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**Governance Spillovers of Labour Provisions in Free Trade  
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# Governance spillovers of labour provisions in free trade agreements



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## Summary

The labor provisions in trade agreements have both direct and indirect effects upon governance. Policymakers designed these provisions to improve the governance of labor rights, but they may also have unanticipated side-effects. These provisions

- empower workers and other citizens;
- facilitate a feedback loop between the government and its citizens on a broad range of issues affecting trade;
- promote wage and income equality, which is conducive to development, social cohesion and democracy.<sup>1</sup>
- help policymakers to better integrate labour rights with other public policies (such as fiscal policy, anti-corruption policies, or criminal laws);
- help citizens and policymakers gradually to improve governance, increase productivity, and advance social cohesion in the community.

## What do we know about labor rights provisions in trade agreements?

Labor rights provisions in trade agreements are designed to improve labor rights governance and to empower workers. But they can also affect governance more broadly. In the absence of a specific, internationally accepted definition of **good**

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<sup>1</sup> Betcherman (2012).

**governance**, herein we use the definition formulated by the United Nations Development Programme “mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights...and mediate their differences”.<sup>2</sup> Good governance follows the rule of law and is transparent, responsive, equitable, effective, and efficient.<sup>3</sup>

Here’s how this process may play out. When country A participates in a free trade agreement (FTA) with one or more countries, country A’s policymakers and citizens know that policymakers and citizens in their FTA partner countries are watching their behavior. Hence trade agreements have a “sunshine effect”).<sup>4</sup> Government officials in country A are likely to improve their respect for labour rights because they know their counterparts are watching them closely. In addition, the US, EU, and Canada include language that require that citizens in their trade partner countries be advised and educated about their labour rights under law and have opportunities to comment on trade-related provisions.<sup>5</sup> In so doing, these trade agreements help empower not just individuals as workers, but as citizens too.

Taken in sum, over time, these provisions can encourage governments to create a feedback loop, involving the public more in trade policy deliberations and in turn facilitating greater

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<sup>2</sup> Zainab (2016).

<sup>3</sup> UNESCAP (2009).

<sup>4</sup> As an example, Sandra Polaski notes that, with the Cambodia textile agreements, “sunshine” was a form of leverage to ensure that the business sector respected labour rights and the Government monitored labour rights conditions (Polaski, 2006).

<sup>5</sup> See for instance CAFTA-DR.

accountability in labor rights and other forms of governance.<sup>6</sup> Moreover, they can facilitate worker-business cooperation and mutual trust, which in turn will enhance economic performance and productivity.<sup>7</sup>

The labor rights provisions in trade agreements can create a virtuous circle of economic growth and governance. If workers are empowered and able to join unions, over time managers and workers learn to develop shared solutions to improving productivity and facilitating stable growth. Businesses benefit from collective agreements, as conditions are more predictable and accountable. Society, as a whole, learns how to accommodate conflicting interests through consultation and negotiation.<sup>8</sup> Gradually, investors will take note of those States that respect workers' rights and will see that they can be trusted to enforce property rights, uphold the rule of law, and act in an even-handed, impartial manner.<sup>9</sup>

Herein, we focus on EU, Canadian and US FTAs to examine whether and how labor rights provisions improve governance. We examine only those free trade agreements where the parties are treated as equals during the implementation phase with reciprocal trade obligations.<sup>10</sup> Thus, we do not include the EU economic partnership agreements (EPAs), which the EU defines as trade and development agreements negotiated between the EU and African, Caribbean and Pacific trade partners engaged in regional economic integration processes.<sup>11</sup> We also do not examine EU association agreements with countries in the Eastern Partnership closer to EU standards and norms. These agreements comprise a broad range of issues,

including employment and social policy and the establishment of a Deep and Comprehensive Free Trade Area between the EU and the partner country.

