

Trade Agreements and their Relation to Labour Standards

The Current Situation

By Pablo Lazo Grandi

ICTSD
International Centre for Trade and Sustainable Development

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ABBREVIATIONS AND ACRONYMS

AA	Association Agreement
ACN	Andean Community of Nations
ACP	African Caribbean and Pacific
AFL-CIO	The American Federation of Labour and Congress of Industrial Organizations
ALC	Agreement on Labour Cooperation
APEC	Asia Pacific Economic Cooperation
BATP	Bipartisan Agreement on Trade Policy
BS OHSAS	British Standard–Occupational Health and Safety Assessment Series
CAFTA	Central America Free Trade Agreement
CARICOM	Caribbean Community
CARIFORUM	CARICOM countries plus the Dominican Republic
CCALC	Canada–Chile Agreement on Labour Co-operation
CP ALC	Canada–Peru Agreement on Labour Co-operation
CPFTA	Canada–Peru Free Trade Agreement
ECOSOC	United Nations Economic and Social Council
EISC	European Iron and Steel Community
FCES	*Foro Consultivo Económico-Social* (Economic and Social Consultative Forum)
EU	European Union
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
GB	Governing Body
GSP	Generalised System of Preferences
ILC	International Labour Conference
ILO	International Labour Organization
ISO	International Organization for Standardization
ITO	International Trade Organisation
MERCOSUR	*Mercado Común del Sur* (Common market between Argentina, Brazil, Paraguay and Uruguay)
MoU	Memorandum of Understanding
NAALC	North American Agreement on Labour Co-operation
NAFTA	North American Free Trade Agreement
NGO	Non-governmental Organisation
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
PTPA	Peru Trade Promotion Agreement
SA	Social Accountability
SADC	Southern African Development Community
SEP	Strategic Economic Partnership
TPA	Trade Promotion Authority
UNGC	United Nations Global Compact
US	United States of America
USTR	United States Trade Representative
WTO	World Trade Organization

FOREWORD

Regional trade agreements (RTA) have become a distinctive feature of the international trading landscape. Their number has increased significantly in recent years, as WTO member countries continue to pursue the negotiation of these agreements. Some 200-odd agreements have been notified to the WTO but their number may be actually higher, as some agreements are never notified to the multilateral bodies and many more are under negotiation. As a result more and more trade is cover by such preferential deals, prompting many analysts to suggest that RTAs are becoming the norm rather than the exception.

Many regional pacts contain obligations that go beyond existing multilateral commitments, and others deal with areas not yet included in the WTO, such as investment and competition policies, as well as labor and environment issues. Regional and bilateral agreements between countries at different stages of development have become commonplace, as have attempts to form region-wide economic areas by dismantling existing trade and investment barriers, an objective that figures prominently in East Asian countries' trade strategies.

Yet, the effects of RTAs on the multilateral trading system are still unclear, as is their impact on trade and sustainable development. RTAs represent a departure from the basic non-discrimination principle of the WTO, and decrease the transparency of global trade rules, as traders are subject to multiple, sometime conflicting requirements. This is particularly the case in relation to rules of origin, which can be extremely complex and often varies in agreements concluded by the same countries. Also, the case that WTO-plus commitments enhance sustainable development is far from proven, and it is not readily apparent whether RTAs enhance trade rather than diver it.

However, developed and developing countries alike continue to engage in RTA negotiations, and this tendency seems to have been intensified recently due to the slow pace of progress in the multilateral trade negotiations of the Doha Round. Countries feel the pressure of competitive regional liberalization and accelerate their search for new markets. Thus, while most countries continue to formally declare their commitment to the multilateral trading system and to the successful conclusion of the Doha negotiations, for many bilateral deals are taken precedence. Some countries have concluded so many RTAs that their engagement at the multilateral levels is becoming little more than a theoretical proposition.

Thus, to gain a better understanding of the workings of RTA and their impact on the multilateral trading system is a key concern of trade analysts and practitioners. Current WTO rules on regional agreements, mainly written in the late 1940s, do not seem well equipped to deal with today's web of RTAs. Economists dispute whether RTAs create or deviate trade, and political scientists try to explain the resurgence of RTAs by a mix of economic, political and security considerations. In some cases, the fear of losing existing unilateral non-reciprocal trade preferences provides the rationale for launching RTA negotiations, as is the case of the Economic Partnership Agreements (EPAs) negotiations between the European Union and its former colonies in Africa, the Caribbean and the Pacific. Many worry about the systemic impact of RTA and dispute whether they can be consider "building blocks" to a stronger and freer international trading system or, rather "stumbling blocks" which erode multilateral rules and disciplines.

