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The Evolution of Labour Provisions in Regional Trade Agreements

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This article maps the evolution of the language of labour provisions in regional trade agreements (RTAs) since 1990. It unpacks how RTAs have become a platform to voice labour concerns and facilitate compliance with international labour commitments, signalling a significant turn from the strict divide between multilateral trade negotiations and labour policies as decided at the Singapore Ministerial Conference of the World Trade Organization (WTO) in 1996. The language of RTA's preambular clauses, provisions governing domestic labour policies and internationally recognized labour rights and standards as well as labour-related trade exceptions form the basis of the analysis. The design of compliance mechanisms for, and implementation of, labour provisions is further analysed, whether they facilitate cooperation or establish dispute resolution procedures. The labour provisions in 512 agreements and forty-two amendments or protocols that entered into force between 1990 and 2022, based on a list of the Design of Trade Agreements (DESTA) database, were studied. Labour provisions vary in degrees of ambition: while RTAs with at least one European, North American, or South American trading partner increasingly include binding labour commitments and dispute resolution procedures, RTAs between African and Asia-Pacific trading partners are still cautious in developing linkages between market access and labour commitments.

Keywords: WTO, ILO, trade, labour, labor, trade agreements, sustainable development, human rights, cooperation, compliance, enforcement, international trade law, international law

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1 INTRODUCTION

In Singapore 1996, Members of the World Trade Organization (WTO) decided that the WTO was not the appropriate forum to govern labour standards in fear that they could be used for trade protectionist purposes. In the Singapore Ministerial Declaration, Members agreed on the following formulation on the intersection of trade and labour:

> *We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them.*[1]

Removing labour standards from the WTO's governance did not suppress the issue. Rather, it resulted in the proliferation of regional trade agreements (RTAs) that encouraged and facilitated compliance with labour obligations and international labour commitments.[2] Dynamic global economic changes, such as the digitalization of trade, integration of global value chains, and the increasing threat of environmental and health crises has seen a recent push in the interlinkage between trade and other policy areas.[3] Not without controversy,[4] modern economic partnerships such as the Indo-Pacific Economic Framework (IPEF), the United States-Mexico-Canada Agreement (USMCA), the Americas Partnership for Economic Prosperity (APEP), and the European Union (EU)-New Zealand RTA create new paradigms in the international economic order as they bring together a variety of non-trade topics and mechanisms, including labour provisions.

The modern international economic order paints a somewhat fragmented and complex picture of labour rights and standards in RTAs, signalling a significant turn from the strict divide between multilateral trade negotiations and labour policies as decided at the Singapore Ministerial Conference. These developments give rise to the following questions: how have RTAs evolved to become a platform not only to voice labour concerns, but also to facilitate compliance with international labour commitments? To what extent has the trade and labour nexus become a regional or a global phenomenon? A retrospective analysis of labour language in RTAs is called for, not only to understand the current state of play on labour standards globally, but

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1 Paragraph 4, *Singapore WTO Ministerial 1996: Ministerial Declaration*, WT/MIN(96)/DEC (18 Dec. 1996), https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (accessed 2 Mar. 2023).

2 The proliferation of labour standards in bilateral agreements have created higher standards and compliance mechanisms, whereas agreements under WTO law only account for unacceptable conditions such as prison labour. *See* International Labour Organization, *Labour Provisions in G7 Trade Agreements: A Comparative Perspective* 12–13 (2019).

3 *See* Edith Laget et al., *Deep Trade Agreements and Global Value Chains*, 57(2) Rev. Indus. Org. 379–410 (2020), https://doi.org/10.1007/s11151-020-09780-0.

4 The increasing linkage between labour standards and trade is has sparked controversy regarding the conditioning of market access on domestic labour legislation.

also to identify trends that may develop in RTAs in the future. The existing literature on the relationship between labour and trade provides insight into the proliferation of labour standards in RTAs globally. While some authors study the various components of labour provisions in RTAs,[5] others provide insight into the practical and policy-oriented consequences of including such provisions in RTAs[6] or discuss the relationship between the International Labour Organization (ILO) and RTAs.[7] Further studies provide a deep-dive into specific regions[8] and some authors review provisions across WTO-notified RTAs.[9] Most of current literature examines a strictly defined set of 'labour provisions', typically encompassing labour standards and principles and their implementation mechanisms.[10]

The focus of this paper, and the types of provisions it captures, is wider than that of previous studies.[11] As a part of this study, the legal texts of labour provisions in 512 RTAs, as well as forty-two amendments or protocols, that entered into force between 1990 and January 2022 were collected and included in a repository.[12] The selection of agreements included in this repository was based on a list of agreements[13] compiled in the Design of Trade Agreements (DESTA) database that has manually coded design features of more than 710 RTAs.[14] The reference year for the agreements examined is the year of entry into force. The period of study 1990–2022 was selected as labour

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5 Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 U.C. Davis J. Int'l L. & Pol'y 13 (2003); Jonas Aissi et al., *Assessment of Labour Provisions in Trade and Investment Arrangements*, ILO Studies on Growth with Equity (2016).

6 Anne Posthuma & Franz Christian Ebert, *Labour Provisions in Trade Arrangements: Current Trends and Perspectives*, International Institute for Labour Studies Discussion Paper 205 (2011).

7 Jordi Agusti-Panareda, Franz Christian Ebert & Desiree LeClercq, *ILO Labor Standards and Trade Agreements: A Case for Consistency*, 36 Comp. Lab. L. & Pol'y J. 347 (2015).

8 *See* International Labour Organization, *Labour Provisions in G7 Trade Agreements*, *supra* n. 2; Lorand Bartels, *Social Issues in Regional Trade Agreements: Labour, Environment and Human Rights*, in *Bilateral and Regional Trade Agreements* (Simon Lester, Bryan Mercurio & Lorand Bartels eds, Cambridge University Press 2015).

9 *See* Aissi et al., *supra* n. 5.

10 *See* Jean-Marc Siroën, *Labour Provisions in Preferential Trade Agreements: Current Practice and Outlook*, 152(1) Int'l Lab. Rev. 85–106 (2013), https://doi.org/10.1111/j.1564-913X.2013.00170.x; Posthuma & Ebert, *supra* n. 6; Damian Raess & Dora Sari, *Labor Provisions in Trade Agreements (LABPTA): Introducing a New Dataset*, 9(4) Global Pol'y 451–466 (2018), https://doi.org/10.1111/1758-5899.12577.

11 For instance, the ILO database on labour standards in RTAs reproduces the exact language of these provisions only for WTO notified RTAs. *See* International Labour Organization, *ILO Labour Provisions in Trade Agreements Hub (LP Hub)*, International Labour Organization, Geneva (2022), https://www.ilo.org/LPhub/ (accessed 2 Mar. 2023).

12 The full repository and corresponding code book (authored by Vishakha Raj) can be, https://linktr.ee/evolutionoflabourprovisions (accessed 2 Mar. 2023). Please note that some of these RTAs are no longer in force.

13 *See* Andreas Dür, Leonardo Baccini, & Manfred Elsig, *The Design of International Trade Agreements: Introducing a New Dataset*, 9(3) Rev. Int'l Org. 353–375 (2014) (Version 2.1, 2022).

14 This study has filtered out agreements that entered in force prior to 1990 or not at all, agreements being currently negotiated, and any amendments or protocols that were pure accessions or withdrawals from parties. All agreements that met this criteria have been screened. Since the DESTA database does not publish the legal texts of the RTAs listed, all agreements' texts were searched using official

provisions in RTAs first proliferated during this time.[15] The study also attempts to make two novel contributions to the literature on the evolution of labour provisions in RTAs.

Firstly, this study takes a relatively broad view of the term 'labour provision' and defines it as a provision that explicitly refers to labour, social, development, and human rights considerations, which may have an impact on the rights, functioning, treatment, and well-being of a country's labour force. Therefore, labour provisions for these purposes are not only provisions that deal with labour rights, standards and policies, but also provisions concerning sustainable development, the free movement of persons, services, or investment. The labour provisions that have been included in the repository were found by virtue of a keyword search based on the terms; 'employment', 'employer', 'labour'/'labor', 'sustainable development'/'social development'/'economic development', 'worker', 'human rights', 'human liberties', 'job', 'general exception' and 'ILO', which were reviewed in light of the agreements' overall text. Unlike other databases,[16] such as the DESTA database, the repository prepared as a part of this study reproduces the exact language of over 4,000 'labour provisions'. This repository further extends beyond the database of the ILO Labour Provisions in Trade Agreements Hub,[17] as the broader conceptualization of labour clauses of this study allows for an analysis beyond labour standards and rights and examines parties' trade specific commitments such as services with labour linkages.

Secondly, this article maps not only the type of labour commitments in RTAs, but focuses specifically on the language used in such provisions. While numerous authors distinguish the characteristics of RTAs,[18] exemplify common labour provisions in RTAs,[19] or document the expansion of RTAs into new policy areas,[20] few studies to date examine the evolution of language of labour provisions,

governmental sources or databases of international organizations like the Global Preferential Trade Agreement Database of the World Bank, https://wits.worldbank.org/gptad/trade_database.html (accessed 2 Mar. 2023). The texts of seventy-five of these agreements could not be accessed and they were excluded from the scope of the analysis. *See* Dür, Baccini, & Elsig, *supra* n. 13. *See also* DESTA, Project Description, https://www.designoftradeagreements.org/project-description/ (accessed 12 Jan. 2023).

15 For instance, the Southern Common Market (MERCOSUR) of 1991 is one of the first RTAs to include labour provisions.

16 A variation of databases tracking trade-plus provisions has proliferated in recent years. *See* e.g., Claudia Hofmann, Alberto Osnago & Michele Ruta, *The Contents of Preferential Trade Agreements* 18(3) World Trade Rev. 365–398 (2019).

17 *See* International Labour Organization, *ILO Labour Provisions, supra* n. 11.

18 *See* Aaditya Mattoo, Nadia Rocha & Michele Ruta, *Handbook of Deep Trade Agreements* 635 (The World Bank Group 2020).

19 *See* Deborah Adebayo, Hamsa Fayed, Emily Greenaway & Allison Reading, *UN ESCAP Handbook of Legal Provisions and Options for Sustainable Development in RTAs*, forthcoming.

20 *See* Henrik Horn, Petros C. Mavroidis & André Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 33(11) World Econ. 1565–1588 (2010), https://doi.org/10.1111/j.1467-9701.2010.01273.x. *See also* Robert Basedow et al., *Trade Policy and Non-trade Policy Objectives: Perceptions on EU Strategy*, 7 Pol'y Briefs, 2020/09, Global Governance Programme (2020), http://

by tracking changes in the provisions' phrasing across different regions and decades since 1990 and identifying labour provisions that seem to have had a significant influence on the language of subsequent RTAs.[21] An analysis of language is particularly called for as Western trading blocs have encouraged compliance with international labour standards by virtue of RTAs in recent years, including the establishment of third-party adjudicatory panels that are more frequently tasked with interpreting the precise language of labour provisions.[22]

This study thereby shows which RTAs replicate the language of other agreements and whether some international norms or practices are forming regionally or universally; it identifies those labour provisions borne out of standardization or experimentation. While this study is by no means exhaustive, it indicates the importance and extent of convergence of *'trade and labour'* issues, tools and mechanisms used in RTAs to date. While common provisions in RTAs concerning labour capital, resources, movement, rights, and standards do not necessarily reflect the actual and effective convergence of such practices, they are a stepping stone to addressing trade and labour issues harmoniously at the multilateral level, forming an important feature of the modern international economic order.

In this article, the findings of the compiled repository are presented through a historical narrative of the evolution of labour language in RTAs. It analyses the approaches of five regions, Africa, Asia-Pacific, Europe, North America, and South America, to including labour provisions in RTAs and examines their cross regional trends.[23] Section 2 digs into the language of the substantive provisions on labour, including preambular clauses, provisions governing domestic labour policies and internationally recognized labour rights and standards, as well as labour exceptions to trade disciplines. In section 3, the design of compliance mechanisms for labour

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hdl.handle.net/1814/66232; Ingo Borchert et al., *The Pursuit of Non-trade Policy Objectives in EU Trade Policy*, 20(5) World Trade Rev. 623–647 (2021), https://doi.org/10.1017/S1474745621000070; Alessandro Ferrari et al., *EU Trade Agreements and Non-trade Policy Objectives*, SSRN Electronic Journal (2021), https://doi.org/10.2139/ssrn.3827922; Lisa Lechner, *The Domestic Battle Over the Design of Non-trade Issues in Preferential Trade Agreements*, 23(5) Rev. Int'l Pol. Econ. 840–871 (2016), https://doi.org/10.1080/09692290.2016.1231130; Jean-Baptiste Velut et al., *Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements*, Trade Policy Hub, LSE Consulting, 240 (2022); Aydin Yildirim et al., *EU Trade and Non-trade Objectives: New Survey Evidence on Policy Design and Effectiveness*, 59(3) J. Common Mkt. Stud. 556–568 (2021), https://doi.org/10.1111/jcms.13100.

[21] A closer look at language has been taken by Kathleen Claussen in an examination of boilerplate clauses and the design of various compliance mechanisms in US Free Trade Agreements. *See* Kathleen Claussen, *Separation of Trade Law Powers*, 43 Yale J. Int'l L. 315, 323 (2018).

[22] *See* Guatemala – Issues Relating to the Obligations Under Art. 16.2.1(a) of the CAFTA-DR (2017) and the Panel of Experts Proceeding Constituted under Art. 13.15 of EU–Korea (2011).

[23] Throughout this article, when reference is made to a particular region, such as 'RTAs from the African region' or 'African RTAs', the authors refer to an agreement with at least one trading partner from that region. For instance, when referring to 'RTAs of the African region', this article attempts to find commonalities for cross regional RTAs with at least one African trading partner.

provisions in RTAs is examined, whether it be in the form of facilitating cooperation or establishing adjudicatory dispute resolution procedures. Section 4 concludes.

2 THE LANGUAGE OF LABOUR PROVISIONS IN RTAS

Labour references may be included in all parts of an RTA, ranging from the preamble to the investment chapter, or to a specific chapter or side-agreement dedicated to labour issues. The authors single out four types of provisions that commonly include commitments on labour and have been subject to dynamic evolution. This section firstly examines the preambles of RTAs, secondly, the provisions that govern parties' domestic labour regulation, thirdly, the provisions on internationally recognized labour standards and rights, and fourthly, labour exceptions to trade disciplines.

2.1 Preambular clauses

The evolution of RTA preambles and their inclusion of social, labour and human rights issues carries value in the interpretation of the RTA's substantive provisions. Under Article 31(1) of the Vienna Convention on the Law of Treaties, preambles play a role in the interpretation the object and purpose of a treaty, which informs the interpretation of substantive provisions. Over the last thirty years, preambular clauses have undergone significant changes, indicating that the object and purpose of some RTAs has evolved as well. For instance, in the 1990s, social affairs were embedded in preambles globally with an emphasis lying on 'economic development and social progress'[24] or 'living conditions'.[25] Over time, these preambles became more extensive and specific, first referring to human liberties and labour rights, and in recent years, to the enforcement of labour rights and international labour standards. Today, RTAs, such as the USMCA, specifically mention new labour issues relating to gender and small and medium-sized enterprises (SMEs).

This evolution of preambular language can be observed in the 1990s, coinciding with the negotiation of the Marrakesh Agreement that established the WTO and came into force in 1995. The Marrakesh Agreement referred to living standards and was the first multilateral trade agreement to refer to the objective of sustainable development in its preamble. After the establishment of the WTO, similar references in RTA preambles solidified over the years. Of all 512

[24] Preamble of the Australia-Papua New Guinea RTA of 1991. Note that from hereon, RTAs will be cited in the following format: Australia-Papua New Guinea (1991).
[25] Mercosur (1991).

agreements and forty-two amendments examined, 100 refer to improving living standards, 147 to sustainable development, and 122 to social development in their preambular texts.

While many early European agreements aimed to achieve 'full' or 'complete employment', reflecting the language of the Marrakesh Agreement,[26] the preamble of the North American Free Trade Agreement (NAFTA) of 1994 deviated from such language by aiming to 'create new employment opportunities'. Similar language was thereafter embedded in most subsequent North American agreements' preambles,[27] although European agreements of that time maintained the 'full' or 'complete' employment language. The concept of full employment was not referred to in RTAs' preamble of the Asia-Pacific region either. In the late 2000s, the phrase 'create new employment opportunities', with minor deviations,[28] became more popular globally and even RTAs from the European region started to use this phrase.[29] Interestingly, softer language is employed when agreements are signed with a Least Developing Country trading partner than with developing country trading partners. For instance, in the Preamble of EU-Ghana (2016) parties are 'willing to create new opportunities for employment, attract investment and improve living conditions on the territory of the Parties, while promoting sustainable development' according to their RTA, while EU-Cote d'Ivoire (2016) replicates this provision, but with parties 'wishing to create new opportunities for employment'. To date, the intention to 'raise living standards' and to 'create new employment opportunities' are, apart from development-related affirmations discussed below in

[26] *See* Armenia-Russia (1993), EEA (1994), Armenia-Moldova (1995), Armenia-Ukraine (1996), Azerbaijan-Georgia (1996), Kyrgyzstan-Moldova (1996), Georgia-Turkmenistan (2000), Belarus-Ukraine (2006).

[27] Canada-Chile (1996), Israel-Mexico (2000), US-Jordan (2000), US-Chile (2004), US-Australia (2005), Jordan-Singapore (2005), US-Morocco (2006), CAFTA-DR (2006) Chile-Mexico (1998), Israel-Mexico (2000), EFTA-Mexico (2001), US-Jordan (2001), Canada-Costa Rica (2002), Panama-Chinese Taipei (2004), US-Chile (2004), US-Singapore (2004), US-Australia (2004), CARICOM-Costa Rica (2005), CAFTA-DR (2006) US-Bahrain (2006), US-Morocco (2006), El Salvador-Honduras-Taiwan (2008), Canada-EFTA (2008) US-Oman (2009), US-Peru (2009), Canada-Colombia (2011) Korea-US (2012), US-Colombia (2012), US-Panama(2012), Canada-Honduras (2014), EFTA-Central America (Costa Rica and Panama) (2014), Canada-Korea (2015), Korea-Central America (2021).

[28] *See for instance,* 'promote new employment opportunities' of Canada-Jordan (2012) and Canada-Ukraine (2017) or 'willing to create new opportunities for employment' of EU-Ghana (2016).

