are independent of the State in question (experts from third countries, private sector associations, unions, NGOs or the ILO).

The objective of **promoting decent work and sustainable development** is no longer to deal with the negative effects of opening up trade, but rather at supporting or boosting the endogenous development of labour standards resulting from the part played by trade in development. Subscribing to this objective implies a need to clearly define several points. The range of forms that cooperation and assistance may take is relatively vast and needs to be specified (forums, legal advice to tighten labour law, ratification of ILO conventions, training for labour inspectors, assistance for the unions, support for setting up social protection systems, etc.). The roles played by the various stakeholders also need to be defined: unions, NGOs, firms, international organisations, national civil servants on secondment, and various departments within national or EU administrations. Similarly, the issue of funding for planned actions and for social protection must be addressed and integrated. Aid for trade may be enlarged to finance promotion of the concept of decent work. Cooperation agreements may also be used to this end. Achieving this objective also includes monitoring the development, implementation and effectiveness of aid, promotion and assistance actions. This monitoring must involve government administrative departments, labour and management and civil society, assisted by experts in the field.

Looked at separately, these different objectives may nonetheless be included at different points in the trade agreements. While the general principles must be set out in the preamble, concentrating the provisions relative to labour in a single section affords the advantage of enhancing overall coherence. Integrating "cooperation" provisions in a free trade treaty that is limited to trade aspects is more questionable. Including common provisions relative to both labour and the environmental aspects of sustainable development in the same section and, occasionally, under the same article, needs to be discussed more fully.

An integrated monitoring and dispute settlement mechanism may carry the risk of placing greater emphasis on the objective of protecting trade than the Parties may intend and making

their status as the "*last resort*" or the application of "incentives" or "*positive*" sanctions more complicated.

The monitoring and assistance system must specify the roles of the stakeholders and, in particular, of labour and management, civil society and international organisations in the form of forums, social dialogue committees (including sector-specific and inter-professional committees), as well as committees providing advice, partnership or assistance to local labour and management. The ILO may be called upon to play a greater role and use its authority and experience at grassroots level for monitoring and assistance aimed at establishing tighter labour law.

## 7) General conclusion

Although the debate on the inter-connections between trade, labour and sustainable development is far from closed, it has evolved considerably. The experience of trade liberalisation and of certain regional and bilateral trade agreements demonstrates that, while a positive relation between opening up the markets, growth and social progress is not be denied, it is not systematic. The effects vary depending on the type of workers in question, their qualifications, the sector and the geographical location. These limitations have generated increasing loss of confidence felt among populations with regard to multilateral trade agreements (impasse in the Doha Development Round) or bilateral trade agreements (failure of the agreement with Colombia). In such a context, pursuing the process of liberalising trade implies taking account of its implications for social progress.

While introducing the issues of labour and sustainable development into trade agreements presents an opportunity cost in the negotiation process, it also creates "*added value*" for such agreements: greater support within civil society, support for political and social stability, thereby limiting the risks to trade, support for cooperation enabling stronger bilateral relations to develop, consolidation of a positive relationship between social progress and economic progress, as well as contributing to the promotion of international agreements.

Nonetheless, the introduction of the issues of labour and sustainable development also comes up against a contradiction that clouds debate: these issues aim to respond to people's dissatisfaction with globalisation, with its inadequate or too-slow-to-come-true promises of social progress and, at the same time, they are perceived as protectionist and asymmetrical instruments that work to the advantage of the developed countries.

The proposals put forward in this report are aimed at levelling out these contradictions and, as far as possible, taking account of different and often diverging opinions which are not clearly identified and explained either in theoretical studies or in empirical evidence, and which, therefore, remain inherent in trade negotiations.