There are many different interpretations of the dynamic relationship between RTAs and the WTO. The fact remains, however, that RTAs are here to stay. If any, they will continue to increase in the coming years. They are already an integral part of the international trade framework, and influence the behavior of governments and traders. They co-exist with the multilateral trading system and impact it in

manners that are still to be fully understood. Regional rules often replicate multilateral disciplines, but sometimes go beyond them by going deeper into some commitments, with implications for sustainable development which need to be highlighted. And it may well be that some regional disciplines could find their way into the multilateral framework.

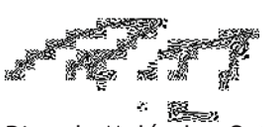
It is for these reasons that ICTSD has decided to initiate a research, dialogue and information program whose main purpose is to contribute to fill the knowledge gaps and to gain a better knowledge of the evolving reality of RTAs and their interaction with the multilateral trading system.

This study, titled Trade Agreements and their relation to Labour Standards: the Current Situation, written by Mr Pablo Lazo Grandi, is part of this programme. The study provides a political and legal review of how international labour standards have been introduced and how those standards have evolved in the international trade arena. The author analyses new trends and negotiations on trade and labour standards at the multilateral, regional, and bilateral levels.

The aim of the study is to offer developing country governments and other relevant stakeholders broad guidelines on how to address these issues in international negotiations with a focus on RTAs, taking into account the experience of countries such as Chile that have already negotiated several of those agreements. Many of these agreements contain some similar baseline clauses including objectives, scope, and minimum international standards. There is also a certain level of divergence in those agreements, especially in relation to specific commitments, arrangements for compliance and dispute resolution clauses. In some cases, countries have adopted co-operation provisions and programmes for improving their capacity for inspection and control.

The author concludes that there could be clear benefits from introducing labour standards in RTAs and provides some policy recommendations for developing countries to enable them to take advantage of such provisions.

We hope that the studies in this series contribute to clarify some of the many questions posed by RTAs, and help getting a better understanding of the working of RTAs and their interaction with the multilateral trading system.



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EXECUTIVE SUMMARY

In recent years, the basic model for bilateral trade agreements has evolved considerably, particularly for those involving the European Union (EU) and the United States (US). One of these changes is their inclusion of labour questions and commitments with respect to control mechanisms and the fulfilment of agreements.

The specific aim of this article is to describe, on the basis of an initial historical overview, the institutional and legal models that are now being developed, and to analyse possible future trends.

To appreciate the importance of these changes, we have first gone back to the discussion on the relationship between international trade and labour regulation, briefly reviewing events in the twentieth century relating to the setting up of the International Labour Organization (ILO) in 1919, the unsuccessful attempt to set up the International Trade Organisation in 1948, the appearance of the General Agreement on Tariffs and Trade (GATT) in 1947 and the setting up of the World Trade Organization (WTO) in 1995.

Next, this paper addresses the main results of multilateral ILO discussions held in 1994 in Geneva, as well as discussions of the World Summit of Heads of State held in Copenhagen in 1995, of the Trade Ministers' Conference held in 1996 in Singapore[1] of the International Labour Conference held in Geneva in 1998,and of the meetings of the Economic and Social Council of the United Nations in New York in 2005 and 2006, and finally at the headquarters of the ILO in Geneva in 2008. These meetings in effect served to build consensus concerning the labour requirements that should be coupled with agendas for development, growth and international trade. They reflected a concern with social matters, and in particular with the application of core labour standards governing labour, employment and decent work.

This paper then deals with the manner in which labour matters have been treated in the context of bilateral agreements, whether these are Association Agreements (AAs), free trade agreements (FTAs) or integration processes, containing material on trade. The analysis includes a variety of experiences, including integration processes, which are treated in somewhat greater detail in the case of MERCOSUR (*Mercado Común del Sur* – Common Market between Argentina, Brazil, Paraguay and Uruguay).