[29] *See* Jordan-Singapore (2005), EFTA-Singapore (2003), EFTA-Chile (2004), EFTA-Korea (2006), EFTA-Egypt (2007), China-Pakistan (2007), EFTA-SACU (2008), EFTA-Albania (2011), EFTA-Albania (2010), EFTA-Serbia (2010), EFTA-Colombia (2011), EFTA-Peru (2011), EFTA-Hong Kong (2012), EFTA-Montenegro (2012), EFTA-Ukraine (2012), EU-ESA (2012), EU-Colombia, Peru, Ecuador (2013), EFTA-Gulf Cooperation Council (2014), Iceland-China (2014), EFTA-Bosnia and Herzegovina (2015), EU-SADC (2016), EFTA-Georgia (2017), Singapore-Turkey (2017), EFTA-Philippines (2018), EU-Singapore (2019), EFTA-Ecuador (2020), EU-Viet Nam (2020), EFTA-Indonesia (2021), EFTA-Türkiye (2021), UK-Iceland, Liechtenstein and Norway (2021), UK-Korea (2021), UK-SACU and Mozambique (2021), UK-Türkiye (2021), UK-Kenya (2021), UK-ESA (2021).

this section, the most common labour-related phrasings of preambular texts of many RTAs between developing countries of the African, Asia-Pacific, or South American regions.[30]

European, North American, and South American[31] parties were the first to make explicit reference to working conditions and rights in the 1990s. While the European Communities (EC)[32] were the first to promote 'improved working conditions' in an RTA in 1994,[33] it is the NAFTA that made a bold step and coined the phrase 'protect, enhance and enforce basic workers' rights',[34] which became a standardized clause for many US RTAs to this day.[35] The phrase also diffused to Canadian RTAs, but is not commonly employed by RTAs of other regions.[36] The first RTA without a North American party to include this phrase in a preamble was the Trans-Pacific Strategic Economic Partnership in 2006, although, this reference was included in the preamble of its Memorandum of Understanding (MoU) on Labour and not in the main agreement.[37] The first reference to the enforcement of workers' rights in US agreements underscores their enforcement-based approach to facilitating global compliance with labour rights, even in their preambular clauses.

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30 *See for instance*, Melanesian Spearhead Group (1994), ECOWAS (1995), Colombia, Mexico, Venezuela (1995), Costa Rica-Mexico (1995), Armenia-Turkmenistan (1996), CARICOM (1997 Protocol), Mexico-Nicaragua (1998), Chile-Mexico (1999), Mexico-Triangulo del Norte (2001), Central America-Dominican Republic (2002), Panama-Taiwan, China (2004), Jordan-Singapore (2005), India-Singapore (2005), Pakistan-Iran (2006), China-Chile (2006), Colombia-Mexico (2006), Iran-Syria (2006), Guatemala-Taiwan, China (2006), China-Pakistan (2007), El Salvador-Honduras-Taiwan, China (2008), Malaysia-Pakistan (2008), Panama-Chile (2008), Peru-Chile (2009), Central America-Panama (2009), China-Singapore (2009), Peru-China (2010), Chile-Ecuador (2010), Colombia-Triangulo del Norte (2010), East African Community (2010 Protocol), Türkiye-Chile (2011), Costa Rica-China (2011), Panama-Peru (2012), Central America-Chile (2012), Chile-Malaysia (2012), Costa Rica-Singapore (2013), Central America-Mexico (2013), Costa Rica-Peru (2013), Chile-Viet Nam (2014), Alianza del Pacifico (2016), Costa Rica-Colombia (2016), Honduras-Peru (2017), Hong Kong, China-Georgia (2019), Chile-Indonesia (2019).

31 *For instance*, intra-South American RTAs referring to working conditions in the 1990s specifically include Colombia-Mexico-Venezuela (1995), Costa Rica-Mexico (1995), CARICOM-Dominican Republic (1999), Chile-Mexico (1999).

32 From 1986 onwards, the European Communities, a common market and trading bloc, consisted of twelve members. When the EC-Maastricht RTA of 1993 came into effect, the EC was replaced with the European Union and with subsequent accessions now comprise twenty-seven European Member States.

33 EEA (1994).

34 Preamble of NAFTA (1994).

35 *See* US-Chile (2004), CAFTA-DR(2006), US-Bahrain (2006), US-Oman (2009), US-Peru (2009), US-Colombia (2012), US-Panama (2012).

36 The language has then also been used by Canada-Chile SA (1997), Canada-Costa Rica Agreement on Labour Cooperation (2002), Canada-Peru SA (2009), Canada-Colombia SA (2011), Canada-Jordan SA (2012), Canada-Panama SA (2013), Canada-Hondura SA (2014), Canada-Korea (2014), Canada-Ukraine (2017), CPTPP (2018), Canada-Israel FTA Amending Protocol (2018).

37 TPSEP Memorandum on Labour (2006).

During this period, Asia-Pacific and European parties equally emphasized the free movement of labour in their RTAs. After the fall of the Soviet Union in 1991, Russia's attempts to establish hegemonic ties with the Commonwealth of Independent States (CIS+)[38] and Central Asian economies is evident in the language of preambles in RTAs that proliferated amongst these countries in the 1990s and early 2000s. This language is apparent in the preamble of the Armenia–Russia RTA of 1993:

Intending to promote the establishment of common market for goods, services, capital and labour,

The same language with minor variations such as creating a 'single market of […] manpower'[39] or 'services'[40] is found in other agreements of the region as well.[41] In such agreements, a separate provision would also be dedicated to the principle of the freedom of transit and the trading partners' integration 'into the system of international division of labour and cooperation'.[42] This trend abated in the early 2000s.[43]

During the 1990s, RTAs from the European region were also one of the first to include commitments on human rights in their preambles.[44] For instance, parties to RTAs that include the EC as trading partner in the 1990s reaffirm their commitment to, or recognize the need to, respect human rights.[45] Reference to human rights in preambles of RTAs of other

[38] The CIS members are Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, and Uzbekistan. CIS+ members additionally include the associates, Turkmenistan and Ukraine. Mazhikeyev and Edwards discuss their trading relationship: 'For example, trade between the Central Asian former Soviet republics and Russia (the metropole), during the 1995–2014 period increased almost 11-fold from its post-Soviet nadir (from 2.1 to 23 billion U.S. dollars) and ex-Soviet republics' shares in each other's total bilateral trade actually increased'. Arman Mazhikeyev & T. Huw Edwards, *Post-Colonial Trade Between Russia and Former Soviet Republics: Back to Big Brother?*, 54 Econ. Change & Restructuring 877–918, 881 (2021).

[39] Kyrgyzstan-Russia (1993).

[40] Armenia-Turkmenistan (1996).

[41] *See for instance*, Armenia-Russia (1993), Russia-Turkmenistan (1993), Russia-Uzbekistan (1993), Georgia-Russia (1994).

[42] Article 10 of Armenia-Russia (1993) reads: 'Contracting Parties agree that the adherence to the principle of freedom of transit is the major condition for achieving goals of this Agreement and a substantial element in the process of their integration into the system of international division of labour and cooperation. '. This provision was then included for eighteen further RTAs: Azerbaijan-Russia (1993), Kyrgyzstan-Russia (1993), Belarus-Russia (1993), CIS Agreement (1994), Georgia-Russia (1994), Kazakhstan-Kyrgyzstan (1995), Armenia-Moldova (1995), Armenia-Turkmenistan (1996), Azerbaijan-Georgia (1996), Armenia-Ukraine (1996), Kyrgyzstan-Moldova (1996), Kazakhstan-Uzbekistan (1997), Kyrgyzstan-Uzbekistan (1998), Armenia-Georgia (1998), Kyrgyzstan-Ukraine (1998), Georgia-Kazakhstan (1999), Georgia-Turkmenistan (2000), EC-Switzerland (2002).

[43] *See* Armenia-Kazakhstan (2001) or Tajikistan-Ukraine (2002).

[44] *See also* CEFTA (1992) EFTA-Bulgaria (1993), EFTA-Hungary (1993), EFTA-Romania(1993), Estonia-Latvia-Lithuania (1994), EFTA-Slovenia (1995) Moldova-Romania (1995) EFTA-Estonia (1996), EFTA-Lithuania (1996), EFTA-Latvia (1996), EFTA-Ukraine (1996), Estonia-Ukraine (1996) Latvia-Slovenia (1996), Slovenia-Macedonia (FYROM) (1996), Estonia-Slovenia (1997), Lithuania-Poland (1997), Lithuania-Slovenia (1997), Romania-Turkey (1998), Croatia-Slovenia (1999).

[45] *See* e.g., EC-Poland (1992), EC-Hungary (1992), EC-Bulgaria (1993), EC-Romania (1993), EC Maastricht Treaty (1993), European Economic Area (1994), EC-Estonia (1995), EC-Czech Republic (1995), EC-Latvia (1995), EC-Lithuania (1995), EC-Slovak Republic (1993), EC-Slovenia (1997), EU-Tunisia (1998), EC Amsterdam Treaty(1999).

regions, with the exclusion of RTAs with European trading partners, only came later on: such references are first observed for Central and South American RTAs in 1994 with the Association of Caribbean States,[46] and for Canadian RTAs in 2009 with the Canada-Peru RTA.[47] In contrast, African and Asia-Pacific RTAs will only refer to human rights in their preambles if the agreement was made with a European or North American trading partner, with the now lapsed Lome IV Convention between the EC and the African, Caribbean and Pacific Group of States (ACP) of 1990 being the first to make such a reference to human rights. Since then, the first intra-African RTA to make explicit reference to human rights in the preamble is the African Continental Free Trade Area (AfCFTA) of 2019.

The trading bloc formed by the European Free Trade Association (EFTA), followed in the steps of the EC and from 1993 onwards included the following language in RTAs with their European counterparts:

> *Reaffirming their commitment to pluralistic democracy based on the rule of law, human rights, including rights of persons belonging to minorities, and fundamental freedoms, and recalling their membership in the Council of Europe,*[48]

This preambular clause on human rights became a standardized provision and was replicated for five further EFTA agreements.[49] The EFTA successfully standardized their language in RTAs' preambles, with little deviation from trading partner to trading partner; and over time, this standardized preamble of EFTA agreements did evolve. From 1995 onwards, these preambles started referring to sustainable growth.[50] In 1999, the EFTA–Morocco RTA first referred to the principle of sustainable development and the principles of the United Nations (UN) Charter.[51] This language referring to these principles also diffused to other RTAs with

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46 *See also* the revised CARICOM (2006), Peru-Korea (2011), and the CPTPP (2018).

47 *See also* Canada-Colombia (2011), Canada-Jordan (2012), Canada-Panama (2013), Canada-Honduras (2014), Canada-Korea (2015), Canada-Ukraine (2017), EU-Canada (2017), and CPTPP (2018).

48 EFTA-Bulgaria (1993).

49 *See* EFTA-Hungary (1993), EFTA-Slovenia (1995), EFTA-Estonia (1996), EFTA-Lithuania (1996), and EFTA-Latvia (1996). Please note that EFTA-Hungary (1993) uses this language, but excludes the reference to the rights of minorities and similar language was also employed in EFTA-Romania (1993).

50 *See for instance*, EFTA-Slovenia (1995), EFTA-Estonia (1996), EFTA-Lithuania (1996) and EFTA-Latvia (1996). Interestingly, at around the same time, the first South American RTAs also started to make reference to 'sustainable development', *see* for instance, Costa Rica-Mexico (1995), Colombia-Mexico-Venezuela (1995), and Mexico-Nicaragua (1998).

51 *See* EFTA-Croatia (2002), EFTA-Jordan (2002), EFTA-Macedonia (2002), EFTA-Singapore (2003), EFTA-Chile (2003), EFTA-Tunisia (2005), EFTA-South Korea (2006), EFTA-Egypt (2007), EFTA-Lebanon (2004), EFTA-SACU (2008), Canada-EFTA (2009), EFTA-Serbia (2010), EFTA-Albania (2010), EFTA-Colombia (2011), EFTA-Peru (2011), EFTA-Hong Kong, China (2012), EFTA-Montenegro (2012), EFTA-Ukraine (2012), EFTA-Central America (2014), EFTA-GCC (2014), EFTA-Bosnia and Herzegovina (2015), EFTA-Georgia (2017), EFTA-Philippines (2018), EFTA-Ecuador (2020), EFTA-Türkiye (2021), EFTA-Indonesia (2021).

European trading partners.[52] While the EFTA-Morocco RTA preamble was the first EFTA agreement to introduce sustainable development, development objectives have long been a priority for RTAs that are concluded with developing countries. For instance, African RTAs referred to economic development prior to the establishment of the WTO in 1994, and they continue to do so to date.[53]

With the EFTA–Singapore RTA of 2003, EFTA preambles further expanded to refer to the Universal Declaration of Human Rights, the language of which was embedded in twenty-one subsequent EFTA RTAs.[54] In 2009, a new provision was added to the standardized EFTA template, making the first reference to ILO fundamental rights and principles:

> *Affirming their commitment to economic and social development and the respect for the fundamental rights of workers and the principles set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work;*[55]

Variations of this provision was used for all seventeen EFTA RTAs that followed.[56] Unlike EFTA and EC agreements during this time, US RTAs make no explicit reference to ILO fundamental rights and principles in their preambles to date. Additionally in 2010, the 'significance of responsible corporate conduct' for social issues and explicit reference to Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance, and the UN Global Compact were also included in EFTA RTAs.[57] This language is still replicated in EFTA RTAs today, serving as a showcase on how standardized labour language has evolved in RTAs over time.[58]

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52 *See for instance*, EU-Moldova (2016), EU-Kazakhstan (2020).

53 *See* WAEMU (1994), COMESA (1995), ECOWAS (1995). EU and UK (post-Brexit) RTAs that have been concluded with African countries make frequent references to development.

54 *See* EFTA-Chile (2004), EFTA-Korea (2006), EFTA-Egypt (2007), EFTA-Lebanon (2007), EFTA-SACU (2008), Canada-EFTA (2009), EFTA-Serbia (2010), EFTA-Albania (2010), EFTA-Colombia (2011), EFTA-Peru (2011), EFTA-Hong Kong, China (2012), EFTA-Montenegro (2012), EFTA-Ukraine (2012), EFTA-Central America (2014), EFTA-GCC (2014), EFTA-Bosnia and Herzegovina (2015), EFTA-Georgia (2017), EFTA-Philippines (2018), EFTA-Ecuador (2020), EFTA-Türkiye (2021), and EFTA-Indonesia (2021).

55 Preamble of EFTA-Canada (2009).

56 *See* EFTA-Serbia (2010), EFTA-Albania (2010), EFTA-Colombia (2011), EFTA-Peru (2011), EFTA-Hong Kong, China (2012), EFTA-Montenegro (2012), EFTA-Ukraine (2012), EFTA-Central America (2014), EFTA-GCC (2014), EFTA-Bosnia and Herzegovina (2015), EFTA-Georgia (2017), EFTA-Philippines (2018), EFTA-Ecuador (2020), EFTA-Türkiye (2021), and EFTA-Indonesia (2021).

57 EFTA-Serbia (2010), EFTA-Albania (2010).

58 *See* EFTA-Colombia (2011), EFTA-Peru (2011), EFTA-Hong Kong, China (2012), EFTA-Montenegro (2012), EFTA-Central America (2015), EFTA-Bosnia and Herzegovina (2015), EFTA-Serbia (2017 amendment), EFTA-Albania (2017 amendment), EFTA-Georgia (2017), EFTA-Philippines (2018), EFTA-Ecuador (2020), EFTA-Türkiye (2021), and EFTA-Indonesia (2021).

In this light, RTAs with European and North American trading partners, including EFTA, have been the drivers of including stronger language on human rights and labour objectives in their RTAs preambles. Modern agreements such as NAFTA's successor, the USMCA, diverges from NAFTA language,[59] employs novel preambular clauses aiming to 'facilitate women's and men's equal access to and ability to benefit from the opportunities'[60] and includes a provision on SMEs:

> *Recognize that small and medium-sized enterprises (SMEs), including micro-sized enterprises, contribute significantly to […] employment*[61]

These European and North American approaches have had an impact on RTAs of other regions, especially South American RTAs. Compared to RTAs of the European and North American regions, intra-African and Asia-Pacific RTAs make fewer references to labour, and focus more on promoting social and economic development.[62] Typically, references to labour in the preambles of RTAs of the African, and Asia-Pacific regions are only found in agreements concluded with European or North American trading partners. For example, the first African RTA to explicitly mention labour issues in its preamble is the EU–South Africa RTA of 2000 while the first Asia-Pacific RTA is the US–Jordan RTA of 2001.[63]

The trends observed for RTAs' preambles indicate that RTAs across different regions and across time periods take varying approaches to the inclusion of labour-related social issues in the preamble. The specific language of the preamble will inform adjudicators' interpretation of the object and purpose of the RTA.

2.2 Obligations regulating domestic labour laws

In addition to promoting labour protections in preambular clauses, RTA parties seem to have created new obligations that govern how they are to regulate their labour policies domestically. This section explores the extent to which RTAs regulate national labour laws and policies of parties and identifies where RTAs

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[59] The Preamble of USMCA (2020) diverged from the typical phrase 'protect, enhance and enforce basic workers' rights', which was changed to 'Promote the protection and enforcement of labor rights'.

[60] Preamble of the USMCA (2020). For more information on gender provisions, *see* Lolita Laperle-Forget, *WTO Database on Gender Provisions in Regional Trade Agreements*, World Trade Organization (23 Aug. 2022). *See also* World Trade Organization, *Trade and Gender-Related Provisions in Regional Trade Agreements*, INF/TGE/COM/ (19 Sep. 2022).

[61] Preamble of the USMCA (2020).

[62] *See for instance*, Türkiye-Tunisia (2015), Morocco-Türkiye (2006), Egypt-Türkiye (2006), the Agadir Agreement (2006), Mauritius-Türkiye (2013), China-Mauritius (2021) only make reference to development cooperation and make no reference to labour issues in the preamble.

[63] The following intra-Asia agreements directly reference labour issues in the preamble: Trans-Pacific Strategic Economic Partnership (TPSEP) (2006), New Zealand-Malaysia (2010), Hong Kong China-New Zealand (2011), Korea-Turkey (2013), New Zealand-Taiwan (2013), New Zealand-Korea (2015), New Zealand-Singapore Amendment (2020).

emphasize the regulatory space of governments to determine aspects of their own labour legislation. While the 1990s saw to few labour obligations in RTAs, except in the field of free movement, the NAFTA of 1994 shifted the balance in favour of RTAs addressing national labour laws. Today, RTAs of European and North American countries, such as recent EU RTAs, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the USMCA, include extensive domestic labour commitments.

In the 1990s, in early EC agreements, provisions concerned workers' treatment abroad. For example, the language employed in EC–Hungary RTA of 1992 reads:

> *the treatment accorded to workers of Hungarian nationality, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals;*[64]

Such language was employed in further EC RTAs during this period.[65] The emphasis on free movement was a result of European integration processes at the time: these agreements were frequently adopted with the aim of possibly acceding to the EC later on. For this reason, the EC also included provisions promoting harmonious social development.[66] Harmonization of labour legislation creates a level playing field for employers and enterprises to compete in the market that facilitates integration.