Each of the three trade giants takes a different approach to labor rights. The EU includes labour rights provisions in the legally-binding sustainable development chapter, which also focuses on human rights and governance, own, as with the United States or Canada. The EU did not include labor rights language in all of its FTAs. However, Columbia and Peru (2013), Republic of Korea (2015), and Ukraine (2016) do include labor rights provisions.<sup>12</sup> If CETA (EU/Canada) is approved it will also have labor rights language,

These recent EU FTAs commit the parties to the ILO's Core Labour Standards, to the ratification of the ILO fundamental Conventions, and to the effective implementation of all ratified Conventions. The parties to the agreements also agree that they will not use labour standards for the purposes of disguised protectionism, that they will uphold their own existing domestic labour laws, that they will not waive or fail to effectively enforce such laws to encourage trade or investment, and that they shall strive to ensure that their relevant laws and policies provide for and encourage high levels of labour protection<sup>13</sup> The EU agreements also require the establishment of a joint committee comprising representatives of the two parties who will oversee the implementation of the chapter, accompanied by civil society mechanisms of various types.<sup>14</sup> Finally,

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<sup>6</sup> Rodrik (2016); Aaronson (2015b).

<sup>7</sup> Maskus (1997).

<sup>8</sup> Sengenberger (2005).

<sup>9</sup> Kucera and Principi (2014); Kucera (2002).

<sup>10</sup> Marx et al. (2016), p. 599.

<sup>11</sup> See [http://ec.europa.eu/trade/policy/countries-and-regions/agreements/index\\_en.htm](http://ec.europa.eu/trade/policy/countries-and-regions/agreements/index_en.htm) [8 Nov. 2016]; and <http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/>[8 Nov. 2016].

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<sup>12</sup> See <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/> [8 Nov. 2016].

<sup>13</sup> Bartels (2013); see e.g. art 268, EU FTA with Colombia and Peru . Some EU FTA's (e.g. EU-Korea) also include commitments on effectively implementing the ILO Conventions that respectively the EU Member States and Korea have ratified. In some EU FTAs both Parties also agree to make sustained efforts to the ratification of ILO priority Conventions as well as other ILO Conventions classified by ILO as up to date Conventions.

<sup>14</sup> See the chapter in this handbook on involving social partners in trade agreements. See also ILO (2016).

the EU includes a dispute settlement mechanism in its sustainable development chapter. If the two parties cannot find common ground on consultations, independent panel of experts will review.

The United States has FTAs with labour provisions with 19 countries, the most recent of which came into force in 2012 (Panama, Korea, and Colombia). Canada has seven FTAs with labour rights provisions in force, including the North American Free Trade Agreement (NAFTA), one of which is too recent to assess (Republic of Korea, 2015).<sup>15</sup> However, the EU's FTAs are very new and hence we have less about the effects of these provisions on governance than in the case of Canadian or US FTAs with labour provisions.

The US, EU, and Canada have revised their labour provisions over time, learning what works and what does not, how to improve enforcement, and how to empower workers. The United States has five generations of approaches to these issues, although the latest generation, found in TPP, has not yet been approved by Congress.<sup>16</sup> After 2005, the United States put labour provisions at the core of the agreement, which required parties to “effectively enforce their own labour laws”, and included public education and participation provisions. After 2007, the United States again revised its approach and required parties to adapt and maintain fundamental labour rights, effectively enforce their own labour laws and not waive or derogate from laws implementing fundamental labour rights. Signatories can apply normal trade sanctions and dispute settlement to all labour provisions.<sup>17</sup>

Until recently, the labour provisions in Canadian FTAs were contained in side agreements. However, Canada's newest trade agreements (with the EU and

Korea) include labor rights in a separate chapter.<sup>18</sup> Canada's labor rights chapters are legally binding. Should a party not comply with these provisions, it could be fined.

*We do not know how effective these three approaches are, but each has benefits for labour rights and governance*

Scholars and policymakers are just beginning to use quantitative data sets to examine the effects of these different approaches to labour provisions over time, and also to compare different approaches. Thus, we do not yet know if any of these approaches is generally more effective than any other. We do know, however, that they all want to reach the same goal – to help trade partners uphold or improve the governance of labour rights and to empower workers.