Within these processes it is worth emphasising four models to address labour issues within trade negotiations in terms of their relative importance. There is, firstly, the US model, whose development was initiated unilaterally with the Generalised System of Preferences (GSP). This model was first shaped on an initial agreement concluded by Canada, Mexico and the US in 1993, in parallel with the FTA by these countries. After experiences with Jordan and Cambodia, the model finally took a more definitive form in the Trade Promotion Authority (TPA) of 2002, which in turn led to a series of agreements initiated with Chile and with Singapore in 2003, entering into force in 2004. The final formulation can be found in the agreement that the US reached with Peru, renegotiated after the Bipartisan Agreement on Trade Policy presented to the US Congress in 2007[2], thus facilitating the approval of the policy with Peru. Essentially, the most recent formula sets up regulatory obligations on core rights recognised in the ILO Declaration on fundamental principles and rights at work, and its Follow-up, as well as to the observance of existing domestic labour legislation, laying down trade sanctions for failure to observe them as well as a system of preliminary consultations.

Another model which has seen considerable development is that promoted by Canada, which in its latest version also contains commitments on regulations and on the fulfilment of local labour law,

with the additional characteristic that it lays down a system of financial compensation which can reach as much as USD 15 million annually, to ensure that labour standards are observed. In this respect, the North American Agreement on Labour Co-operation (NAALC) model is taken as a guide.

The third model to be examined is that of the EU, which has developed a series of association agreements, of which the most innovative are those reached at Lomé (Togo) and Cotonou (Benin), and those with Mexico and Chile and, the agreement which we will analyse in greatest depth, that of the EU with Cariforum (the Community of Caribbean States plus the Dominican Republic). This last agreement develops stricter regulatory commitments, adding those proceeding from the work agenda developed by the ILO and from the full employment agenda of ECOSOC (the United Nations Economic and Social Council) and the UN, dating from 2006. It includes a powerful element of participation by civil society for checking that labour standards have been applied. Although under the agreement labour questions can be submitted to dispute settlement procedures, in the case of disagreements, they are excluded from the scope of trade sanctions.

The fourth model for addressing labour issues within the context of an FTA which we discuss is that promoted with some little differences by both Chile and New Zealand. This model is based upon substantive commitments but focuses on co-operation and not on trade sanctions. Both countries have had the experience of negotiating separately agreements with China and other Asian countries which makes the model particularly interesting. Both countries also negotiated together with Singapore and Brunei Darussalam. Chile's experience is analysed in more detail, in particular because it is a developing country which promotes the inclusion of labour matters in trade agreements and because it is the country with the greatest number of trade agreements at the international level. Additionally, experiences with Canada and the US are also analysed, as they include, respectively, possible financial contributions and trade sanctions.

We then review and analyse the contents of the agreements and include a comparative table (see Appendix 1) covering the main evidence.

Following this, we review the experience of so-called *Soft Law,* in particular the United Nations Global Compact (UNGC) and the ISO Standard 26000 covering social responsibility.

Finally, we formulate some thoughts on the challenges facing attempts to enforce the agreements, the role of the ILO in new circumstances and the implications for developing countries. The conclusion seeks to identify trends based on lessons learnt from bilateral and multilateral agreements.

INTRODUCTION

The relationship between trade agreements and labour standards is closely linked to the spectacular global changes in the means of production and the world of labour. Indeed, economic globalisation and technological revolution are developing at such speed, especially with respect to trade liberalisation and free movement of capital, but also with respect to transport and telecommunications, that they have transformed the economy and with it societies across the world. The process has a continuous and daily impact on the worlds of labour and employment.

The result has been a clear transformation in the character of employment, businesses and workers, as well as changes in the role of the State, to such an extent that employment is now subject to fast turnover, whereas employment used to be practically for life. In many countries, services have been displacing primary activities, businesses have fragmented, divided into branches or externalised activities to other firms. At the same time, in employment a gap has developed between highly qualified workers with growing incomes and less qualified workers whose employment has become precarious and who continue to receive low wages. The State has assumed an essentially regulatory and fiscal function and over time has become less important in labour matters. At the same time, processes which are leading to more privatisation, more mediation and less employment security are creating a wide gap between low- and high-skilled workers. Although it may be true that the recent financial crisis has led to some questioning of the weak role of the State and that today we are seeing governments of some of the major economies taking over huge corporations, it is nevertheless clear that such processes are clearly transitory and that essentially the character of employment and work will change little.[3]

In this context, faced with the slow pace of negotiations at the multilateral level, especially at the present Doha Round, various countries and groups of countries have adopted bilateral or sub-regional strategies. Some of them, in particular the European Union (EU) and the United States of America (US), have launched a new generation of regional or bilateral agreements which also cover labour issues. Canada, Chile and New Zealand have also been active in this area. Such negotiations allow the Parties to reach agreements more quickly than under the umbrella of the World Trade Organization (WTO) and can proceed without prejudice to the multilateral process.