Similarly, African RTAs provided for regulatory coherence on social policies during this time.[67] The 1994 Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) is the first intra-African agreement of the repository to provide for the harmonization of human resource policies:

> *The Member States shall, in particular: […]*
> *(e) harmonise the curricula of training institutions in the Common Market;*[68]

Harmonization policies were common in agreements establishing the African Regional Economic Communities during the 1990s, a period marked by a deeper continental integration process.[69] The parties of the Treaty Establishing the African

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64 Article 37 of EC-Hungary (1992).

65 *See* EC-Poland (1992), EC-Romania (1993), EC-Bulgaria (1993), EC-Romania (1993), EC-Czech Republic (1995), EC-Slovak Republic (1995), EC-Lithuania (1998), EC-Slovenia (1999), EC-San Marino (2002), EC-Switzerland (2002).

66 *For instance*, EC-Hungary (1992) prescribes that 'policies designed to bring about the economic and social development of Hungary […] shall also take into account the requirements of sustainable and harmonious social development'. Such language was repeated in EC-Bulgaria (1993). *See also* EC-Poland (1992), EC-Romania (1993), EC-Czech Republic (1995), EC-Lithuania (198), EC-Slovenia (1999), EC-Slovak Republic (2005).

67 This phenomenon had already started in the 1980s with the formation of the Economic Community of Central African States (E.C.C.A.S.) in 1984.

68 Article 156 of COMESA (1994).

69 *See* Abuja Treaty (1994) and ECOWAS (1995). Such language was also employed in E.C.C.A.S. (1984).

Economic Community (Abuja Treaty) of 1994 aim to 'harmonize gradually their labour and social security legislation'.[70] Such language was also employed in other African agreements during this period.[71]

In 1994, NAFTA came into effect and was concluded with a side-agreement on labour (the North American Agreement on Labour Cooperation or NAALC), which was far reaching in terms of regulating domestic labour laws and policies at the time. Considering widespread social concerns, including fears of job losses by giving market access to a large developing country, a binding and enforceable side-agreement on labour for NAFTA became a priority for the Clinton administration of 1992.[72] NAALC was the first of its kind, establishing 'guiding [labour] principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law' in Annex 1.[73] Such principles include, inter alia, the freedom of association, right to bargain collectively and strike, prohibition of forced labour, the elimination of employment discrimination, and equal pay. The language employed in describing these principles is of a general nature and strikes a balance between prescribing parties' domestic labour protections and providing parties with the regulatory autonomy to determine the means of implementation of such protections. For instance, the principle on minimum employment standards reads:

> *The establishment of minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements.*[74]

In this example, NAALC specifies that minimum wages and overtime pay should be established for wage earners, however, it is up to the parties of the RTA to determine the level of protection and amount of minimum wage that accommodates their respective economies. These guiding principles were referred to in a few other agreements.[75]

NAALC's provisions pertaining to public awareness and transparency imposed strong obligations on RTA parties:

> *Each Party shall promote public awareness of its labor law, including by:*
>
> 1. *ensuring that public information is available related to its labor law and enforcement and compliance procedures; and*
> 2. *promoting public education regarding its labor law.*[76]

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70 Article 72 of Abuja Treaty (1994). Art. 71 also stipulates that parties 'undertake to […] harmonize their employment and income policies'.

71 *See* WAEMU (1994), ECOWAS (1995), CEMAC (1999), EAC (2000) and its subsequent protocol.

72 *See* J. I. Garvey, *Trade Law and Quality of Life–Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89(2) Am. J. Int'l L. 439 (1995), https://www.doi.org/10.2307/2204217.

73 Annex 1 of NAALC (1994).

74 *Ibid.*

75 *See* e.g., Canada-Chile SA (1997), Canada-Costa Rica SA (2002), Nicaragua-Taiwan, China (2008).

76 Article 7 of NAALC (1994).

This stronger formulation is explained by the fact that the NAALC was intended as a 'review mechanism […] so that over time such enhanced oversight and scrutiny will generate more effective labour law enforcement'.[77] This provision on public awareness and transparency is included in several modern North American RTAs to date.[78]

The NAALC was unique as it not only regulated aspects of the domestic labour legislation of the parties, but for some situations, it prescribed how the parties should enforce them. Article 3 stipulates:

> *Each Party shall promote compliance with and effectively enforce its labour law through appropriate government action, subject to Article 39, such as:*
>
> *a) appointing and training inspectors;*
> *b) monitoring compliance and investigating suspected violations, including through on-site inspections;*

This provision or similar language was included in nine further RTAs with US or Canadian trading partners to date.[79] The phrase 'shall promote compliance with' is dressed in stronger language than providing for guiding principles as found in Annex 1 of the NAALC and seems to include the objective of complying with the specified obligation of appointing training inspectors and ensuring on-site inspections. Such labour obligations in RTAs are not unlike other RTA obligations that cover, inter alia, health or sanitary concerns, which may also lead to changes in the domestic legal systems of the RTA parties. US RTAs such as the NAFTA and the more recent Trans-Pacific Partnership (TPP) of 2016 – prior to the US' withdrawal – extend beyond the flexible approach of ILO conventions and declarations that aim to establish 'a universal floor [of labour rights] reflective of national conditions and realizable by diverse economies and cultures' as these US RTAs are more prescriptive in nature, by not just providing that obligations be implemented, but also specifying how they must be implemented and enforced.[80]

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[77] Lance A. Compa, *NAFTA's Labour Side Agreement and International Labour Solidarity*, Cornell University, ILR School, 3 (2001), http://digitalcommons.ilr.cornell.edu/articles/175/ (accessed 01 Dec. 2022).

[78] *See* Canada-Chile (1997), CAFTA-DR (2006), United States-Bahrain (2006), United States-Morocco (2006), Canada-Peru (2009), United States-Oman (2009), United States-Peru (2009), Canada-Colombia (2011), Canada-Jordan (2012), Korea-United States (2012), United States-Colombia (2012), United States-Panama (2012), Canada-Panama (2013), Canada-Honduras (2014), Canada-Ukraine (2017), EU-Canada (2017), CPTPP (2018), USMCA (2020), Korea-Central America.

[79] Canada-Chile SA (1997), Canada-Costa Rica SA (2002), Canada-Peru SA (2009), Canada-Colombia SA (2011), Canada-Jordan SA (2012), Canada-Panama SA (2013), Canada-Korea (2014), Canada-Ukraine (2017), USMCA (2020).

[80] *See* Desiree LeClercq, *The Indo-Pacific Economic Framework for Prosperity: Promise or Peril for Labor Governance Through Trade Instruments*?, 40 Chinese (Taiwan) Y.B. Int'l L. & Aff. (forthcoming 2023) (29 Oct. 2022), SSRN, https://ssrn.com/abstract=4300166 or http://dx.doi.org/10.2139/ssrn.4300166 (accessed 30 Jan. 2023).

The NAALC additionally formulates a 'right to regulate'-type provision, which is an expression of state sovereignty frequently used in investment agreements, with a particular focus on labour law:

> *Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.*[81]

Even within the 'right to regulate' provision, the margin of action for NAFTA's parties is limited by the condition that the standards must be of 'high quality'.[82] EC agreements of the 1990s also included similar 'right to regulate'-type provisions, mainly regarding the free movement of labour, but without the condition of meeting 'high' labor standards'.[83] While such 'right to regulate' provisions are incorporated as a response to constraints to government capacity to implement labour policies that incur through the provision of investment protection,[84] their prevalence in RTAs seem to be positively correlated with the inclusion of more far reaching labour obligations. This trend continued in the 2000s: those RTAs that more frequently specify workers' rights and labour obligations for governments also included provisions reiterating the right to regulate as well. In this light, right to regulate provisions proliferated in RTAs from the 2000s onwards.[85] RTAs with such a clause are primarily concluded with European, North American, or South

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[81] Article 2 of NAALC (1994).

[82] *Ibid*. Note: Terms such as 'high quality' are subject to interpretation.

[83] *See* EC-Hungary (1992), EC-Slovenia (1999), EC-Bulgaria (1993), EC-Romania (1993, EC-Lithuania (1995)).

[84] *See* International Labour Organization, *Assessment of Labour Provisions in Trade and Investment Arrangements*, 8 (2016), wcms_498944.pdf (ilo.org) (accessed 30 Jan. 2023).

[85] *See for instance*, US-Jordan (2001), Canada-Costa Rica SA (2002), Central America-Dominican Republic (2002), EU-North Macedonia (2004), Mexico-Uruguay (2003), US-Chile (2004), EU-Croatia (2005), US-Australia (2005), Colombia-Mexico (2006), US-Bahrain (2006), US-Morocco (2006), China-New Zealand (2008), EU-CARIFORUM (2008), Nicaragua-Taiwan (2008), Centro America-Panama (2009), Chile-Colombia (2009), EU-Albania (2009), US-Oman (2009), Colombia-Triangulo (2010), EU-Montenegro (2010), New Zealand-Malaysia (2010), Canada-Colombia SA (2011), EU-Korea (2011), Canada-Jordan (2012), Central America-Chile (2012), EFTA-Hong Kong, China (2012), EFTA-Montenegro (2012), Mexico-Peru (2012), Panama-Peru (2012), US-Panama (2012), Canada-Panama SA (2012), Central America-Mexico (2013), Costa Rica-Peru (2013), EU-Central America (2013), EU-Colombia, Peru, Ecuador (2013), EU-Serbia (2013), Korea-Türkiye (2013), Canada-Honduras SA (2014), EFTA-Central America (2014), Canada-Korea (2015), EFTA-Bosnia and Herzegovnia (2015), EU-Bosnia and Herzegovnia (2015), Mexico-Panama (2015), Allenzia de Pacifico (2016), Costa Rica-Colombia (2016), EU-Georgia (2016), EU-Moldova (2016), EU-SADC (2016), EFTA-Albania (2017 amendment), EFTA-Georgia (2017), EFTA-Serbia (2017 amendment), EU-Canada (2017), EU-Ukraine (2017), Honduras-Peru (2017), EFTA-Philippines (2018), Argentina-Chile (2018), Canada-Israel (2019), Canada-Chile (2019 amendment), Chile-Indonesia (2019), EU-Japan (2019), Australia-Indonesia (2020), EFTA-Ecuador (2020), EU-Kazakhstan (2020), EU-Vietnam (2020), EFTA-Indonesia (2021), EFTA-Türkiye (2021), EU-

American trading partners.[86] RTAs from the African region, except for those agreements concluded with an EU and US trading partner, do not include right to regulate clauses, while also stipulating fewer labour provisions.[87]

Building on those labour provisions included in early EC RTAs and the NAFTA in the 1990s, RTAs of the European and North American region enhanced their social and labour obligations in RTAs in the 2000s. For instance, RTAs established with the EU as a trading partner would continue to include provisions regulating the free movement of workers[88] and have the objective of promoting 'trade and the expansion of harmonious economic and social relations between the Parties'.[89] In the 2000s, however, only few European agreements included provisions pertaining to harmonization as European integration processes of the 1990s were on the verge of completion, with the exception of states from the Balkan and Black Sea areas.[90] In addition, with the US–Jordan RTA of 2001, US RTAs no longer contained 'guiding principles' for their labour obligations, but rather included a provision that defined the term 'labour laws' to account for similar protections such as the right of association, a prohibition of forced labour, minimum employment age, and 'acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health'.[91]

Armenia (2021), Korea-Central American (2021), UK-CARIFORUM (2021), UK-Georgia (2021), UK-Iceland (2021), UK-Japan (2021), UK-Korea (2021), UK-Moldova (2021), UK-SACU (2021), UK-Ukraine (2021). Recent agreements such as EU-UK (2021) and EU-Japan (2021), specify the right to regulate only for labour conditions using a strong formulation: 'Nothing in this Title shall affect the right of a Party to define or regulate its own levels of […] (c) occupational health and safety; (d) labour conditions', *see* Art. GRP.1 of EU-UK (2021).

86 Examples for South American RTAs include: Nicaragua-Taiwan (2008), Chile-Colombia (2009), Peru-Korea, Republic of (2011), Chile-Uruguay (2018), Argentina-Chile (2019), Chile-Indonesia (2019), Korea, Republic of-Central America (2021).

87 *See* EU-Algeria (2005), US-Morocco (2006).

88 *See* EFTA-Mexico (2001).

89 Article 1 of EU-Tunisia (1998) and Art. 1 of EU-Morocco (2000). *See also* EU-North Macedonia (2004), EU-Croatia (2005), EFTA-Lebanon (2007), EU-Bosnia and Hergevonia (2015). There are minor variations in language, for instance, EU-South Africa (2000) stipulates the 'harmonious and sustainable economic and social development'. Interestingly, the Gulf Cooperation Council Economic Agreement (2003), and the Korea-Türkiye (2013) followed suite. This trend abated in recent agreements.

90 With the exception of EU-North Macedonia (2004), EU-Croatia, EU-Albania (2009) and the Lisbon Treaty (2009), no other EU RTAs of the 2000s included measures of harmonization. This continued after 2010 with EU-Serbia (2013), EU-Bosnia and Herzegovinia (2015), EU-Moldova (2016), EU-Georgia (2016) EU-Ukraine (2017), and EU-Armenia (2021) being the only RTAs with harmonization provisions.

91 Article 6(6) of US-Jordan (2001). The same language was also employed in US-Singapore (2004), US-Chile (2004), CAFTA-DR (2006), US-Morocco (2006), US-Bahrain (2006), US-Peru (2009), US-Korea (2012) and US-Panama (2012). Similar language was also used, but to define internationally recognized labour standards, in US-Australia (2006), US-Oman (2009), CPTPP (2018), USMCA (2020). Such language was then also employed in Canadian RTAs' side agreements during this time, such as Canada-Peru SA (2009) or Canada-Colombia (2011).

While RTAs from the European and North American region in the 2000s built on their pre-existing RTAs obligations regulating domestic labour laws of the 1990s, these developments do not mean that little or no innovations occurred in the 2000s. During that period new labour obligations that promote international labour standards and ensure that they are 'protected by domestic law'[92] proliferated globally in RTAs (these commitments are thoroughly discussed in section 2.3). The increased inclusion of party commitments to adhere to international labour standards brings greater normative coherence, as parties no longer provide for varying degrees of labour protections for a plurality of RTAs, as they had done in the 1990s.

In addition to including labour obligations that reference international labour rights and principles, another novel phenomenon started in the 2000s: RTAs included non-derogation clauses for labour laws that discourage their relaxation. This phenomenon started with the US–Jordan RTA of 2001, which stated:

> *The Parties recognize that it is inappropriate to encourage trade by relaxing domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party.*[93]

This language was replicated for eight US agreements,[94] the language of which further influenced non-derogation clauses of the Asia-Pacific and South American region, including RTAs between developing countries.[95] Canadian RTAs would use a stronger formulation of the provision. [96]

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92 Article 6 of US-Jordan (2001).

93 Article 6(2) of US-Jordan (2001).

94 *See* US-Chile (2004), US-Singapore (2004), US-Australia (2005), CAFTA-DR (2006), US-Bahrain (2006), US-Morocco (2006), US-Oman (2009). and USMCA (2020). USMCA also identifies specific provisions from which derogation is not permitted.

95 Similar language was also included in: Japan-Philippines (2006), China-New Zealand (2008), Nicaragua-Taiwan, China (2008), New Zealand-Philippines (2009), Chile-Colombia (2009), Japan-Switzerland (2009), Hong Kong, China-New Zealand (2011), Peru-Korea (2011), EU-Korea (2011), Canada-Jordan (2012), EFTA-Hong Kong, China (2012), Canada-Colombia SA (2011), Türkiye-Chile (2011), Switzerland-China SA (2014), Korea-Turkey (2013), Korea-Australia (2014), New Zealand-Korea (2015), Costa Rica-Colombia (2016), Japan-Mongolia (2016), Chile-Uruguay (2018), EFA-Philippines (2018), Canada-Israel (2019), Argentina-Chile (2019), EU-Japan (2019), EU-Singapore (2019), Peru-Australia (2020), EFTA-Indonesia (2021), Korea-Central America (2021), UK-Japan (2021), UK-Korea (2021), Chile-Brazil (2022).

96 For example, Art. 2 of Canada–Peru SA (2008) provides: 'A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour laws in a manner that weakens or reduces adherence to the internationally recognized labour principles and rights referred to in Article 1 to encourage trade or investment'. *See also* Canada-Colombia SA (2011), Canada-Jordan SA (2012), Canada-Panama SA (2012), Canada-Honduras (2014), Canada-Korea (2015), Canada-Ukraine (2017), EU-Canada (2017), and Canada-Israel (2018). CPTPP (2018) identifies specific provisions from which derogation is not permitted.

In the 2010s, the use of non-derogation clauses intensified and most agreements of the EU, EFTA, UK, Canada, and the US included one.[97] When the EU introduced its first 'Trade and Sustainable Development' (TSD) chapter in the EU-South Korea RTA of 2011, a chapter that became a template for subsequent EU RTAs, EU and EFTA agreements would also use stronger language, similar to the Canada-Peru RTA, which demands that parties 'shall not weaken or reduce the […] labour protections afforded in its laws'.[98] This language was also employed in RTAs of the Asia-Pacific region.[99] Other agreements in the Asia-Pacific region used a weaker formulation for their non-derogation provisions, such as the Korea–Australia RTA of 2014, which states that the parties 'shall endeavour to ensure that it does not waive or otherwise derogate […] from its labour laws'.[100] Similar to right to regulate provisions, non-derogation clauses would also be included in those agreements, which extensively prescribe the domestic regulation of labour laws. For this reason, stringent obligations such as non-derogation clauses are not included in African RTAs.

The 2010s not only saw to the more frequent inclusion of non-derogation clauses, but it also gave rise to a further phenomenon in which RTAs of the Asia-Pacific region,[101] such as Article 13.1.3 of the EU–Korea RTA of 2011, included the following language:

> *The Parties recognise that it is not their intention in this Chapter to harmonise the labour or environment standards of the Parties*,

This language provides for greater leeway for governments to determine their owns standards of labour protections and maintain their labour regimes and apparatuses.[102]

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97 The formulation of the non-derogation clause of Canada-Peru SA (2008) was then further replicated twelve agreements worldwide, particularly in recent EU RTAs: EU-South Korea (2011), South Korea-US (2012), EU-Central America (2013), EFTA-Central America (2014), EU-Georgia (2016), EU-Moldovia (2016), EU-Singapore (2019), EU-Vietnam (2020), UK-Georgia (2021), UK-Moldova (2021), EU-Armenia (2021), EFTA-Indonesia (2021), UK-EEA (2021).