Some scholars who have tried to compare these effects using statistical data have hypothesized that governments such as those of the United States and Canada, which focus on labour rights enforcement, will be better able to get those FTA partners with inadequate labor rights governance to monitor, enforce, and invest in labour rights.<sup>19</sup> They assert that a disincentive based approach (consultations and if that does not yield change, trade disputes, sanctions or fines to encourage compliance, is more likely to yield labor rights results. These scholars also note that by focusing on enforcement, the demandeur countries signal that the protection of labour rights is essential to building trust and cementing good trade relations.

However, one can also argue that by focusing on labor rights and not other human rights, the US and Canada may, without intent, convey that certain human rights are more important than other human

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<sup>15</sup> The Canada/EU FTA has not been approved by either parliament as of this writing and is not in effect.

<sup>16</sup> DOL and USTR (2015).

<sup>17</sup> DOL and USTR (2015), p. 49.

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<sup>18</sup> Government of Canada, “Negotiating and Implementing International Labor Cooperation Agreements” <http://tinyurl.com/hwkkdps>

<sup>19</sup> Luce (2013); Dewan and Ronconi (2014).

rights or that human rights are divisible, which is not how they are understood in international law. Hence, the EU's broader focus on human rights coherence, sustainable development and enhanced governance might yield better results over time for several reasons. First, labour rights such as the right to work, freedom of assembly, association, a ban on slave labour and the right to fair remuneration, are also human rights delineated in the Universal Declaration of Human Rights.<sup>20</sup> Moreover, these rights are important to democracy. According to the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, “freedom of peaceful assembly and association are foundational rights...essential to human dignity...and democracy. They are the gateway to all other rights.”<sup>21</sup>

Secondly, by focusing on labor rights as part of broader human rights language, EU policymakers signal the indivisibility and universality of human rights as well as the close ties between the protection of human rights and stable democratic governance. Hence, the EU may be better able to convince its FTA partners to take a more holistic approach to human rights and good governance. In turn, one can argue that governments understand the indivisibility of human rights will have more opportunities to learn how to govern human rights including labor rights. It is not easy to protect, respect and remedy human rights—it takes governance prowess. There are times when governments must actively intervene in markets (for example, when workers are discriminated against) and times when they should not intervene (for example, when workers practice freedom of association).<sup>22</sup> As government officials learn how to respect human rights, including labor rights, they will build trust among workers and businesses. Moreover, these states will signal to their

citizens that the process of labour rights governance (and governance in general) is fair and effective.<sup>23</sup>

## **What are the main arguments?**

*Governance spillovers may occur through worker empowerment leading to sustainable growth, a more productive economy and a more inclusive society.*

While scholars tend to focus on the enforcement of labour provisions, few researchers have focused their attention on how these agreements may affect worker empowerment. The United States, EU, and Canada have developed provisions dedicated to increasing the ability of workers to demand labour rights and influence labour rights governance. While all three include language creating consultative bodies to advise on labor rights, the US and EU have specific language on public awareness and education to build a demand for labor rights.

Since 2005, US agreements have included provisions in the labour rights chapter related to procedural guarantees and public awareness. US policymakers significantly strengthened those provisions in the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) and later FTAs. The enhanced provisions require parties to encourage public participation in the development of labour rights policies. They also require that all persons have “appropriate access to tribunals,” that the “proceedings are fair, equitable, and transparent...open to the public”, give all parties the right to seek review “and, where warranted, correction of final decisions”.

Moreover, “each Party shall promote public awareness of its labour laws” by educating the public about labour rights and by ensuring information that the public can obtain information about labour rights. Finally, the parties are encouraged to “convene a new, or consult an existing, national labour advisory or consultative committee,

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<sup>20</sup> See <http://www.un.org/en/universal-declaration-human-rights/> [9 Nov. 2016].

<sup>21</sup> Maina Kiai, “Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association,” A/71/385, 14 Sept., 2016, 1, para. 1.

<sup>22</sup> Aaronson and Zimmerman (2007); Aaronson (2015a).