The International Labour Organization (ILO) has made interesting advances in discussions and in the manner of tackling labour challenges in the international trade liberalisation agenda. We shall see how this agenda has developed and how it relates to trade issues.

Labour issues have been treated in very different ways in bilateral agreements and at the subregional level. For example, those which form part of integration agreements, such as the EU process or the processes developed by the Southern Common Market (MERCOSUR),[4] emphasise economic deregulation.

In this paper, we attempt to provide a systematic picture of how various understandings at the multilateral or bilateral level have developed, from symbolic or ideological positions, to agreed, pragmatic solutions. These in turn have enabled the concerns of all actors to be taken into account, whilst at the same time advancing the international trade agenda.

Although this agenda was originally promoted by the most developed countries, a number of developing countries have agreed to various types of commitments on labour issues, to degrees which are compatible with their own national policies.

1. ORIGINS AND HISTORY

There is a very copious body of writing on the relationship between international trade and labour standards which, as early as 1788 in material written in France, included observations on the advantage which could be gained by a country if it abolished the weekly day of rest, at least until its actions were imitated by others.[5]

Towards the end of the nineteenth century, the subject of labour was brought up when negotiating commercial treaties, especially with respect to the protection of migrant workers.[6]

The League of Nations Pact (1919), which came about after the First World War, by which Member States committed themselves to guaranteeing and maintaining fair and humane working conditions in their own territories "*as well as in all countries to which their trade and industrial relationships extend*", is of fundamental importance.

In the context of the League of Nations Pact, the authors of the Constitution of the International Labour Organization (ILO) stated in 1919 in the Preamble that:

> "*The failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.*"[7]

The ILO was emerging at the end of the First World War as a single tripartite institution, made up of representatives of governments, trades unions and employers, with the mission of drawing up labour regulations applicable to all States and with the supplementary mission of checking implementation of each Member State.

The International Economic Conference held in London in 1933 and organised by the League of Nations in response to the serious economic depression, should also be noted, as well as many other events and declarations referring to the necessity of improving the living conditions of workers and of avoiding the introduction of elements of unfair competition, which could lead to difficulties in international trade.

As the WTO itself has placed on record[8], during the course of the XXth Century there were other attempts to link trade and labour issues. The Havana Charter of the forties explicitly refers to labour issues:

> *"1. The Members recognise that measures relating to employment must take fully into account the rights of workers under intergovernmental declarations, conventions and agreements. They recognise that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and conditions as productivity may permit. The members recognise that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each member shall take whatever action may be appropriate and feasible to eliminate such conditions in its territory.*
>
> *2. Members which are also members of the International Labour Organisation shall co-operate with that organisation in giving effect to that understanding."*

The Havana Charter emerged out of discussions for a "Charter for an International Trade Organisation", a UK-US proposal which was taken before the Economic and Social Council of the United Nations (ECOSOC), which in turn called for a conference to set up the International Trade Organisation (ITO). Eighteen countries took part in the Preparatory Committee which sat from October 1946 to March 1948 for the purpose of drawing up the ITO Charter. The final meeting was held from November 1947 to March 1948 in Havana, hence the name. The ITO was signed by 53 countries and covered not only trade policy, but also employment and economic activity, amongst others.[9]

The Havana Charter required Members to monitor for any anti-competitive practices which could affect trade and which could have international repercussions, placing an obligation on Members to act in consequence, although it did not include any general obligation to adopt laws in defence of competition. However, mechanisms for co-operation were provided for.

The US Administration which had promoted the ITO Charter encountered powerful resistance in the US Congress, which objected that the questions covered by the Charter were only indirectly related to trade. Other legislatures also rejected the plan, which as such never reached fruition.

At the same time, a General Agreement on Tariffs and Trade (GATT) was being negotiated and included some of the questions from the negotiations concerning the ITO Charter. Initially, it was conceived as a temporary agreement which would remain valid until the ratification of the ITO Charter. The provisional character of GATT was also reflected in the fact that the signatories were referred to as "the contracting Parties" with the aim of dissipating any fears that an international organisation had been created. The GATT was signed by 23 countries[10] on 30 October 1947, during one of the meetings of the Preparatory Committee of the ITO held in Geneva, and came into force on 1 January 1948.