98 Article 13.7 of EU-Korea (2011). Also with minor deviations, *see* EFTA-Montenegro (2012), EFTA-Hong Kong, China (2012), EU-Colombia, Peru, Ecuador (2013), EFTA-Bosnia and Herzegovnia (2015), EFTA-Serbia (2017 amendment), EFTA-Albania (2017 amendment), EFTA-Georgia (2017), EU-Ukraine (2017), EFTA-Philippines (2018), EFTA-Ecuador (2020), EU-UK (2021), UK-South Korea (2021), UK-Ukraine (2021), EFTA-Türkiye (2021).

99 *See* Korea-Türkiye (2013) and New Zealand-Taiwan (2013). Similar language is included in New Zealand-Malaysia (2010).

100 Article 17.1 of Korea-Australia (2014). Such language was also used with weaker formulations in: New Zealand-Philippines (2009), Japan-Switzerland (2009), Hong Kong, China-New Zealand (2011), Malaysia-Australia (2013), Switzerland-China (2014), and Chile-Indonesia (2019).

101 Starting with EU-South Korea (2011), such language was also employed in Korea-Türkiye (2013), Colombia-Korea (2016), EU-Singapore (2019), Korea-Central America (2021), UK-Japan (2021), UK-Korea (2021).

102 However, with respect to this provision, in 2021, a Panel of Experts established under the EU–South Korea RTA rejected Koreas' argument adjudicating on Korea's adherence to minimum labour standards expressed in the ILO Constitution may result in the harmonization of labour standards contrary to Art. 13.1.3. The panel highlighting that core international labour standards form a 'floor' of

While recent RTAs of the Asia-Pacific region include such provisions that preserve their policy space,[103] the CPTPP of 2018 nonetheless includes more extensive labour obligations. In addition to provisions on international labour protections, the CPTPP's new clause on the domestic regulation of labour laws states:

> *Each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.*[104]

While the language is similar to prior US RTAs, the formulation requiring parties to 'adopt and maintain statutes and regulations' is new. This provision was also included in the USMCA of 2020, which specified strong reform obligations for Mexico's labour legislation regime. For instance, specific minimal wage provisions were also introduced in the USMCA rules of origin for automotive goods, such as the 'labour value content rule' requiring such goods to be produced by employees earning an average of USD 16 an hour.[105] The USMCA therefore serves as an example of an RTA further prescribing the level of protection afforded to workers.

An analysis of labour obligations demonstrates the delicate balance between labour legislation governed by international instruments, the RTAs, and carving out space for governments to determine their own level and methods of labour protections. Labour provisions in RTAs oscillate between these two poles. European and North American RTAs are characterized by providing for extensive labour obligations. Towards the other extreme, African and Asia-Pacific agreements, especially between developing countries, contain fewer labour-related provisions and express provisions that allow governments to determine their own levels of labour protection. South American RTAs position themselves in the middle of both extremes, with a lot of variations between agreements.[106] The sheer variety of labour regimes with differing regional

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protections: 'once the rules of the game are set, domestic labour law may then be set in accordance with local economic and social conditions, norms and cultures'. Panel of Experts Proceeding Constituted under Art. 13.15 of EU-South Korea (2011), para. 82.

103 *See* for instance, EU-Korea, Republic of (2011), Korea, Republic of-Turkey (2013), EU-Singapore (2019), UK-Japan (2021), UK-Korea, Republic of (2021).

104 Article 19.3 of CPTPP (2018). *See also* Art. 23.2 of USMCA (2020).

105 Office of the United States Trade Representative, *Report to Congress on the Operation of the United States-Mexico-Canada Agreement With Respect to Trade in Automative Goods* 5 (1 Jul. 2022), https://ustr.gov/sites/default/files/2022%20USMCA%20Autos%20Report%20to%20Congress.pdf (accessed 2 Mar. 2023).

106 South American Intra-Regional RTAs frequently contain both non-derogation provisions and right to regulate provisions, but do not go beyond that, *see* for instance, Chile-Colombia (2009), Peru-Chile (2009), Chile-Uruguay (2018). Argentina-Chile (2019) and Chile-Brazil (2022) even contain an obligation for parties to effectively implement their domestic labour legislation. Some inter-regional South American RTAs such as Nicaragua-Taiwan, China (2008) also provide for this, while others Japan-Peru (2012) do not contain any provisions on domestic labour obligations at all. South American RTAs with European and North American parties generally adapt the extent and shape of the labour obligations to their trading partner, *see* e.g., US-Chile (2004).

approaches can not only lead to normative incoherency in domestic labour regulation across the globe, but also create an uneven playing field for enterprises competing in trade between the RTA parties. In this context, it is worth noting that the ILO Declaration on Social Justice for a Fair Globalization of 2008, which is referred to by RTAs worldwide (as discussed in the following section), proclaimed that fair labour forms a cornerstone of economic policy, and that the violation of fundamental principles and rights at work cannot be invoked as a 'legitimate comparative advantage'[107] or justification for violating fundamental labour rights. Basing labour obligations in RTAs on international labour standards may assuage resulting discrepancies and level the playing field.

2.3 Obligations concerning international labour standards, rights, and principles

In 1998, in light of renewed momentum to promote labour rights, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (the 1998 ILO Declaration) was adopted.[108] Given the infrequent use of the ILO's mechanism for recourse in case of disputes, and the reluctance of WTO Members to oversee labour issues, facilitating compliance with international labour standards through traditional judicial means was not taken up within the multilateralist setting. Rather, it resulted in a decentralized enforcement system in which commitments to promote labour rights, obligations and standards are enforced bilaterally and plurilaterally in RTAs. Such developments were reflected in the language of RTAs. For example, some parties went from recognizing international labour standards and rights in their RTAs in the 2000s to mandating taking steps to ratify ILO conventions in the EU-Korea RTA of 2011, an obligation which is still embedded in RTAs to date.

The promotion of internationally recognized labour standards and rights was first mentioned in the 2000s with the EU–South Africa RTA, which includes a separate clause entitled 'Social Issues', specifying:

> *[The parties] recognise the responsibility to guarantee basic social rights, which specifically aim at the freedom of association of workers, the right to collective bargaining, the abolition of forced labour, the elimination of discrimination in respect of employment and occupation and the effective abolition of child labour. The pertinent standards of the ILO shall be the point of reference for the development of these rights.*[109]

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[107] ILO Declaration on Social Justice for a Fair Globalization of 2008. *See also* Gabrielle Marceau, *Instances of International Coherence in the International Social and Economic Order*, in *Women Shaping Global Economic Governance* 101–111 (Arancha González & Marion Jansen eds, London: Centre for Economic Policy Research Press 2019).

[108] *See* John D. French, *From the Suites to the Streets: The Unexpected Re-emergence of the 'Labor Question', 1994–1999*, 43(3) Lab. Hist. 285–304, 302–303 (2002).

[109] Article 86 of EU-South Africa (2000).

This clause or similar language became popular in EU agreements of this time[110] According to an ILO study, the RTAs of this period formed part of the 'second generation' of EU agreements that dealt with labour issues, despite being the first to refer to international labour standards.[111] Around the same time, the US (also in its 'second generation' of RTAs)[112] used stronger language when first referring to ILO commitments in the US–Jordan RTA of 2001 as it includes the additional obligation of ensuring that domestic law reflects the parties' international labour commitments:

> *The Parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in paragraph 6 are recognized and protected by domestic law.*[113]

From its first reference to internationally recognized labour rights, the US has used RTAs to ensure that these rights are protected under the parties' domestic law, differently from the EU approach of including a 'Social Issues' clause in its RTAs recognizing the Parties' responsibility to guarantee these rights.[114] This US RTA provision became a standardized one until the 2010s.[115] Similar affirmations also became systematized for subsequent Canadian RTAs.[116]

In addition to the 1998 Declaration, further ILO Declarations and Conventions were also referred to in RTAs, which the parties strive to implement domestically. Due to its 'relative indeterminacy and vagueness',[117] the Decent Work Agenda, as conceptualized by former ILO Director-General Juan Somavia in 1999, was a popular initiative in the ILO, which later became a well-established reference point in RTAs as well. It was first referred to in the 2007 MoU between the Southern African Development Community (SADC) and the ILO. From then on, the objective of attaining 'decent work' or committing to the ILO Decent Work Agenda or the '2006 Ministerial Declaration by the UN Economic and Social Council on Full Employment and Decent Work' (2006 UN Declaration) was found in forty-seven agreements and amending protocols of the repository prepared as part of this study,

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110 *See for instance*, EU-Chile (2003), EU-Montenegro (2010).

111 International Labour Organization, *Assessment of Labour Provisions*, *supra* n. 84, at 50.

112 *Ibid.*, at 50.

113 Article 6 of US-Jordan (2001).

114 *See for instance*, the US' description of labour issues in the 'May 10 Agreement' and the Trade Act of 2002. Office of the United States Trade Representative, *Bipartisan Agreement on Trade Policy* (May 2007), https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf (accessed 2 Mar. 2023). House Bill: H.R.3009, 107th Cong. (2001–2002), https://www.congress.gov/bill/107th-congress/house-bill/3009 (accessed 2 Mar. 2023).

115 *See* US-Chile (2003), US-Singapore (2003), US-Australia (2005), US-Morocco (2006), US-Bahrain (2006), CAFTA-DR (2006), US-Oman (2009).

116 *See* Canada-Costa Rica SA (2002), Canada-Peru SA (2009), Canada-Colombia SA (2011), Canada-Ukraine (2017).

117 Nicola Bonucci et al., *IGOs' Initiatives as a Response to Crises and Unforeseen Needs*, 19(2) Int'l Org. L. Rev. 423–482 (2022).

from 2008 onwards.[118] Notably, while the Decent Work Agenda was introduced in RTAs of all regions, it remains absent from US RTAs.

After ILO members agreed on Convention 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour in 1999, the US–Chile RTA of 2004 was the first RTA to set up a labour cooperation mechanism to facilitate compliance with the Convention, which was subsequently incorporated in eight further US agreements,[119] and thereafter included in Canadian agreements from the late 2000s onwards.[120] The US–Panama RTA of 2012 was the first RTA to mention the principles and standards of the UN International Convention of the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). Thereafter, the EFTA–Montenegro Agreement of 2012 was the first to reaffirm the principles of the 2008 ILO Declaration on Social Justice, which became a frequent trend in RTAs thereafter.[121]

A significant development occurred in 2011, when the EU introduced TSD chapters in RTAs. In a standardized clause, parties affirm their commitments to the 1998 ILO Declaration and the 2006 UN Declaration, and accordingly 'commit to respecting, promoting and realizing, in their laws and practices, the principles concerning the fundamental rights' such as the freedom of association, or eliminating forced and child labour.[122] While the EU–Central America RTA of 2013

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[118] *See* EU-CARIFORUM (2008), Canada-Peru (2009), East African Community Protocol (2010), Canada-Colombia (2011), EU-Korea (2011), Canada-Jordan (2012), EU-Central America (2012), EFTA-Montenegro (2012), Canada-Panama (2013), EU-Colombia, Peru, Ecuador (2013), EFTA-Central America (Costa Rica and Panama) (2013), EU-Cameroon (2014), Switzerland-China (2014), Korea-Turkey (2013), Canada-Honduras (2014), EFTA-Bosnia and Herzegovina (2015), New Zealand-Korea (2015), Colombia-Korea (2016), EU-Georgia (2016), EU-Moldova (2016), EU-SADC (2016), EAEU-Viet Nam (2016), Canada-Ukraine (2017), EFTA-Albania Amendment (2017), EFTA-Georgia (2017), EFTA-Serbia Amendment (2017), EU-Canada (2017), EU-Ukraine (2017), EFTA-Philippines (2018), EU-Japan (2019), EU-Singapore (2019), Chile-Indonesia (2019), EFTA-Ecuador (2020), EU-Kazakhstan (2020), EU-Viet Nam (2020), EFTA-Indonesia (2021), EFTA-Türkiye (2021), EU-Armenia (2021), EU-UK (2021), UK-CARIFORUM (2021), UK-Georgia (2021), UK-Iceland, Liechtenstein and Norway (2021), UK-Japan (2021), UK-Korea (2021), UK-Moldova (2021), UK-SACU and Mozambique (2021), UK-Ukraine (2021).

[119] This cooperation mechanism was put in place with reference to Convention 182 in US-Singapore (2004), US-Morocco (2006), US-Bahrain (2006), CAFTA-DR (2006), US-Oman (2009), US-Peru (2009), US-South Korea (2012), US-Colombia, US-Panama (2012) and USMCA (2020).

[120] Cooperation activities for the purposes of this Convention are also embedded in Canada-Colombia (2001), Canada-Peru (2009), Canada-Jordan (2012), Canada-Panama (2013), Canada-Honduras (2014), Canada-Israel Amendment (2019), and Canada-Ukraine (2017).

[121] *See* EFTA-Central America (Costa Rica and Panama) (2014), Switzerland-China (2014), EFTA-Bosnia Herzegovina (2015), EU-Georgia (2016), EU-Georgia (2016), EU-Moldova (2016), EU-SADC (2016), Canada-Ukraine (2017), EFTA-Albania Amendment (2017), EFTA-Georgia (201), EFTA-Serbia Amendment (2017), EU-Canada (2017), EFTA-Philippines (2018), EU-Singapore (2019), EFTA-Ecuador (2020), EU-Kazakhstan (2020), EU-Vietnam (2020), USMCA (2020), EFTA-Indonesia (2021), EFTA-Turkey (2021), EU-Armenia (2021), EU-UK (2021), UK-Georgia (2021), UK-Iceland, Liechtenstein and Norway (2021), UK-Japan (2021), UK-Moldova (2021), UK-SACU and Mozambique (2021).

[122] Article 13.5 of EU-South Korea (2012).

also specifically lists out the eight ILO conventions that the parties commit to,[123] most EU agreements typically refer to the 'internationally recognised core labour standards as contained in the fundamental Conventions of the [ILO]'.[124] Interestingly, in contrast, recent US RTAs, such as the US-Panama RTA of 2012[125] and the USMCA includes a footnote to its provision affirming the 1998 ILO Declaration: 'the obligations set out in this Article, as they relate to the ILO, refer only to the ILO Declaration on Rights at Work'.[126]

Another novel element of the EU's TSD chapter is its push for parties to ratify ILO Conventions:

> *The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as "up-to-date" by the ILO.*[127]

This clause became a standardized provision that was employed in five subsequent EU RTAs[128] and in the Korea–Turkey RTA of 2013.[129] Similar language concerning ratification also diffused to EFTA[130] and UK[131] agreements. Recent EU

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123 *See* Art. 286 of EU-Central America (2013). These are the Convention 138 concerning Minimum Age for Admission to Employment; Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; Convention 105 concerning the Abolition of Forced Labour; Convention 29 concerning Forced or Compulsory Labour; Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; Convention 111 concerning Discrimination in Respect of Employment and Occupation; Convention 87 concerning Freedom of Association and Protection of the Right to Organise; and Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.

124 While interpreting this provision, the Panel of Experts established under the 2011 EU–South Korea RTA stated that even in the absence of specific reference to ILO Conventions, the reference to principles concerning fundamental rights was sufficiently precise to invoke a legally binding obligation to implement the principles of freedom of association as expressed in the ILO Conventions 87 and 98. The Panel of Experts Proceeding Constituted under Art. 13.15 of EU–Korea (2011), paras 136–141.

125 Article 16.2(1), footnote 1 of US-Panama (2012).

126 *See* Art. 23.2 of USMCA (2020).

127 Article 13.4 of EU-South Korea (2011).

128 *See* EU-Canada (2017), EU-Japan (2019), EU-Singapore (2019), EU-Viet Nam (2020), EU-UK (2021). Exchange of information provisions on ratification are also included in EU-Colombia, Peru, Ecuador (2013), EU-Central America (2013).

129 A notable outlier for an RTA that uses similar language and includes no Western European party, is Korea-Türkiye (2012), which displays striking similarities to EU-South Korea (2011). It is an outlier, since Türkiye, then still actively seeking accession to the EU has not employed such language in former or later agreements, and South Korea has employed it only one other time-in the UK-Korea FTA (2021).

130 EFTA-Montenegro (2012), EFTA-Hong Kong, China (2012), EFTA-Central America (2014), EFTA-Bosnia and Herzegovina (2013), EFTA-Serbia (2017 amendment), EFTA-Albania (2017 amendment), EFTA-Georgia (2017), EFTA-Philippines (2018), EFTA-Ecuador (2020), EFTA-Turkey (2021), EFTA-Indonesia (2021). For instance, Art. 8.6.3 of EFTA-Indonesia (2021) reads: 'The Parties recall the obligations deriving from membership of the ILO to effectively implement the ILO Conventions, which they have ratified, and to make continued efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as "up-to-date" by the ILO'.

131 UK-Korea (2019), UK-Iceland, Lichtenstein, and Norway (2021), UK-Japan (2021), UK-EEA (2021).

and UK RTAs with Armenia, Georgia, Moldova, and Ukraine also refer to ratifying ILO conventions, but in a more flexible manner:

> *The Parties will also consider the ratification of the remaining priority and other conventions that are classified as up-to-date by the ILO.*[132]

The reference to internationally recognized labour standards and rights has become a global phenomenon and is expressed in agreements of all five regions examined in this study, although fewer are included in between developing country parties.[133] In the African region, reference to such ILO instruments is only found in RTAs that have been concluded with the EU, UK or the US,[134] except for SADC (2007). Of the eleven African agreements that entered into force in 2021, only four agreements[135] – those with the UK – make references to ILO commitments and declarations, which will typically be limited to cooperation-based provisions or apply only to the seamen of their vessels.[136] Similarly, of the forty-three Asia-Pacific Agreements that refer to ILO commitments, only seventeen of these are agreements were concluded without a North American or European trading partner.[137]

In summary, RTA obligations concerning international labour standards, rights, and principles can be categorized globally in four degrees in terms of their 'depth', referring to the inclusion of deeper policy commitments.[138] In the first category, such standards are recognized in 'Social Issues' clauses, such as in the EU–

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[132] Article 221 of UK-Georgia (2021). *See also* EU-Georgia (2016), EU-Moldova (2016), EU-Armenia (2021), UK-Moldova (2021), UK-Ukraine (2021).

[133] *See* for Asia-Pacific and South American RTAs specifically: Chile-Japan (2007), Nicaragua-Taiwan, China (2008), Australia-Chile (2009), New Zealand-Philippines (2009), Chile-Colombia (2009), Peru-Chile (2009), Peru-South Korea (2011), Türkiye-Chile (2011), Chile-Malaysia (2012), Hong Kong, China-Chile (2014), Chile-Uruguay (2018), Argentina-Chile (2019), Peru-Australia (2020), South Korea-Central America (2021), Chile-Brazil (2022).