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<sup>23</sup> Postnikov and Bastiaens (2014).

comprising members of its public, including representatives of its labour and business organizations, to provide views on any issues related to this Chapter”.<sup>24</sup> Taken in sum, these provisions could empower workers (the demand side of labour rights) through rules on public awareness, public participation, and due process rights.<sup>25</sup>

Canada also requires public awareness of labour laws in its labour cooperation agreements. For example, in the Canada-Panama agreement, the parties must also inform the public about labour laws and allow public comment.<sup>26</sup>

In the sustainable development chapters of EU FTAs, each party is required to “consult domestic labour and environment or sustainable development committees or groups, or create such committees or groups when they do not exist” (EU–Colombia and Peru trade agreement, art. 281). The EU also includes language mandating transparency. These provisions state that when parties develop, introduce, and implement any measures aimed at protecting labour conditions that affect trade between the Parties, they must make these measures public with due notice and public consultation (EU–Korea, article 13.9).

No one has yet done a study as to whether these provisions and consultative bodies actually empower workers. Nonetheless, in a 2016 study of trade and labor rights, the ILO noted that “the impact of labour provisions depends crucially on, first, the extent to which they involve stakeholders, notably social partners such as unions and NGOs”.<sup>27</sup> Workers who are aware of their rights and able to challenge firm and government behaviour are empowered. Over time, empowered workers can promote greater income equality through improved

productivity and better share in profits through wage increases. Some analysts argue that this process can advance development, social cohesion and democracy and ensure that more people meet their potential.<sup>28</sup> Moreover, these provisions may help to legitimize trade agreements and help them to gain a base of public support.<sup>29</sup>

## Is there evidence of governance spillovers?

### *Empowering guest workers*<sup>30</sup>

Since joining NAFTA, Mexican trade policy has become more responsive to public concerns about labour rights. For example, the Mexican Government, which was long chided for its unwillingness to respect labour rights, began to work internationally to protect its citizens’ labour rights. In September 2009, Mexican consulates attempted to educate Mexican guest workers in the United States regarding their labour rights.<sup>31</sup> In 2013, with help from US and Mexican civil society groups, guest workers came together to form the Sinaloa Temporary Workers Coalition to defend the rights of guest workers in Mexico and abroad. In 2014, the group complained to the Mexican Ministry of Labour regarding recruitment fees. The Ministry investigated and found 27 violations of the law, resulting in fines. In this example, Mexicans held their Government accountable for violations of the law at home. The process educated Mexican policymakers about the situation of Mexican guest workers in the United States and empowered Mexican workers.<sup>32</sup>

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<sup>24</sup> [https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file320\\_3936.pdf](https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf) [8 Nov. 2016].

<sup>25</sup> DOL and USTR (2015), p. 1.

<sup>26</sup> See Canada/Panama FTA, articles 6 and 10, at [http://www.labour.gc.ca/eng/relations/international/agreements/lca\\_panama.shtml#part1](http://www.labour.gc.ca/eng/relations/international/agreements/lca_panama.shtml#part1). These provisions are not binding, however [9 Nov. 2016].

<sup>27</sup> ILO (2016), pp. 7–8.

<sup>28</sup> Sengenberger (2005); Betcherman (2012).

<sup>29</sup> Aaronson and Zimmerman (2007), p. 173.

<sup>30</sup> Guest workers are individuals who have temporary permission to work in another country.

<sup>31</sup> Aaronson and Zimmerman (2007).