In about 1987 the US government had suggested to the GATT Council that a working group should be set up to consider the relationship between international trade and internationally-recognised workers' rights. On that occasion the suggestion was rejected. The US attempted to renew the suggestion in 1990, with the same result. From 1993 until the Marrakech meeting, the US has continued to insist that the connection between trade and labour rights should be recognised, but the proposal has never been accepted.

The proposal to include labour matters on the agenda for trade negotiations has received the staunch support of trade union organisations but has been opposed by employers. Equally, a large majority of developed countries has shown itself to be in favour of the inclusion of these clauses, whereas the majority of developing countries, led by the largest of the emerging countries were against.

Amongst the questions to be resolved, there has been much discussion on the possible inclusion of a social clause in the WTO agenda, which would lead to a group or space created specifically for such discussion. However, there has never been sufficient agreement, and in consequence at the present time there is no space reserved for this debate.[11]

2. GENEVA, COPENHAGEN, SINGAPORE AND NEW YORK

Although the discussion on the link between trade and labour standards originated a long time ago[12] and has been present in the WTO since its creation, 1994 marked a revival of the debate. The disagreement was still in evidence in April 1994 in the Marrakech meeting at which the Treaty which set up the WTO was signed. On this occasion, according to the WTO, almost all the trade ministers approached this question.[13] It should nevertheless be highlighted that the Marrakech Agreement itself states in the Preamble that "*relations in the sphere of trade and economic activity should tend to increase living standards (and) achieve full employment...*"[14] Moreover Article XX of the General Agreement on Tariffs and Trade dated 1994 allows that governments may restrict imports "*linked to articles manufactured in prisons*".[15]

Later, in June of the same year, there were heated debates at the International Labour Conference (ILC)[16] of the ILO, at which representatives of the governments of developed nations once again clashed with those of developing countries, and representatives of labour organisations clashed with employers, over the possibility of including labour or social clauses in the WTO framework.[17]

These debates continued in the following year at the Conference of Heads of State in Copenhagen (1995) and in the Ministerial Trade Meetings at the WTO in Singapore (1996), in the meeting in Seattle (1999)[18] and at the ILC of the ILO held in Geneva in 1998. On all these occasions, diverse interpretations and reciprocal fears of the real intentions lying behind the trade negotiations emerged. When the EU and the United States made their positions clear, it emerged that they were the clearest exponents in favour of including social clauses in the WTO, whilst amongst the developing countries the loudest voices against came from Brazil, Egypt, India, Mexico and Pakistan.[19]

In 1995 the Heads of State meeting at the World Summit on Social Development in Copenhagen, managed to reach a certain minimum agreement on the basis of the discussions at the ILO Geneva Conference in 1994. The result of the Conference appeared as the *Copenhagen Declaration on Social Development and Action Programme of the World Council on Social Development* which essentially covered the core labour standards in: "*the prohibition of forced labour and child labour, liberty of association, the right to be a member of a trade union, to collective bargaining and the principle of non discrimination*."

Trade and labour were once again the subjects of difficult discussions at the WTO Conference in Singapore in 1996, at which a diplomatic agreement was reached confirming that responsibility at the international level for observing international labour standards and ensuring the application of basic labour rights lay with the ILO. The arguments were extremely intense because once again on this occasion there was the powerful presence of representatives of civil society, including non-governmental organisations (NGOs) and trade unions. There was a good deal of pressure, as a consequence, from both the public and the media. The same occurred at the following Seattle Conference in 1999, although the debates on the subject were not as intense.

The WTO's official position on labour standards is covered in the Singapore Ministerial Declaration of 1996, which lays down the following:

> *"4. We renew our commitment to the observance of internationally recognised core labour standards. The ILO is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes and agree that the comparative advantage of countries especially insofar as developing countries, particularly low wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue to collaborate."*[20]

In accordance with the position decided at the Singapore Conference, at the present time the Councils and Committees of the WTO are not working on the question of trade and labour.[21] Nonetheless, in harmony with the Singapore Declaration, the Secretariats of the ILO and WTO have continued collaborating and exchanging information. This collaboration includes the participation of the WTO in meetings of the ILO, exchanging documentation, joint research, and informal co-operation between the Secretariats of both organisations. For example, in 2007 both Secretariats undertook a joint study on the relationship between trade and employment.[22]

The theoretical and empirical analysis of the relationship between trade and labour standards has led to particular attention being paid to the arguments over "below the belt" competition and the "freezing" of standards.[23]