[134] *See* e.g., EU-South Africa (2000), US-Morocco (2006), EU-ESA (2012), EU-SADC (2016), UK-Cameroon (2021), UK-ESA (2021), UK-Kenya (2021) and UK-SACU and Mozambique (2021).

[135] UK-SACU and Mozambique (2021), UK-Kenya (2021), UK-ESA (2021), UK-Cameroon (2021). In UK-Cameroon (2021), the parties merely commit to conclude negotiations on the 'use of international environmental standards and of the International Labour Organization and promotion of decent work'.

[136] 'The International Labour Organisation (ILO) Declaration on fundamental principles and rights at work shall apply as of right to seamen signed on UK vessels'. Art. 55 of UK-Kenya (2021).

[137] TPSEP (2006), Chile-Japan (2007), China-New Zealand (2008), Australia-Chile (2009), New Zealand-Malaysia (2009), Hong Kong, China-New Zealand (2011), Peru-Korea (2011), Korea-Turkey (2013), Hong Kong, China-Chile (2014), Korea-Australia (2014), New Zealand-Korea (2015), Colombia-Korea (2016), Chile-Indonesia (2019), Australia-Indonesia (2020), Peru–Australia (2018), New Zealand-Philippines (2009), Turkey-Chile (2009).

[138] Wang develops a framework in which he characterizes free trade agreements according to their breadth, depth, and strength, meaning the scope of policies areas covered, the intensity of the policy commitments, and the inclusion of a binding dispute settlement procedure respectively. Wang defines 'depth' in this context as being 'concerned with regulatory density – the penetration of trade agreements into domestic regulatory practice primarily through reduced regulatory barriers. The content of FTAs is becoming increasingly deeper. Deep agreements move beyond "a simple free

South Africa RTA of 2000, or in cooperation clauses, such as a 'Working together on trade and sustainable development' clause included in modern EU and UK RTAs,[139] and are also employed in agreements with African, Asia-Pacific or South American trading partners to date.[140] Such provisions are frequently dressed in language of a voluntary nature. For instance, Article 11 of EU-SADC RTA of 2016 provides that 'the Parties may cooperate, inter alia, in the following areas: (a) the trade aspects of labour or environmental policies in international fora, such as the ILO Decent Work Agenda and [Multilateral Environmental Agreements] MEAs'. In the second category, the parties will reaffirm their ILO commitments. Such language is common in Canadian, US, and UK agreements, present in South American agreements and later European agreements, but less so in Asian-Pacific and African ones.[141] For example, in Africa, only one agreement, the UK–SACU and Mozambique RTA of 2021 employs such language.[142] In the third category, the RTA parties recognize international labour standards in their domestic legislation or commit to implementing recognized international labour rights and obligations in domestic legislation, with examples including Asia-Pacific and North and South American RTAs.[143] The fourth category comprises 'deeper'[144] or more far reaching commitments for which the parties agree to ratify ILO conventions. This phenomenon only started in the early 2010s and is driven by the EU, EFTA, and the UK. While such language is found in recent EU agreements with Vietnam, Singapore, and Japan, it is not yet employed with trading partners from Africa and South America. While this trend shows an increase in the call for ratification

trade area" and contain deeper policy commitments (such as the harmonization of domestic regulation of financial services, and environmental standards). This is because behind-the-border measures have become a topic of increasing concern over the years. Two major indicia enable the evaluation of such depth: (1) regulatory cooperation and coherence, and (2) domestic law changes'. Heng Wang, *How to Assess Regional Trade Agreements? Deep FTAs v. China's Trade Agreements*, 54(2) Int'l Law. 247–279, 264 (2021).

139 *See for instance*, EU-Georgia (2016), EU-SADC (2016), EU-Viet Nam (2020), EU-Armenia (2021), UK-Moldova (2021), UK-SACU and Mozambique (2021).

140 *See* e.g., EU-South Africa (2000), Chile-China (2005 MoU), TPSEP (2006 MoU), Chile-Japan (2007 MoU), China-New Zealand (2008), Australia-Chile (2008), Australia-Chile (2009), Peru-Chile (2009 MoU), New Zealand-Malaysia (2010 SA), Hong Kong, China-New Zealand (2011 MoU), Türkiye-Chile (2011), Costa Rica-Singapore (2013), Hong Kong, China-Chile (2014), EU-SADC (2016), Chile-Indonesia (2019), UK-SACU and Mozambique (2021).

141 For South American RTAs, *see* for instance, Chile–Colombia (2006), Chile-Peru (2009), Chile-Uruguay (2018), and Chile-Brazil (2022).

142 Out of recent agreements, Annex VII of UK-SACU and Mozambique (2021) uses the most firm language stating that the parties 'reaffirm their commitments to internationally recognised core labour standards, as defined by the relevant ILO Conventions', which resembles the language of US-Morocco (2006).

143 As exemplified by Art. 19.2 of US-Korea (2012): 'Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)'.Other examples include: Nicaragua-Taiwan, China (2008), Chile-Colombia (2009), Argentina-Chile (2017), Chile-Uruguay (2018), Korea, Republic of-Central America (2021), Chile-Brazil (2022).

144 *See* Wang, *supra* n. 138.

and enforcement of ILO standards in RTAs, the actual impact of such provisions on increased implementation of ILO conventions domestically by parties remains to be seen.[145]

2.4 General exceptions clause for trade in goods

When the General Agreement on Tariffs and Trade (GATT) of 1947 was initially negotiated, the Contracting Parties agreed on certain exceptions to their multilateral trade commitments embedded in Article XX of the GATT. Under this provision, the Contracting Parties may justify derogations from GATT commitments in the interest of public morals (Article XX(a)) and human health (Article XX(b)), and to prevent trade in products made by prison labour (Article XX(e)). Historically, this provision was drafted amidst the Second World War with compatriots in war prisons. This language was initially included to avoid unfair trade and competition, and only later did 'the prohibition of imports made by prison labor […] take on moral or ethical implications since prison sentences involving hard labor have been imposed on political opponents in China and in the former [Union of Soviet Socialist Republics] USSR'.[146] While some suggest that GATT Article XX(e) can be read expansively to include forced labour and further labour issues, the ILO's interpretation of the term indicates differently: the ILO Convention No. 29 on Forced Labour (1930) explicitly excludes labour that is extracted under the supervision and control of a public authority from convicted persons from its scope.[147] To date, while GATT Article XX(e) is the only trade and labour link included in the WTO Covered Agreements from 1994 onwards,[148] in no dispute has any Member invoked Article XX(e) to justify an otherwise inconsistent trade measure.[149] The GATT language of

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[145] *See also* s. 4 for a reference to EU's use of pre-ratification conditionalities that conditions the RTA's entry into force on the ratification of ILO Conventions. *See also* Kristoffer Marslev & Cornelia Staritz, *Towards a Stronger EU Approach on the Trade-Labor Nexus? The EU-Vietnam Free Trade Agreement, Social Struggles and Labor Reforms in Vietnam*, Rev. Int'l Pol. Econ. (2022), https://doi.org/10.1080/09692290.2022.2056903.

[146] Virginia Leary, *Workers' Rights and International Trade: The Social Clause*, in *Fair Trade and Harmonization: Prerequisites for Free Trade?* 227 (Jagdish Bhagwati & Robert E. Hudec eds 1996). *See also* Elissa Alben, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101(6) Colum. L. Rev. 1410–1447 (Oct. 2001).

[147] Article 2(2)(c) ILO Convention No. 29; *See* Gabrielle Marceau, *Chapter 19 Trade and Labour*, in *The Oxford Handbook of International Trade Law* 539–570 (Daniel Bethlehem et al. eds, Oxford University Press 2009).

[148] Thomas Cottier & Alexandra Caplazi, *Labour Standards and World Trade Law: Interfacing Legitimate Concerns*, ResearchGate 3 (Oct. 2011), https://www.researchgate.net/publication/242465994_Labour_Standards_and_World_Trade_Law_Interfacing_Legitimate_Concerns (accessed 2 Mar. 2023).

[149] In the WTO United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products Panel Report, the Panel did mention that Art. XX(e) applies extra-territorially. United States-Restrictions on Imports of Tuna, GATT Doc. DS29/R (1994) (Report by the Panel not Adopted), 33 I.L.M. 839, at paras 5.26–5.27. *See also* Bradly J. Condon, *Chapter 4 The Evolution of*

paragraph (e) has significantly influenced exception clauses in RTAs. Similar language to GATT Article XX including paragraphs XX(a), (b), and (e) were employed in RTAs of the repository as early as the Australia–Papua New Guinea RTA of 1991.

Divergent approaches have developed towards the inclusion of exceptions to trade disciplines in RTAs, specifically for products of prison labour. In the 1990s, the exceptions clause of RTAs, particularly of the European region, did not include a reference to prison labour products.[150] They did however employ similar language to that of GATT Article XX(a) and (b), which could arguably cover labour issues.[151] In 1994, the NAFTA directly incorporated GATT Article XX, including its exception referring to prison labour, *mutatis mutandis* into its agreement.[152] Similar language has been frequently used in RTAs of the Asia-Pacific and South American region.[153] In the 2000s, some RTAs from all regions, particularly recent EU RTAs, started to explicitly write exception clauses in full instead of incorporating the provision *mutatis mutandis*.[154] Despite these developments, some other countries of the Asia-Pacific, North American, and South

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Jurisprudence on GATT Article XX, in *Environmental Sovereignty and the WTO: Trade Sanctions and International Law* 75–124, 89 (Brill Publishing 2006).

150 The authors have tracked over 100 RTAs with a European trading partner where the exception clause does not explicitly cover prison labour products. *See also* SADC (2007), CEFTA (2007), China-Mauritius (2021), Mauritius-India (2021).

151 The WTO has adopted an expansive and evolutive reading of GATT Art. XX(a) and its sister provision GATS Art. XIV(a) to account for animal cruelty considerations. *See* Appellate Body Report, *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, adopted 18 Jun. 2014. Appellate Body Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 Apr. 2005. *See also* Marceau, *supra* n. 147, at 5, and Gabrielle Marceau, *La place des considéerations liées aux conditions et standards de travail dans le système du commerce internaitonal de l'OMC*, in *Le Travail au XXIe siècle* 167–179, 175 (Alain Supiot ed., Ivry-sur-Seine, Les Editions de l'Atelier 2019).

152 *See* Art. 2101 of NAFTA (1994), which includes the phrase 'GATT Article XX and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement'.

153 *See for instance*, India-Singapore (2005), Chile-China (2006), Trans-Pacific Strategic Economic Partnership (2006), Japan-Brunei Darussalam (2008), Panama-Chile (2008), Chile-Colombia (ACE 24) (2009), China-Singapore (2009), Peru-Chile (2009), ASEAN-Australia-New Zealand (2010), Chile-Ecuador (ACE 65) (2010), Colombia-Triangulo del Norte (2010), India-Korea (2010), Peru-China (2010), Costa Rica-China (2011), Chile-Malaysia (2012), Panama-Peru (2012), Central America-Mexico (2013), Malaysia-Australia (2013), Mauritius-Turkey (2013), Chile-Vietnam (2014), Singapore-Taiwan China (2014), Gulf Cooperation Council-Singapore (2013), Mexico-Panama (2015), New Zealand-Korea (2015), Alianza del Pacifico (2016), Colombia-Korea (2016), Costa Rica-Colombia (2016), Honduras-Peru (2017), Chile-Uruguay (2018), Argentina-Chile (2019), ASEAN-Hong Kong China (2019), Chile-Indonesia (2019), Colombia-Israel (2020), Peru-Australia (2020), Mauritius-India (2021), Chile-Brazil (2022), Nicaragua-Taiwan China (2008), Turkiye-Chile (2011).

154 *See* e.g., EFTA-Mexico (2000), Singapore-New Zealand (2000), Pacific Island Countries Trade Agreement (PICTA) (2001), EU-Chile (2002), Singapore-Australia (2003), EFTA-Chile (2004), ASEAN-China (Goods) (2004), Japan-Mexico (2004), Jordan-Singapore (2004), New Zealand-Thailand (2005), United States-Australia (2004), ASEAN-Korea (2005), Panama-Singapore (2006), Trans-Pacific Strategic Economic Partnership (2005), Chile-Japan (2007), EU-CARIFORUM (2008), Canada-Peru (2008), EU-Pacific States (2009), Peru-Singapore (2009), ASEAN Trade in Goods Agreement (2010).

American regions, did not include a general exceptions clause for trade in goods in their RTAs at all and some RTAs continue to do so to date. Other RTAs employ similar language to GATT Article XX(a), (b), and (e) in their list of exceptions for the RTAs' rules for governing public procurement.[155] Today, the express inclusion of GATT Article XX(a), (b), and (e) language is common in recent agreements such as UK RTAs post-Brexit.[156] For instance, the AfCFTA of 2019 is the only intra-regional African RTA to expressly write an exceptions clause in full that relates to the products of prison labour.[157]

The language of the general exceptions clause in RTAs has changed little since 1947. The scope of provisions employing the language of GATT Article XX(e) do not deviate from the term 'prison labour' and do not refer explicitly to 'forced labour' or other labour issues.[158] Three exceptions to this trend are identified. The revised Caribbean Community and Common Market (CARICOM) agreement of 2006, comprises an additional exception:

> *(f) relating to the products of prison labour;*
> *(g) relating to child labour;*[159]

Similarly, the EU – Caribbean Forum of African Caribbean and Pacific States (CARIFORUM) RTA of 2008 and the UK–CARIFORUM RTA of 2021 are the only agreements that clarify that their exceptions clause is to be interpreted broadly so as to account for child labour:

> *The Parties agree that, in accordance with Chapter 5 of Title IV, measures necessary to combat child labour shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health.*[160]

These references to child labour in exception clauses of RTAs are rare to date. It is of note that other labour issues are frequently included in distinct positive

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155 *See* e.g., NAFTA (1994), Israel-Mexico (2000), EC-Mexico (2000), EFTA-Mexico (2001), EU-Chile (2003), Singapore-Australia (2003), US-Chile (2004), EFTA-Chile (2004), US-Singapore (2004), US-Australia (2005), CAFTA-DR (2006), Panama-Singapore (2006), US-Bahrain (2006), EU-CARIFORUM (2008), US-Peru (2009), Canada-Peru (2009), US-Oman (2009), Colombia-Chile (2009), Canada-Colombia (2011), EFTA-Peru (2011), US–Panama (2012), EFTA–Ukraine (2012), Canada-Panama (2013), EU-Colombia, Peru, and Ecuador (2013), EU-Central America (2013), Costa Rica-Singapore (2013), Canada-Honduras (2014), EFTA–Gulf-GCC (2014), Gulf–GCC-Singapore (2015), Canada-Ukraine (2017), EFTA-Georgia (2017), Colombia-Israel (2020), USMCA (2020), EFTA–Ecuador (2020), EU-Kazakhstan (2020), Korea-Central America (2021).

156 *See* e.g., UK-Côte d'Ivoire (2021), UK-Ghana (2021), UK-Cameroon (2021), UK-CARIFORUM (2021), UK-ESAS (2021), UK-Kenya (2021), UK-Pacific States (2021), UK-SACU and Mozambique (2021).

157 *See* Art. 26 of AfCFTA (2019).

158 Some have argued that under exception clauses similar to GATT Art. XX(e), RTA parties would only be able to justify trade restrictions for products of prison labour, but not for products related to other labour issues, such as those derived from child labour.

159 Article 226 of CARICOM (2006).

160 Article 224 of EU-CARIFORUM (2008) and Art. 224 of UK-CARIFORUM (2021).

obligations elsewhere in the RTA. It remains to be seen whether RTA adjudicators, like the WTO Appellate Body, will also adopt an expansive reading of 'GATT Article XX(a) and (b)'-type exceptions in RTAs, that possibly accounts for labour issues.

3 THE IMPLEMENTATION OF LABOUR OBLIGATIONS IN RTAS

Various RTAs not only prescribe the various labour objectives, standards, and rights that the parties should adhere to, but they also lay out how the parties may implement these labour commitments. For example, some RTAs specify the process and mechanism via which the parties will cooperate to advance their labour commitments under the RTA. Some RTAs also provide for dispute settlement resolution processes to facilitate compliance with their labour commitments. An institution or working group established under the RTA may be tasked with overseeing both cooperation activities and resolving disputes.[161] Sections 3.1 and 3.2 will discuss these two forms of treaty implementation respectively.

These two approaches have been singled out due to their prevalence among RTAs, while other approaches to facilitate compliance have also evolved. For instance, the EU provided additional and unilateral benefits under their General Scheme of Preferences (GSP) to those developing countries that have ratified fundamental labour conventions. [162] The US similarly conditions its GSP on the beneficiaries taking steps to grant internationally recognized workers' rights. The US also employed pre-ratification conditionalities as an enforcement tool in several RTAs such as US–Oman, US-Morocco and US-Panama.[163] Under such conditionalities, the entry into force of an

[161] *See for instance*, the Association Council under EC-Slovakia (1995).

[162] *See* Marceau *supra* n. 151, at 173. *See also* EU Council Regulation no 980/2005 of 27 Jun. 2005, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32005R0980 (accessed 02 Mar. 2023), US Generalized System of Preferences, Guidebook: https://ustr.gov/sites/default/files/gsp/GSPGuidebook_0.pdf (accessed 2 Mar. 2023). Furthermore, by tying unilateral tariff preferences to labour commitments, a country is applying a method of differentiation based on non-product related process and production methods (PPMs). As the WTO US – Import Prohibition of Certain Shrimp and Shrimp Products dispute highlighted, there are specific obstacles to such an approach for unilateral trade policies in WTO law, whereas in RTAs there are less obstacles for this, as parties are free to chose whatever sustainability preferences they wish, as long as they meet the general minimum requirements for RTAs (as specified in Art. XXIV GATT and Art. V GATS). Additionally, with EFTA-Indonesia (2021), the first regional agreement encompassing a regulatory distinction between conventional and sustainable production, as a precedent, PPM-based tariff preferences might enter the realms of future RTAs as well. *For more information see* Charlotte Sieber-Gasser, *Is the Future of Preferential Trade in Sustainable Production Only?*, https://www.tradeexperettes.org/blog/articles/is-the-future-of-preferential-trade-in-sustainable-production-only (accessed 12 Jan. 2022).

[163] *See* Franz Ebert, *Social Dimensions of Free Trade Agreements*, International Labour Organization and International Institute for Labour Studies 36 (2015), wcms_228965.pdf (ilo.org) (accessed 30 Jan. 2023).