<sup>32</sup> Whitney Eulick, “Mexico’s first union for guest workers fights abuses at home and in US”, in CSMonitor.com, 28 December 2015, <http://www.csmonitor.com/World/Americas/2015/1228/Mexico-s-first-union-for-guest-workers-fights-abuses-at-home-and-in-US>

***Policy coherence: linking labour and tax policies to improve labour rights governance***

Guatemala is one of the members of the US FTA CAFTA-DR. The US Trade Representative and the US Department of Labor noted issues in Guatemala relating to labour rights and governance. Both recognized the need to link tax and labour rights policies and to provide incentives to adherence and, in response, Guatemala published its Ministerial Accords. These Accords created a public comment process as part of the review of applications by export companies for certain tax benefits and require rejection of applications from companies that are found to have violated labour laws. They also establish a streamlined process to revoke the tax benefits for existing beneficiaries that violate labour laws and publish the names of companies whose benefits are withdrawn. The new regulations require the Ministry of Labour to conduct annual inspections of all enterprises receiving special tax benefits.<sup>33</sup> This strategy made labour rights a key priority for the Government, integrated it with trade and fiscal policy, and helped the Government become more accountable to its firms and workers – an unanticipated spillover.

***Policy coherence: linking the criminal code and workers' rights in Colombia***

Colombia has also taken steps to reduce impunity and make it harder for anti-unionists to use violence, including murder, against union officials.

In 2011, as specified in the action plan associated with the US-Colombia FTA, the Colombian Congress reformed the country's criminal code, establishing criminal penalties and possible imprisonment for employers that undermine the right to organize and bargain collectively, including by extending better conditions to non-union workers through collective pacts. The Colombian Government also enacted new legal provisions and regulations in 2011 and 2013 to prohibit, and to

punish with significant fines, the misuse of cooperatives and other employment relationships that undermine workers' rights. In 2011, the Government increased the number of labour inspectors from 424 to 718. In 2015, the Colombian Constitutional Court strengthened the ability of inspectors to investigate a lack of protection for contingent workers.<sup>34</sup>

A recent study by Marx et al. (2016) found that, although Colombia has “established a fairly robust legal and institutional framework to protect labour rights, compliance is problematic, because while the laws were good, the government lacked capacity given the size of the country and the magnitude of labor rights problems”.<sup>35</sup> A more coherent approach, which links labour rights and criminal law, could gradually yield better labour rights governance and results for workers.

***Involving and empowering civil society in FTA partners: the EU takes a coordinated approach***

EU policymakers recognize that including labour rights provisions in FTAs and providing capacity-building assistance to trade partners are important but not, on their own, sufficient to empower workers and civil society. Some studies have asserted that officials need to do more to empower citizens to monitor their own governments' labour rights obligations in domestic law and in international – including trade – agreements. These studies have asserted that dialogue should not be just box ticking, but should include greater transparency and consultation in rulemaking (Marx et al: 2016). The EU has been trying to respond to such concerns. Since 2014, EU delegations abroad have been developing country roadmaps to engage with local civil society and in so doing, build up civil society in a broad range of partner countries – irrespective of whether they have a trade agreement in place with

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<sup>33</sup> DOL and USTR (2015), p. 12.

<sup>34</sup> DOL and USTR (2015), pp. 22–23.

<sup>35</sup> Marx et al. (2016), p. 597.

the EU or not. In countries such as Peru, this type of support could gradually alter policymakers' negative attitudes about unions and about labour rights.<sup>36</sup> Moreover, civil society groups will gain a stake in the success of these provisions and will carefully monitor and hold government to account. In so doing, they will gain greater insights as to how to improve governance.

## Conclusion

Labour rights provisions may have an unanticipated spillover. As policymakers learn how to effectively protect and respect workers' rights, they are also learning how to govern effectively and transparently and respond to public comment. Likewise, workers are learning to influence and trust their government. Moreover, over time countries that learn to improve labor rights governance are likely to build trust in effective governance and be better able to develop solutions to complex problems.<sup>37</sup> There is growing evidence that countries that protect labour rights implicitly signal to traders and investors that they are advantageous places to do business. Governments that protect labour rights are likely to attract investment over the long term and reap benefits in productivity and growth. After all, through their ideas and hard work, people are the principal wealth of nations.<sup>38</sup>

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<sup>36</sup> Obie and Van den Putte (2016), p. 35.

<sup>37</sup> Sengenberger (2005).

<sup>38</sup> Aaronson and Zimmerman (2007), pp. 193–196.

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