RTA is subjected to the parties' ratification of certain ILO Conventions. Due to the success of Viet Nam's ratification of key ILO Conventions as a part of the obligations under the EU–Viet Nam FTA, the EU may also be considering incorporating pre-ratification conditionalities in its future RTAs.[164]

3.1 Cooperation clauses on labour commitments

Cooperation clauses pertaining to social issues are frequently not subjected to dispute resolution procedures and can be traced back to RTAs concluded with African and European trading partners in the 1990s. Starting with NAALC in 1994, North American RTAs institutionalized the implementation of labour commitments, in which a council of labour ministers undertakes various cooperative activities, which have expanded extensively with the CPTPP and the USMCA. RTAs of the repository seem to demonstrate that cooperation activities with civil society actors and international organizations specified in the EU and US RTAs have now become institutionalized, while African, South American, and Asia-Pacific RTAs are gradually expanding their more modest cooperation provisions. Even though cooperation clauses are frequently understood as the softer method to facilitate compliance with RTA labour obligations, economic studies show that deeper cooperation provisions in RTAs are particularly beneficial for the commercial interests and exports of low-income countries.[165]

Throughout the 1990s, cooperation clauses between CIS+, eastern European, and west Asian countries included obligations, such as the exchange of information[166] for the purpose of cooperating on economic policy, rather than social policies. However, in EC RTAs, the general objective of cooperation provisions was to further development.[167] Labour cooperation provisions were also focused on workers' health and safety[168] or transit issues[169] during this time. These provisions, often titled 'Social Cooperation' (such as in Article 87 of the 1992 EC–Poland RTA), provide that the 'Parties shall aim at improving the level of protection of the health and safety of workers'. This RTAs also specified a non-

[164] *See* European Parliamentary Research Service, *Labour Rights in EU Trade Agreements: Towards Stronger Enforcement*, TradeExperettes (Jan. 2022), https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698800/EPRS_BRI(2022)698800_EN.pdf (accessed 12 Jan. 2022).

[165] Céline Carrère, Marcelo Olarreaga & Damian Raess, *Labor Clauses in Trade Agreements: Hidden Protectionism?*, 17 Rev. Int'l Org. 453–483 (2022), https://doi.org/10.1007/s11558-021-09423-3.

[166] *See* e.g., Armenia – Kyrgyzstan (1995), Turkmenistan-Ukraine (1995), Azerbaijan-Ukraine (2006).

[167] *See* e.g., Art. 71 of EC-Poland (1994): 'The Community and Poland shall establish cooperation aimed at contributing to Poland's development'.

[168] All bilateral EC agreements of this period focused on worker's health and safety.

[169] All non-EC, east European agreements of this period focused on transit issues in connection with cooperation.

exhaustive list of cooperation activities, such as 'the provision of technical assistance; the exchange of experts; cooperation between firms; information and training operations'.[170] In addition, particular priority areas for cooperation on employment policies included the 'organization of the labour market; job-finding and careers advice services; planning and realization of regional restructuring programmes; encouragement of local employment development'.[171] Such language was employed in further EC RTAs during the 1990s.[172]

During this period, African RTAs included more extensive cooperation provisions compared to the aforementioned EC RTAs pertaining to labour. With the Lome IV agreement between the EC and African, Caribbean, and Pacific (ACP) countries, cooperation clauses dressed in binding language were first included with a particular emphasis on capacity building, technical support, and the development of ACP countries,[173] including enhancing the status of women,[174] and healthcare.[175] The Abuja Treaty of 1994 further provides a variety of binding cooperation clauses that are tailored to specific sectors, including for human resources.[176] While the 1995 Treaty of the Economic Community of West African States (ECOWAS) builds on the language of the Abuja Treaty,[177] COMESA of 1994 additionally includes an extensive labour cooperation chapter in which the Member States:

> *shall promote close co-operation […] particularly with respect to:*
> *(a) employment and working conditions;*
> *(b) labour laws; […]*
> *(e) the prevention of occupational accidents and diseases; […]:*
> *(g) the right of association and collective bargaining between employers and workers;* [178]

Further inter-regional African RTAs during that time include softer cooperation clauses on social development.[179] Unlike some EC RTAs, cooperation provisions of African RTAs during that period extended beyond addressing development concerns, and focused on labour protections.[180]

In 1994, the NAALC included extensive labour cooperation provisions. Similar to the COMESA of 1994, the language employed in the NAFTA was

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170 Article 87 of EC-Poland (1994).
171 *Ibid*.
172 *See* EC-Romania (1993), EC-Bulgaria (1993), EC-Slovak Republic (1995), EC-Slovenia (1995). Also found later in EU-North Macedonia (2004), EU-Montenegro (2010), EU-Serbia (2013).
173 Article 4 of Lome IV (1990) reads 'Support shall be provided in ACP-EEC cooperation for the ACP States' efforts to achieve comprehensive self-reliant and self-sustained development'.
174 Article 153 of Lome IV (1991).
175 Article 154 of Lome IV (1991).
176 Article 71 of Lome IV (1991).
177 COMESA also includes a provision on cooperation for human resources (Art. 156). *See also* Art. 60 of ECOWAS (1995).
178 Article 143 of COMESA (1994).
179 *See* Arts 45, 46, 63 and 71 of EFTA-Tunisia (1998), and Art. 1 of Jordan-Morocco (1999).
180 *See* Art. 143 of COMESA (1994).

binding and included a list of priority areas for cooperation activities pertaining to labour protections such as occupational health and safety and child labour.[181] NAALC also stipulated various ways in which these cooperation activities could be carried out, such as through seminars, training sessions, working groups and conferences, joint research projects, and technical assistance.[182] NAALC provided for institutionalized cooperation processes: it established a council comprising parties' labour ministers that met annually and were responsible for carrying out the cooperation functions.[183] NAALC was also the first RTA to 'establish cooperative arrangements with the ILO' to draw on the organization's expertise.[184] NAALC was an influential agreement that informed the language of cooperation provisions in other RTAs signed by North American parties to date.[185]

The NAFTA experience influenced US RTAs of the 2000s that no longer included a side-agreement on labour cooperation,[186] but included an Annex to the labour chapter of the RTA, entitled 'Labor Cooperation Mechanism'. For instance, the parties to the US-Chile RTA of 2004 established national contact points in the agreement's Annex:

> *Each Party shall designate an office within its ministry of labor to serve as a point of contact to support the work of the Labor Cooperation Mechanism.*[187]

Under this agreement, the parties' labour ministries oversee a number of cooperation activities such as reviewing a work programme, advancing the effective implementation of the ILO 1998 Declaration, and collecting data relevant to advancing labour protections.[188] This 'Labor Cooperation Mechanism' was thereafter established in nine US RTAs in the 2000s shaping the US approach to cooperation clauses.[189]

In the late 2000s Asia-Pacific and South American RTAs, most of them between developing countries, increasingly included cooperation provisions on

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[181] Article 11 of NAALC (1994).
[182] *Ibid*.
[183] *See* Arts 9(1) and 9(3) of NAALC (1994).
[184] Article 45 of NAALC (1994).
[185] *See for instance*, Canada-Chile SA (1997), Canada-Costa Rica SA (2002), Canada-Panama SA (2013), Canada-Honduras SA (2014), Canada-Ukraine (2017).
[186] US-Jordan (2001) is an exception, which has only one provision on labour cooperation. Art. 6.5 of the agreement reads 'The Parties recognize that cooperation between them provides enhanced opportunities to improve labor standards. The Joint Committee established under Article 15 shall, during its regular sessions, consider any such opportunity identified by a Party'.
[187] Annex 18.5(2) of US-Chile (2004).
[188] *See* Annex 18 of US-Chile (2004).
[189] *See* US-Singapore (2004), US-Chile (2004), US-Morocco (2006), US-Bahrain (2006), US-Oman (2009), US-Korea (2012). Some agreements establish a 'Labor Cooperation Mechanism' within the RTA's labour chapter that employs similar language: CAFTA-DR (2006), US-Peru (2006), US-Colombia (2012), US-Panama (2012).

labour issues as well.[190] While cooperation clauses in many Asia-Pacific RTAs pertained solely to trade, such as customs cooperation,[191] others in this region slowly developed to include cooperation provisions on social policy.[192] Cooperation clauses frequently related to human resource development, education, or capacity building, rather than promoting labour standards. While these agreements provided for the ways in which such cooperation activities can be carried out, focusing on the exchange of information or the development of collaborative training,[193] few of these RTAs established an institutional forum to implement such activities.

In the 2010s, the EU streamlined and institutionalized cooperation on labour issues in its RTAs' TSD chapters. Inspired by cooperation clauses of North American RTAs, EU RTAs introduced designated contact points and specialized TSD sub-committees, which parallel the 'labour affairs councils' as specified in US RTAs.[194] The EU RTAs also mandated the establishment of Domestic Advisory Group (DAG) for each party, which are unique institutions, but comparable to long established 'national labour advisory' or consultative 'committees' that parties 'may convene' under North American RTAs.[195] The DAGs are tasked with 'advising on the implementation' of the TSD chapter and comprise members from civil society organizations including worker union representatives. DAGs take part in an annually organized 'Civil Society Forum' to exchange information on the implementation of the TSD chapter, the outcome of which can be directly submitted to the parties.[196]

EU RTAs from the 2010s onwards are similar to the North American RTAs as they also used stronger language in their cooperation commitments in which the parties 'commit to' initiating cooperative activities that are laid out in a specified annex or provision.[197] With the introduction of the TSD chapter, the EU also included review clauses regarding its implementation:

> *The Parties commit to reviewing, monitoring and assessing the impact of the implementation of this Agreement on sustainable development, including the promotion of decent work, through their*

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190 *See for instance*, Chile-China (2006), Nicaragua-Taiwan, China (2008), China-New Zealand (2008), Australia-Chile (2009), Peru-Chile (2009), Chile-Colombia (2009), Peru-China (2010).

191 *See for instance*, Mainland and Hong Kong Closer Economic Partnership (2003), GUAM (2003).

192 Article 3 of Singapore-Australia (2003).

193 *Ibid*.

194 *See* e.g., Art. 13.12 of EU-South Korea (2011).

195 *See* Art. 17 of NAFTA (1994). *See also* Canada-Chile SA (1997), US-Singapore (2004), US-Chile (2004), US-Bahrain (2006), CAFTA-DR (2006), Canada-Peru (2009), US-Oman (2009), US-Peru (2009), Canada-Colombia SA (2011), Canada-Jordan SA (2012), Canada-Panama SA (2013), Canada-Ukraine (2017).

196 *See for instance*, Arts 13.12 and 13.13 of EU-South Korea (2011).

197 *See* Annex 13 of EU-South Korea (2011), also EU-Colombia, Peru, Ecuador (2013), EU-Central America (2013), EU-Moldova (2016), EU-Georgia (2016), EU-SADC (2016) EU-Canada (2017), EU-Japan (2019), EU-Singapore (2019), EU-Viet Nam (2020).

respective participative processes and institutions, as well as those set up under this Agreement, for instance through trade-related sustainability impact assessments.[198]

Although North American RTAs in the 2010s largely maintained the same features of their previous cooperation provisions introduced in prior agreements, some novelties such as providing for increased cooperation with the ILO were introduced.[199] Furthermore, the CPTPP and the USMCA further enhanced their cooperation provisions, by including a list of extensive cooperation activities that advance labour protections and by making the establishment of a civil society advisory body mandatory for all parties.[200]

From the 2010s onwards, cooperation provisions became more frequent in Asia-Pacific and South American RTAs, such as the New Zealand - Malaysia RTA and Peru - China RTA of in 2010, and Turkey - Chile RTA and Peru - South Korea RTA of 2011.[201] Recent RTAs of these regions, such as the South Korea-Central America RTA of 2021, show increasing similarities to those institutionalized cooperation mechanisms introduced by North American RTAs earlier.[202] In contrast, African RTAs, especially intra-region ones, display a continuous reluctance to incorporate institutional mechanisms to oversee the cooperation activities on labour in their RTAs.[203] Nonetheless, cooperation provisions have become more extensive in inter-regional African RTAs in recent years, and have been embedded for specific sectors.[204] Especially, since Brexit, agreements between Africa and the UK are largely focused on 'Development Cooperation' with reference to cooperation on social development and labour in line with the UK's Economic Development Strategy of 2017.[205] The language employed in

198 Article 13.10 of EU-South Korea (2011).

199 *See for instance*, Canada-Jordan SA (2012), Canada-Honduras SA (2014), CPTPP (2018). Art. 19.12 of CPTPP (2018) reads: 'The Parties shall, as appropriate, liaise with relevant regional and international organisations, such as the ILO and APEC, on matters related to this Chapter'.

200 *See* CPTPP (2018) and USMCA (2020).

201 *See also* Hong Kong, China-New Zealand (2011), Korea-Türkiye 2013, Malaysia-Australia (2013), Costa Rica-Singapore (2013), New-Zealand-Taiwan, China (2013), Hong Kong, China-Chile (2014), Korea-Australia (2014), Chile-Thailand (2015), New Zealand-Korea (2015), Chile-Uruguay (2018), Chile-Indonesia (2019), Argentina-Chile (2019), Peru-Australia (2020), Australia-Indonesia (2020), China-Mauritius (2021), Chile-Brazil (2022).

202 *See* Art. 16.5 and 16.6 of Korea-Central America (2021).

203 Labour-related cooperation provisions in African RTAs provide in most cases for decentralized and not institutionalized implementation, *see* e.g., Art. 143 of COMESA (1994) that provides that 'The Member States shall promote close co-operation between themselves in the social and cultural fields, particularly with respect to: (a) employment and working conditions; (b) labour laws '. This is also the case, for instance, for the AEC (1994), ECOWAS (1995), and EAC (2000), as well as for newer inter-regional RTAs like EU-SADC (2016) and UK-SACU and Mozambique (2021). A notable exceptions is US-Morocco (2006), which sets up a 'Labor Cooperation Mechanism' in line with other US RTAs.

204 *See for instance*, EU-ESA (2012), EU-Côte d'Ivoire (2016), EU-SADC (2016), EU-Ghana (2017), China-Mauritius (2021).

205 *See* UK-ESA (2021), UK-Kenya (2021), UK-SACU and Mozambique (2021), UK-Ghana (2021), UK-Côte d'Ivoire (2021). *See also* UK Department for international Development, *Economic*

these UK RTAs, for instance in Article 13 (Annex VII) of the UK-SACU and Mozambique RTA of 2021 which states that '[The parties] agree to enhance cooperation in this area', remains however softer than the one employed in North American and European RTAs, such as the US - Colombia RTA of 2012 (Annex 17.6) which states that 'the Parties shall use any means they deem appropriate to carry out activities'.

In summary, cooperation provisions have generally evolved to increasingly provide for institutional mechanisms that oversee cooperation activities, such as those frequently included in European and North American RTAs. While cooperation efforts are gradually expanding worldwide, including in African, Asia-Pacific, and South American RTAs, further questions arise as to their effectiveness; as for some RTAs, such as those of the EU, 'cooperative activities, which are envisaged as central to the ethos of the TSD chapters, have not been systematically implemented'.[206]

3.2 Dispute resolution processes for labour commitments

While various countries incentivise the implementation of RTA labour provisions by enhancing cooperation between the parties, some RTAs also include a formalized dispute resolution procedure for labour issues. A variety of binding and non-binding early dispute resolution procedures for labour commitments existed in few RTAs in the 1990s. In 1994, the NAALC introduced a binding dispute resolution approach for labour commitments, elements of which have been found in other North American RTAs. In 2011, the EU established a unique not-fully binding dispute resolution process for labour issues with the introduction of the TSD chapter.[207] In recent years there have been additional developments in the US and EU approaches to labour-related dispute settlement. The recent decision by the EU to shift to a fully binding enforcement approach with the currently discussed EU-New Zealand RTA and the USMCA's new Facility Specific Rapid Response Labor Mechanism (RRLM) may indicate a broader paradigm shift

Development Strategy: Prosperity, Poverty and Meeting Global Challenges (Jan. 2017), https://www.gov.uk/government/publications/dfids-economic-development-strategy-2017 (accessed 15 Jan. 2023).

[206] James Harrison, *The Labour Rights Agenda in Free Trade Agreements*, 20(5) J. World Inv. & Trade 705–725 (2019), https://doi.org/10.1163/22119000-12340153.

[207] There is no agreement on a definition of binding dispute settlement systems. In this study's database, only those dispute settlement systems which are cumulatively compulsory, obligatory, time-bound with conclusions which must be implemented with right to retaliation, and without allowing parties to disagree. This determination is based on the language of the provision, and whether the RTA notes that the final dispute settlement is binding and final on the Parties, such that Parties are required to implement the findings of the report. The ability to retaliate with countermeasures or seek remedies via monetary assessments, is not the determinative factor for this study for identifying binding dispute resolution mechanisms.

towards the greater enforcement of RTA labour commitments in the RTAs (*see* section 3.2[d] for a more detailed discussion on this).

The authors of this study have identified three approaches to the inclusion of dispute resolution processes for labour commitments in RTAs.[208] Firstly, labour commitments can be enforced through the RTA's general dispute resolution mechanism (GDRM). An RTA's GDRM is frequently included in one of its final chapters that is dedicated to the resolutions of disputes that may arise under the RTA. Either the general dispute settlement chapter specifies a list of chapters or provisions that fall within its scope, or the mechanism applies to all provisions of the RTA, including those on labour, unless provided otherwise. Secondly, labour-related complaints can be brought forth under a specific dispute resolution process (SDRP) that applies to specific provisions or chapters of an RTA. Frequently, if an agreement has a SDRP for labour provisions, complaints under these provisions cannot be brought under the general dispute settlement chapter of the agreement, or only on certain conditions.[209] One example includes when labour provisions are found in the investment chapter of the agreement, which may regulate the employment of 'aliens' or foreign nationals[210] or restrictions that safeguard balance of payments for economic development purposes.[211] These provisions are also subject to a SDRP, such as investor-state dispute settlement.[212] Thirdly, some labour provisions of RTAs are not enforceable as they do not fall under the scope of the agreement's GDRM nor any other binding SDRP for labour-related matters.[213] Sometimes, labour provisions are subject to both an SDRP as well as a GDRP.[214] These three approaches have been employed differently in RTAs of various regions and countries over time. For this reason, the use of dispute resolution processes for labour provisions in RTAs is discussed chronologically

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[208] *See also* Marva Corley-Coulibaly, Gaia Grasselli & Ira Postolachi, *Promoting and Enforcing Compliance With Labour Provisions in Trade Agreements: Comparative Analysis of Canada, European Union and United States Approaches and Practices*, forthcoming, for a deep dive into the evolution of the labour-related dispute settlement mechanisms of the EU, US and Canada RTAs.

[209] For example, Art. 16.6 of US-Morocco (2006) notes as follows: 'Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under any provision of this Chapter other than Article 16.2.1(a)'.

[210] *See* Art. 8 (Ch. IV) of US-Vietnam (2001).

[211] *See for instance*, Art. 12 of Singapore-Australia (2003).

[212] *For instance*, Panama-Taiwan, China (2004) not only allows for use of the agreements GDRM under Art. 10.16, but Art. 10.21(1) also allows an investor to submit a claim under: '(a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention; (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; (c) the UNCITRAL Arbitration Rules; or (d) the ICC Arbitration Rules'.

[213] *See for instance*, Ch. 12 on Economic Cooperation of China-Mauritius (2021) i.e., excluded from the RTA's GDRM as specified in Art. 12.4 of the agreement.

[214] *See for instance*, Art. 19.15 of the CPTPP (2018).

starting with early dispute resolution processes of the 1990s to more formalized, mandatory, and complex procedures employed in modern RTAs.

3.2[a] *Early Dispute Resolution: A Variation of Binding and Non-binding Approaches*

Dispute resolutions processes applicable to labour provisions were established in RTAs as early as the 1990s. For instance, the EC–Poland RTA of 1992 established an Association Council that comprised members of the EC's Commission and Council as well as governmental ministers that would all meet at a ministerial level once a year under its GDRM.[215] Among other roles, the Association Council was tasked with the interpretation and settlement of disputes by means of a decision. In the event that the dispute was not settled by the Association Council, the parties could refer the matter to arbitration.[216] While agreements during the 1990s had few labour provisions, some provisions concerning the free movement of labour,[217] the approximation of labour legislation,[218] and the right to regulate labour conditions[219] could be enforced by the Association Council or through arbitration.[220]

During this time, CIS+, Eastern European, and Western Asian countries did not include extensive GDRM provisions, and frequently only provided for inter-party deliberations in which the parties could enter into consultations or negotiations to come to a mutually agreed solution.[221] More commonly, agreements between Eastern European, as well as Western Asian countries established a 'Joint Committee' and provided that parties shall exchange information and, at the request of either Party, hold consultations within the Joint Committee. Such language was replicated for twenty-nine agreements within this region between 1997 and 2010.[222] Apart

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[215] Articles 102–103 of EC-Poland (1992).
[216] Article 105 of EC-Poland (1992).
[217] Article 37 of EC-Poland (1992).
[218] Article 69 of EC-Poland (1992).
[219] Article 58(1) of EC-Poland (1992).
[220] Article 40 (EA 113) of EC-Slovenia (1997), EC-Slovakia (2005).
[221] Starting from the Russia-Turkmenistan (1993), CIS+ countries agreements merely provide that 'disputes between Contracting Parties, which are related to interpretation or application of provisions of this Agreement, shall be settled by means of negotiations'. *See also* Kyrgyzstan-Uzbekistan (1998), Armenia-Kazakhstan (2001).
[222] *See for instance*, Croatia-North Macedonia (1997), Slovakia-Türkiye (1998), Czech Republic-Türkiye (1998), Estonia-Türkiye (1998), Lithuania-Türkiye (1998), Romania-Türkiye (1998), Croatia-Slovenia (1998), Bulgaria-Türkiye (1999), Macedonia-Türkiye (2000), Latvia-Türkiye (2000), Poland-Türkiye (2000), Armenia-Kazakhstan (2001), Bosnia and Herzegovina-Macedonia (2002), Bosnia and Herzegovina-Slovenia (2002), Estonia-Poland (2002), Croatia-Türkiye (2003), Bosnia and Herzegovina-Croatia (2003), Bosnia Herzegovina-Romania (2003), Türkiye-Bosnia and Herzegovina (2003), Albania-Croatia (2003), Croatia-Lithuania (2003), Bulgaria-Bosnia and Herzegovina (2004), Albania-Bosnia and Herzegovina (2004), Croatia-Moldova (2004), Albania-Serbia and Montenegro (2004), Moldova-Serbia and Montenegro (2004), Croatia-Serbia and Montenegro (2004), Bulgaria-Serbia and Montenegro (2004), Moldova-Bosnia and Herzegovina (2004), Albania-Türkiye (2003), Türkiye-Serbia and Montenegro (2010).

from two of these agreements,[223] these RTAs specify that the resulting decision of the consultations is legally binding:

> *If the representative of any Contracting Party in the Joint Committee has accepted a decision subject to the fulfilment of internal legal requirements, the decision shall enter into force.*[224]

Similarly, African[225] and Asia-Pacific[226] agreements of that period, mostly between developing countries, would typically provide for consultations, and only rarely also include binding third-party adjudication. This consultation-based approach was maintained for intra-African agreements until today; the African RTAs that do provide for formal dispute resolution procedures with third-party adjudication and the possibility of requesting remedies, are those that were concluded with a European or North American trading partner. For instance, modern UK agreements with African trading partners provide for government consultations, third party adjudication, and surveillance mechanisms, however, they do not provide for countermeasures.[227]

3.2[b] *The Influence of NAFTA 1994 and the Adoption of Binding Dispute Resolution for Labour Worldwide*

In 1994, NAALC, revolutionized the legal landscape of enforcing labour provisions in RTAs by providing for a SDRP for the resolution of labour issues that may arise under the side agreement on labour. NAALC was the first agreement to provide for a variation of complex and intensive dispute resolution procedures, such as alternative dispute resolution (ADR). Notably, the agreement mandates that 'each Party shall establish a National Administrative Office (NAO) at the federal government level', which serves as a national contact point that may request formal consultations.[228] NAALC also provided for an *ad-hoc* 'Evaluation Committee of Experts' which could issue a non-binding set of recommendations.[229] If the matter was unresolved, parties could request for an arbitral panel for obligations concerning occupational safety and health, child labour or minimum wage technical labour

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[223] The two agreements that do not include this provision are Moldova-Serbia and Montenegro (2004), and Croatia-Serbia and Montenegro (2004).

[224] Article 34(3) of Croatia-Macedonia (1997). Note that there are minor deviations in language in the provision. *See* for instance Türkiye-Serbia and Montenegro (2010): 'If a representative in the Joint Committee of a Party to this Agreement has accepted a decision subject to reservation of the fulfilment of internal legal requirements the decision shall enter into force'.

[225] *See* COMESA (1994), Jordan-Morocco (1999), EFTA-Morocco (1999), EAC (2000), Türkiye-Tunisia (2005), Morocco-Türkiye (2006), Agadir agreement (2006), Egypt-Türkiye (2007), Mauritius-Pakistan (2007) (consultations only), Mauritius-Türkiye (2013).

[226] *See for instance*, Armenia-Iran (1997), GCC (2003), PCTA (2003), Afghanistan-India (2004).

[227] *See for instance*, UK-SACU and Mozambique (2021), UK-ESA (2021).

[228] Article 15 of NAALC (1994).

[229] *See* Arts 23(1) and 24(2) of NAALC(1994). These may be further deliberated upon in an renewed set of government consultations according to Art. 27 of NAALC (1994).

standards[230] that also allowed for trade remedies in the form of a monetary enforcement assessment and the suspension of tariff concessions[231]

The dispute settlement procedures of the NAALC have been influential on subsequent RTAs in the North and South American regions, which RTAs borrow elements of the NAALC dispute resolution mechanism[232] While not all aspects of the NAALC SDRP were taken up in subsequent US RTAs,[233] mandating the establishment of national contact points in RTAs became a global phenomenon and was established in thirty-nine agreements thereafter. A similar public submission procedure for individuals or civil society stakeholders was also later employed in South American RTAs, such as Chile-Paraguay RTA.[234] Following the NAALC, Canadian bilateral RTAs included an SDRP similar to the NAALC, however, without the possibility of suspending tariff concessions as a last resort.[235]

Amidst domestic negotiations on the US 2002 Bipartisan Trade Promotion Authority Act, the US approach shifted in the 2000s in favour of a more stringent focus on the effective enforcement of domestic labour laws. A new approach was adopted with the US–Chile RTA of 2004 that developed a SDRP for the labour-specific chapter comprising interparty deliberations and ADR, but excluding third party adjudication. However, one exception for this process is provided for. Only Article 18.2(1)(a) of the US–Chile RTA of 2004 is also subject to the GDRM[236]

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230 Article 27(1) of NAALC. We consider these as binding.

231 *See* Art. 39 of NAALC (1994). According to Art. 29 of NAALC (1994), the jurisdiction of such an arbitral panel is limited to 'consider the matter where the alleged persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards is: trade-related; and covered by mutually recognized labor laws'. Furthermore, according to Art. 41 of NAALC (1994), in case of continued non-compliance, the complaining Party may temporarily suspend tariff concessions in an amount no greater than the monetary enforcement assessment.

232 Canada-Chile (1997), Canada-Costa Rica (2002), Canada-Peru (2009), Canada-Colombia (2011), Canada-Jordan (2012), Canada-Panama (2013), Canada-Honduras (2014).

233 For example, the procedures that involves the Evaluation Committee of Experts under Art. 23 of NAALC or the limited jurisdiction of the arbitral panel confined to obligations concerning occupational safety and health, child labour or minimum wage technical labour standards was not taken up in subsequent US RTAs.

234 *See* International Labour Organization, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* (2019), https://www.ilo.org/wcmsp5/groups/public/—dgreports/—inst/documents/publication/wcms_564702.pdf (accessed 30 Jan. 2023); CPTPP (2018) and USMCA (2020).

235 *See* e.g., Canada-Chile SA (1997), Canada-Peru SA (2009), Canada-Colombia SA (2011), Canada-Jordan SA (2012), Canada-Panama SA (2013), Canada-Ukraine (2017). Notably, while most Canadian RTAs of this period are non-binding, Art. 35(6) of the Canada-Chile Agreement on Labour Cooperation (1997) provides for a binding implementation review mechanism which is engaged if parties are unable to agree on a resolution pursuant to an Expert Panel Report. The determination of whether the mechanism is binding or not is made here on the basis of the language of these Canadian. In the agreements which include a final implementation review, there is no option for parties to not comply or disagree with the findings of the implementation review. Such mechanisms are considered binding for the purpose of this study.

236 Article 18.6.6 of US-Chile (2004) read with Ch. 22 of the Agreement.

upon exhaustion of those procedures specified in the SDRP.[237] Article 18.2(1)(a) pertains to the effective enforcement of domestic legislation:

> *A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement*

For the purpose of this provision only, Article 18.2(1)(a), may parties access the GDRM and therefore, bring disputes before arbitration and have access to remedies such as the suspension of benefits in the case of non-compliance.[238] Such procedures were codified for six further US RTAs that entered into force in the 2000s, including the CAFTA-DR of 2006.[239] This approach further influenced RTAs of Canada and the South American region, although without the possibility of suspending benefits in case of non-compliance.[240] The phrase 'in a manner affecting trade' also diffused to a variety of labour provisions in RTAs worldwide, but compared to North American RTAs, these provisions are not subject to the RTA's GDRM.[241] For instance, in the Parallel Agreement on Labour Cooperation between New Zealand and Malaysia of 2010, the trade-labour link established under the phrase 'in a manner affecting trade' is employed in the context of a non-derogation clause, which is not subject to the RTA's GDRM:

> *'Neither Party shall seek to encourage or gain trade or investment advantage by weakening or failing to enforce or administer its labour laws, regulations, policies and practices in a manner affecting trade between the Parties'*.[242]

The language of Article 18.2(1)(a) of the US-Chile RTA first came under scrutiny in 2017 when the arbitral panel under the CAFRTA-DR issued their report on

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[237] *See* Art. 18.6.7 of US-Chile (2004) 'Neither Party may have recourse to dispute settlement under this Agreement for a matter arising under Article 18.2(1)(a) without first pursuing resolution of the matter in accordance with this Article'.

[238] *See* Art. 18.6.6 of US-Chile (2004) read with Ch. 22 of the Agreement.

[239] *See* US-Singapore (2004), US-Australia (2005), US-Morocco (2006), US-Bahrain (2006), CAFTA-DR (2006), US-Oman (2009). Note that in these agreements there were minor clarifications were added regarding deadlines and procedures.

[240] *See for instance*, Canada-Chile SA (1997), Nicaragua-Taiwan (2008), Canada-Peru (2009), Peru-South Korea (2011), Canada-Colombia SA (2011), Canada-Jordan SA (2012), Canada-Panama SA (2013), Canada-Ukraine (2017), South Korea-Central America (2021).

[241] *See* Parallel Agreement on Labour Cooperation of New Zealand-Malaysia (2010), EU-Korea (2011), Türkiye-Chile (2011), EFTA-Montenegro (2011), Korea-Türkiye (2013), EU-Colombia, Peru, Ecuador (2013), EU-Central America (2013), New Zealand-Taiwan (2013), EFTA-Central America (2014), Hong Kong, China-Chile (2014), Korea-Australia (2014), New Zealand-Korea (2015), EFTA-Bosnia and Herzegovina (2015), Colombia-Korea (2016), EAEU-Viet Nam (2016), EFTA-Serbia (2017 amendment), EFTA-Albania (2017 amendment), EU-Ukraine (2017), EFTA-Georgia (2017), Chile-Uruguay (2018), EFTA-Philippines (2018), Chile-Indonesia (2019), EU-Japan (2019), EU-Singapore (2019), EFTA-Ecuador (2020), EU-Viet Nam (2020), UK-Japan (2021), EU-UK (2021), UK-Korea (2021), UK-Central America (2021), Korea-Central America (2021), EFTA-Türkiye (2021).

[242] Article 2(3), New Zealand - Malaysia Agreement on Labour Cooperation.

Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR determining whether Guatemala failed to effectively enforce its labour laws in accordance with the aforementioned provision (in CAFTA-DR the equivalent provision is found under Article 16.2.1(a)).[243] The arbitral panel found that the US was unable to prove that Guatemala's failure in effectively enforcing its labour laws was done 'in a manner affecting trade', which was understood to require a 'change conditions of competition by conferring a competitive advantage upon an employer engaged in trade'.[244] US RTAs have since evolved as a response to this decision. For instance, the USMCA of 2020 included a footnote to the phrase 'in a manner affecting trade', to reverse the burden of proof.[245]

In 2007, with an influential bipartisan trade deal, known as 'May 10 Agreement', the US decided to intensify its approach to the enforcement of RTA commitments and that all labour provisions in future US RTAs should be 'subject to the same dispute settlement procedures and remedies as commercial obligations'.[246] In this light, the scope of arbitral panels established under subsequent US RTAs' GDRM expanded significantly: in addition to effective enforcement of domestic laws when affecting trade, the panels could now also decide upon any provision of the labour chapter, including those provisions pertaining to internationally recognized standards. This approach of subjecting the entire labour chapter to the RTA's GDRM commenced with the US–Jordan RTA of 2001 and has been maintained for all subsequent US RTAs.[247] While some subsequent agreements of other regions adopted a similar approach,[248] other agreements such as the Canada–Jordan RTA of 2012 merely expanded the scope of the provision that is subject to the GDRM.[249]

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[243] *See* Guatemala-Issues Relating to the Obligations Under Art. 16.2.1(a) of the CAFTA-DR (2017).

[244] Office of the United States Trade Representative, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr (accessed 17 Jan. 2022).

[245] Footnote 12 of the Labour Chapter of USMCA (2020) reads: 'for purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise'. This presumption is reminiscent of Art. 3.8 of the WTO DSU.

[246] Office of the United States Trade Representative, *Bipartisan Agreement, supra* n. 114, at 2.

[247] *See* US-Peru (2009). US-Panama (2012), CPTPP (2018), USMCA (2020).

[248] *See* EU-CARIFORUM (2008), as well as some RTAs that give only partial access to dispute settlement systems (general consultations and/or expert panel), such as, EFTA-Montenegro (2012), EFTA-Serbia (2017 amendment), EFTA-Albania (2017 amendment), EFTA-Ecuador (2020), UK-EEA (2021), EFTA-Bosnia and Herzegovina (2015), Peru-Australia (2020).

[249] For instance Art. 12 of Canada-Jordan SA (2012) reads: *'The Party […] may request that a review panel be established if it considers the consultations have not satisfactorily addressed the matter and that: (a) the matter is trade-related; and (b) the other Party has failed to comply with its obligations under this agreement through: (i) a persistent pattern of failure to effectively enforce its labour law; or (ii) failure to comply with its obligations under Articles 1 and 2 to the extent that they refer to the ILO 1998 Declaration'.*

When labour provisions became a more frequent feature of Asia-Pacific and South American agreements in the 2000s, these would be subject to the RTA's GDRM (an approach that is similar to early EC RTAs of the 1990s).[250] Asia-Pacific and South American RTAs would also include more complex dispute resolution procedures including ADR or countermeasures such as the possibility of suspending benefits under the RTA, and this approach is also maintained today.[251] However, some RTAs from these regions, such as those with China or Chile as trading partners, developed specific side agreements on cooperation or labour issues in their RTAs, and unlike their EU and US trading partners, these chapters and side agreements are frequently excluded from any dispute resolution process.[252]

3.2[c] *EU Trade and Sustainable Development Chapters: Introducing a Unique Dispute Resolution Procedure*

In 2011, the EU made steps to increase compliance with their labour provisions by introducing a SDRP for its standardized TSD chapters, which was adopted for all subsequent EU RTAs. This SDRP is unique in its provision of government consultations and a third-party adjudicatory mechanism, which is an *ad-hoc* expert panel that issues a non-binding report with a set of recommendations.[253] While remedies such as the suspension of tariff concessions are not available, a committee on TSD, established as part of the TSD chapter, monitors the implementation of these recommendations.[254] With the non-binding nature of this dispute resolution process, the EU adopted a cooperative approach to facilitating greater compliance with the RTA's labour provisions with its trading partners, which differs from the US approach that is grounded in ensuring the effective enforcement of labour laws.

Following a method commenced by the US RTAs, the EU TSD chapters institutionalized the involvement of civic society stakeholders with the introduction of the DAGs.[255] Parties to EU RTAs may initiate consultations based on the communications of the DAGs, and seek their advice during the consultation

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[250] *See* Australia-Singapore (2003), Economic Agreement Between Gulf Cooperation Council States (2003), Turkey-Tunisia (2005), India-Singapore (2005), CARICOM (revised) (2006).

[251] *See* Nicaragua-Taiwan, China (2008), Türkiye-Chile (2011), and Australia-Peru (2020) in which the labour chapter is subject to the GRDM.

[252] *See* e.g., China-Macao, China (2004), Chile-China (2006), Memorandum of Understanding on Labor Cooperation of Peru-China (2010), Chile-Thailand (2015), Chile-China (2019 amendment), Chile-Indonesia (2019). Recent agreements such as the Memorandum of Understanding on 'Labour Cooperation' accompanying the Hong Kong, China–Chile RTA of 2014 are also excluded from the RTA's GRDM, but this side-agreement provides for specific consultations to solve issues arising under the side-agreement.

[253] Article 13.15 of EU-South Korea (2011).

[254] *Ibid*.

[255] *See* s. 3.1 for an introduction of the DAGs.

process.[256] For instance, in 2014, it was the EU DAG that requested the EU Commission to initiate consultations with South Korea.[257] In 2016, civil society representatives from the EU, Colombia, and Peru also reported a weakening of labour protections in Peru that could possibly breach the EU–Andean Countries RTA of 2013.[258]

Under EU TSD chapters, ninety days after the consultations, the parties may request that the matter is brought before a Panel of Experts, which may seek information from DAGs when issuing their decision.[259] Similar to the US RTAs of the 2000s, the scope of the third-party adjudicatory mechanism under the EU's SDRP is limited to the 'trade-related' aspects of labour and environmental issues as per Article 13.2 of the EU–Korea RTA:

> *Except as otherwise provided in this Chapter, this Chapter applies to measures adopted or maintained by the Parties affecting trade-related aspects of labour (84) and environmental issues in the context of Articles 13.1.1 and 13.1.2.*

Article 13.2 of the EU-Korea RTA was replicated in subsequent European RTAs, especially for agreements of the EFTA trading bloc.[260] In the interpretation of Article 13.2, the Panel of Experts established under the EU–South Korea RTA in 2021 noted that 'the phrase "in a manner affecting trade" [of Article 16.2.1(a) of the CAFTA-DR] does not mean the same thing as "measures affecting trade-related aspects of labour" as set out in Article 13.2.1 of the EU-Korea FTA' and that the 'contextual setting' of the provisions in the two RTAs differ.[261] Therefore, the Panel did not find that the a claimant must prove that a breach of the RTA's labour commitments must confer a competitive advantage on the employer or enterprise engaged in trade under this provision, demonstrating the legal significance of word selection.[262] Even though the panel report is non-binding, the

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256 *See* Art. 13.14(1) of EU-Korea (2011).

257 This procedure resulted in the use of the EU's SDRP adjudicatory mechanism and a Panel of Experts' Report was issued in 2021. *See* Aleydis Nissen, *Not That Assertive: The EU's Take on Enforcement of Labour Obligations in Its Free Trade Agreement With South Korea*, 33(2) Eur. J. Int'l L. 607–630, 609 (May 2022).

258 *See* European Economic and Social Committee, *Summary of the Discussion and Key Messages of Civil Society Representatives and Participants from the EU, Colombia and Peru (Trade and Sustainable Development Title of the EU-Colombia and Peru Trade Agreement)* (2016), https://www.eesc.europa.eu/sites/default/files/resources/docs/joint-declaration_dag-to-dag_dec-2016_en.pdf (accessed 2 Mar. 2023).

259 *See for instance*, Art. 13.15(1) of EU-Korea (2011).

260 *See* EFTA-Montenegro (2012), Korea-Türkiye (2013), EFTA-Central America (2014), EFTA-Bosnia and Herzegovina (2015), EAEU-Viet Nam (2016), EFTA-Albania (2017 Amendment), EFTA-Georgia (2017), EFTA-Serbia (2017 Amendment), EFTA-Philippines (2018), EFTA-Ecuador (2020), UK-Korea (2021), EFTA-Türkiye (2021), EFTA-Indonesia (2021).

261 Panel of Experts Proceeding Constituted under Art. 13.15 of EU-South Korea (2011), paras 90–93.

262 Rather, the panel found that 'such [labour] rights are therefore inherently related to trade as it is conceived in the EU–Korea FTA'. Panel of Experts Proceeding Constituted under Art. 13.15 of EU-South Korea (2011), para. 95.

report put political pressure on Korea, which deposited its ratification of the ILO Conventions on the freedom of association in 2021.[263]

Since the TSD chapter was first introduced in EU agreements, the language establishing government consultations under this SDRP has not evolved, except for minor adjustments concerning the consultation of third-party stakeholders.[264] The language on expert panels in EU RTAs has, however, expanded significantly over the last decade with panel procedures becoming more complex and closely defined in newer agreements.[265]

3.2[d] *Recent Developments in Dispute Resolution on Labour in RTAs*

Two recent developments in labour dispute resolution in US and European agreements respectively showcase innovation in labour dispute resolution in RTAs.

The first development occurred in 2020 when the USMCA replaced its predecessor, the NAFTA (including the NAALC), and provided innovative procedures to facilitate compliance with the RTA's labour provisions at the enterprise level rather than at the governmental level. The labour provisions of the USMCA are subject to the GDRM, but also to a SDRP provided in Annex 31-A and 31-B[266] known as the RRLM, which allows for an accelerated dispute settlement procedure for issues regarding a denial of the freedom of association or collective bargaining rights.[267] When a complaint is issued, the responding party

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[263] In addition, the Panel dismissed the EU's claims that Korea had not made continued and sustained efforts to ratify the ILO Conventions on the freedom of association, International Labour Organization, *Korea Recognizing Respect for Fundamental Labour Standards as the Foundation for Tackling the Challenges of the Future of Work* (2021), https://www.ilo.org/global/standards/WCMS_785448/lang–en/index.htm (accessed 30 Jan. 2023).

[264] Article 13.14 of EU-Korea (2011) says parties 'may seek the advice' of the DAGs, whereas Art. 283 of EU-Colombia, Peru, Ecuador (2013) provides no such language. Art. 23.9 of EU-Canada (2017) goes a bit further, by stating that 'If relevant, and if both Parties consent, the Parties shall seek the information or views of any person, organisation or body, including the ILO, that may contribute to the examination of the matter that arises'. By contrast, Art. 12.16 of EU-Singapore (2019) is again rather limited, by merely stating that parties 'may consult relevant stakeholders'.

[265] Whereas EU-South Korea (2011) only had one provision on expert panels with a single step and three paragraphs, EU-Central America (2013) already had four provisions containing twelve paragraphs in total, outlining various steps of procedure for an expert panel. These steps where maintained for later agreements, like EU-Canada (2017), but again combined under one single article, although with fourteen paragraphs.

[266] Annex 31-A applies between the US and Mexico while Annex 31-B applies between Canada and Mexico.

[267] *See* Art. 31-A.2 of USMCA (2020). The USMCA allows for the public submission of information regarding compliance to any of the parties' NCPs on labour by civil society stakeholders. For the USMCA, the US and Canada have each set up special online forms to report labour issues. *See* US Department of Labour, *U.S. Web-Based Hotline for Labor Issues in USMCA Countries* (2022), https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca/hotline (accessed 2 Mar. 2023); Government of Canada, *Online form to Report Labour Issues Related to the Canada-United States-Mexico Agreement (CUSMA)* (2022), https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/issues-form.html (accessed 2 Mar. 2023).

may conduct a review of the facility in question, as to whether a denial of such rights occurred, which may lead to a party requesting a panel to be convened.[268] Seven such complaints under the RRLM have been initiated by the US to-date.[269] If the panel determines there was a denial of rights, remedies include the suspension of preferential tariffs for goods or services produced by the facility in question, or in case of repeated offenses, the denial of entry for future imports of goods of that facility.[270]

The second development followed a lengthy review and consultation period in 2022,[271] during which the European Commission decided to follow calls from European Parliament and civil society for the better enforcement of EU TSD chapters.[272] In current discussions to sign an RTA between the EU and New Zealand, the EU is shifting from a cooperation-based approach to an enforcement-based approach in facilitating greater compliance with their agreements' labour commitments.[273] Similar to the US RTAs following the May 10 Agreement, the TSD chapter will also be subject to the RTA's GDRM. Additionally, the EU is introducing the possibility of applying 'trade sanctions' for 'serious instances of non-compliance with the ILO fundamental principles and rights at work'.[274] Such dispute-resolution procedures are likely to be further adopted in some currently negotiated and EU RTAs.[275] In parallel, the EFTA trading bloc has also decided in November 2020

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[268] Article 31-A.4(2) and 31-A.7(7) of USMCA (2020).

[269] *See* Office of the United States Trade Representative, *United States Seeks Mexico's Review of Alleged Denial of Workers' Rights at Unique Fabricating* (2023), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/march/united-states-seeks-mexicos-review-alleged-denial-workers-rights-unique-fabricating (accessed 7 Mar. 2023).

[270] Article 31-A.10 of USMCA (2020).

[271] European Commission, *The Power of Trade Partnerships: Together for Green and Just Economic Growth*, COM(2022) 409 final (2022), https://circabc.europa.eu/ui/group/8a31feb6-d901-421f-a607-ebbdd7d59ca0/library/8c5821b3-2b18-43a1-b791-2df56b673900/details (accessed 2 Mar. 2023).

[272] *See* Marco Bronckers & Giovanni Gruni, *Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously*, 56(6) Common Mkt. L. Rev. 1591–1622 (2019), https://doi.org/10.54648/cola2019126. Please also note that already in 2021, the EU–UK RTA became the first EU agreement to expressively allow the suspension of the RTA's commercial obligations under Art. 410.3 if the Expert Panel's report is not implemented. Also note that already the EU-CARIFORUM (2008) allowed for arbitration of labour issues under the agreement's GDRM under certain conditions but this was discontinued for subsequent EU RTAs following the TSD model. *See* Art. 410.3 of EU-UK (2021); Ceretelli Carlotta, *EU – New Zealand FTA: Towards a New Approach in the Enforcement of Trade and Sustainable Development Obligations*, Blog of the European Journal of International law (28 Sep. 2022), https://www.ejiltalk.org/eu-new-zealand-fta-towards-a-new-approach-in-the-enforcement-of-trade-and-sustainable-development-obligations/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2 (accessed 2 Mar. 2023).

[273] *See* Carlotta, *supra* n. 272. European Commission, *Commission Unveils New Approach to Trade Agreements to Promote Green and Just Growth* (2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3921(accessed 2 Mar. 2023).

[274] *See* European Commission, *supra* n. 271.

[275] *Ibid*.

to step up the means of enforcement for obligations in TSD chapters, by introducing a third party adjudicatory mechanism for their model TSD chapter.[276]

4 CONCLUSION

This article examined the evolution of the language of over 4,000 labour provisions in 512 RTAs and forty-two protocols that entered into force between 1990 and 2022. Preambular clauses, provisions that regulate parties' domestic laws and policies, references to ILO standards and rights, as well as labour exceptions to trade disciplines and their dynamic evolution over time were analysed.

The analysis was conducted on a chronological basis. In the 1990s, social issues started being referred to in RTAs. NAFTA of 1994 marks the birth of standardized labour provisions and corresponding dispute resolution mechanisms across the globe, and the language is still employed in RTAs to date. The exclusion of labour issues from the multilateral setting at the WTO may have contributed to the inclusion of international labour considerations in many RTAs.[277] The 2010s saw to more RTAs where governments rely on the RTA's binding force to facilitate compliance with labour commitments. While North American agreements are the first ones to have followed a 'hard'-line enforcement approach, European agreements have followed a cooperative approach, which include non-binding adjudicatory procedures, until the recent negotiation of the EU-New Zealand RTA that envisages binding dispute settlement for certain labour and environmental commitments. As the USMCA shows, innovative labour provisions in RTAs may indicate in which direction labour commitments will continue to evolve globally.[278] Today, current initiatives such as the IPEF, the APEP, the 'Dialogue on the Future of Atlantic Trade' demonstrate that promoting not only labour standards and rights, but also human rights through closer economic cooperation has become a priority for trading partners.[279]

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[276] Previously, EFTA RTAs only allowed for government consultations for obligations under the TSD chapter. European Free Trade Association, *Trade and Sustainable Development: EFTA's Experience and Outlook* (Nov. 2020), https://www.efta.int/sites/default/files/documents/free-trade/EFTA-Sustainable-Development_%20EFTAs-experience-and-Outlook_Website-report.pdf (accessed 12 Jan. 2023).

[277] In particular, the ILO 1998 Declaration, the ILO 2008 Declaration of Social Justice, and the 2012 Decent Work Agenda, are prevalent standards that RTAs use as a reference. *See* s. 2.3.

[278] *For instance*, in USMCA (2020), compliance with labour provisions is facilitated at the enterprise level rather than at the governmental level.

[279] Furthermore, under the US-Japan Partnership on trade, the trading partners will establish a 'task force to promote human rights and international labor supply chains'. *See* Office of the United States Trade Representative, *Remarks by Ambassador Katherine Tai at the Launch of the U.S. – Japan Task Force to Promote Human Rights and International Labor Standards in Supply Chains Under the U.S. – Japan Partnership on Trade* (6 Jan. 2023), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2023/january/remarks-ambassador-katherine-tai-launch-us-japan-task-force-promote-human-rights-and-international (accessed 12 Jan. 2023).

The push for including labour provisions by North American and European countries remained influential, and many South American agreements also followed suite. Asia-Pacific and African agreements are still cautious in developing linkages between market access and labour matters.[280] To some extent, the varying degrees of ambition regarding labour issues in RTAs is parallel to the divide between developed and developing nations. However, the recent CPTPP indicates that the tide may be on the verge of turning. On one hand, striving for higher labour protections for workers worldwide, particularly by the US and the EU, by including them in RTAs, is a 'laudable' effort as described by LeClercq, even though lawmakers in the US such as the Senate Finance Committee would like RTAs to go even further to protect labour rights.[281] On the other, LeClercq also argues that the ambitious 'enforcement-based' approaches that may 'promulgate an entirely new labor regime' for some countries extends beyond the consultative processes between governments, workers, and employers facilitated by the ILO, and may leave such countries unable to 'reconcile unrealistic expectations under its trade arrangements with its local political and labor culture'.[282]

While some substantive obligations of these labour provisions have developed in a uniform manner due to their references to commonly used international labour standards, RTAs have evolved to produce a heterogeneous pattern of labour rights and obligations and dispute resolution procedures globally, resulting potentially in divergent interpretations of differing labour provisions. These developments also reignite the age-old tensions observed in the decentralized proliferation of obligations through RTAs. The standardization of language of labour provisions, on the one hand, allows for both the progressive inclusion of labour standards as well as a sense of predictability in the negotiations of newer treaties. On the other hand, while provisions may appear to contain similar labour obligations, even simple variations in the passage's phrasing of the provision could potentially lead to fragmentation of the law, and perhaps even fray the tenuous thread tying together trade and labour. These tensions have already been echoed in the context of how RTAs refer to the ILO by Panareda, Ebert, and LeClercq,[283] but as the scope of this study shows – the wider the net is cast of what constitutes 'labour provisions' the more fraught the tensions become.

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[280] An interesting observation is that the two most labour-intensive agreements in the Asia-Pacific and African regions were concluded with the US during this time, namely US-Singapore (2004), and US-Morocco (2006). Please note that US-Korea (2012) and US-Australia (2005) are almost identical replications of the US-Singapore Agreement (2004).

[281] LeClercq, *supra* n. 80. *See also* World Trade Online, *Wyden, Crapo Call on USTR to 'Do More' to Enforce USMCA Commitments* (26 Jan. 2023), https://insidetrade.com/daily-news/wyden-crapo-call-ustr-do-more-enforce-usmca-commitments (accessed 2 Mar. 2023).

[282] *Ibid*.

[283] Agusti-Panareda, Ebert & LeClercq, *supra* n. 7.

While labour issues were initially included in bilateral and plurilateral RTAs as they were taken out of WTO discussions, they are slowly returning to the multilateralist setting at the WTO, and the ILO is becoming increasingly involved in dispute resolution processes as well. The evolution of language in RTAs can also influence the development of obligations at the multilateralist setting, just as much as existing multilateral provisions have influenced the evolution of language at the bilateral and plurilateral levels. For example, starting with the US–Cambodia Textile Agreement of 1999 that outsourced surveillance mechanisms to the ILO and continued in Expert Panels established under recent EU TSD chapters that may consult the ILO,[284] the ILO is increasingly being active in the enforcement processes of the labour standards and rights embedded in RTAs through its Supervisory Bodies.[285] Similarly, discussions on labour are returning to the WTO, with Responsible Business Conduct provisions being included in the Investment Facilitation for Development discussions and forced labour being discussed in the context of the Fisheries Subsidies Agreement.[286] While arguably GATT and the TBT Agreement could be interpreted to cover some Members' labour-related trade measures, as border or internal (domestic) measures, the WTO may also not be the most appropriate forum to discuss labour matters – as it holds little expertise in this area. However, closer collaboration in international organizations and between the WTO and ILO may realign the various trade and labour policies found in RTAs worldwide.

To conclude, this article examined the trends in the evolution of language of RTA's labour provisions, and tried to emphasize the changes in legal texts of specific provisions over time. It is a preliminary study and the repository of labour provisions created as part of this study could be further used for an in-depth analysis of labour provisions that were not covered by this article, such as procedural guarantees, labour mobility, transparency and public awareness provisions, or

[284] *See* Art. 379 of EU-Moldova (2016), Art. 243 of EU-Gerogia (2016), Art. 23.10 of EU-Canada (2017), Art. 12.17 of EU-Singapore (2019), Art. 12.17 of EU-Viet Nam (2020), Art. 235 of UK-Georgia (2021), Art. 346 of UK-Moldova (2020), which state that expert panels 'should seek information and advice from the ILO'.

[285] *For more information see* Siroën, *supra* n. 10; Eric Gravel & Quentin Delpech, *The Comments of the ILO's Supervisory Bodies Usefulness in the Context of the Sanction-Based Dimension of Labour Provisions in US Free Trade Agreements*, No. 994809403402676, International Labour Organization (2013), https://www.ilo.org/wcmsp5/groups/public/—dgreports/—inst/documents/publication/wcms_207860.pdf (accessed 30 Jan. 2023).

[286] *See* World Trade Organization, *Agreement on Fisheries: Draft Text*, WT/MIN(21)/W/5 (24 Nov. 2021), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN21/W5.pdf&Open=True (accessed 2 Mar. 2023). World Trade Organization, *Investment Facilitation Talks Advance, Delve into Implementation and Technical Assistance* (17 Jun. 2021), https://www.wto.org/english/news_e/news21_e/infac_17jun21_e.htm (accessed 12 Jan. 2023); Submission of the United States, *Use of Forced Labour on Fishing Vessels* (2021), https://ustr.gov/sites/default/files/IssueAreas/Trade%20Organizations/WTO/US.Proposal.Forced.Labor.26May2021.final%5B2%5D.pdf (accessed 31 Jan. 2023).

surveillance mechanisms. Further research could also expand the search to include other broader dimensions of labour such as 'free movement', 'services', and 'investment', which can track a diverse set of labour issues that were not captured in the initial scope of the repository compiled as part of this study. After all, this continues the work started by the founders of the GATT who, in calling for a Conference on Trade and Employment recognized the linkages between employment, economic development, fair labour standards and trade. The GATT was ultimately borne out of this conference, and included in its Preamble, the language 'to raising standards of living, ensuring full employment' . Today the Marrakesh Agreement's Preamble builds on that of the GATT and goes further by including the broader notion of sustainable development as a goal of the WTO .[287]

[287] Preamble of the GATT 1947.