The World Trade Organization addressed the fundamental debate on the relationship between core labour standards and international trade policy, using models developed by experts to assess the impact of core labour standards on the export sectors of developing countries and the impact on competitiveness.[24] Contrary to popular belief, inappropriate application of core labour standards generally reduces competitiveness through distortions, while applying core labour standards increases

productivity and reduces the real costs of contracting workers. Some exceptions are mentioned, such as the exploitation of child labour, which can expand exports in sectors which require many workers and working time.[25]

Debates at the WTO continued in Geneva in May 1998, at the WTO Ministerial Conference, and particularly at the ILO International Labour Conference in June 1998 when finally, at the 86th meeting of the ILO, the ILO "Declaration on Fundamental Principles and Rights at Work and its Follow-up" (hereinafter referred to as the "1998 ILO Declaration") was approved.[26] As we shall see, this is an instrument of fundamental importance, to which almost all present trade and labour agreements refer and which serves as a basis for laying down commitments on labour matters within trade agreements.

The 1998 ILO Declaration, considered as a successor to the ILO Philadelphia Declaration of 1944, established commitments in four fundamental areas:

- basic or fundamental labour rights and principles;
- jurisdiction of the ILO;
- labour standards should not be used for trade protectionist ends;
- the comparative advantages possessed by any particular country should not be jeopardised on the basis of the present Agreement or its follow up.

With regard to the WTO, the question was raised again at the Ministerial meeting in Doha in November 2001. The Ministerial Declaration stated as follows:

> *"8. We reaffirm the declaration that we made at the Ministerial Conference in Singapore regarding internationally recognised core labour standards. We take note of the work being conducted at the International Labour Organisation (ILO) on the social dimensions of globalisation."*

The debate then proceeded to New York in September 2005 when the World Summit of the United Nations adopted, by means of a resolution approved by the General Assembly, the final document of the 2005 World Summit establishing the principle of "decent work" (to be found in Paragraph 47) which emphasises the fundamental role played by decent work in strategies for development and poverty reduction.[27]

For its part, and along the same lines, the ECOSOC called in July 2006 for the incorporation of productive employment and decent work in all UN policies, programmes and activities, with the aim of achieving fair globalisation and poverty reduction, as part of the application of the Millennium Development Goals. Concrete measures for applying the resolution of the World Summit of 2005 were laid down in the Ministerial Declaration of the Economic and Social Council of 2006.[28] The aim was to convert full employment and decent work into central goals of national and international policies. Once again, the declaration reiterated the consensus on decent work and on basic rights at work.[29]

It is useful to remember the importance of the instrument adopted by the ECOSOC since, when we come to the negotiating experience of the EU, we shall see that in its most recent association agreement it has included as an additional commitment in its trade agenda the observance of tasks relating to full and productive employment and decent work.

Another fundamental step was taken when the ILO unanimously adopted the ILO *Declaration on Social Justice for a Fair Globalization* in June 2008 (hereinafter referred to as th 2008 ILO Declaration).[30] This is the third declaration of principles and far-reaching policies adopted by the International Labour Conference since the Constitution of the ILO in 1919. As can be seen from its formulation, it is the result of tripartite consultations which were initiated after the launch of the Report of the World Commission on the Social Dimension of Globalisation. With the adoption of this text by representatives of governments, employers and workers in its Member States, the concept of

decent work developed by the ILO since 1999[31] has become official, and now plays a central role in the policies of the organisation. The concept of decent work requires that States formulate appropriate strategic goals concerning employment, social protection, social dialogue and fundamental rights at work.

An interesting aspect of the 2008 ILO Declaration and which will have a bearing upon the labour and trade agenda, is connected with the power that the principals grant to the ILO for "*lending aid, when asked, to Members who wish to promote jointly the strategic goals within the framework of bilateral or multilateral agreements, provided that they are compatible with its obligations to the ILO.*"

In this way, the 2008 Declaration establishes in an official text the concept of decent work promoted by the organisation and strengthens the importance of its fundamental conventions and priorities. In addition, it complements the WTO Singapore Agreement of 1996 and the ILO Geneva Agreement of 1998 by stating that "*the violation of fundamental principles and rights at work can not be invoked or used as a legitimate comparative advantage*." In addition, it facilitates participation by the ILO in the bilateral agendas adopted by its Member States. On the other hand, it should be noted that the ILO Standards are made up of agreements and recommendations which, unlike conventions, are non-binding.

The 2008 Declaration confirms that the ILO will maintain a list of so-called "updated" instruments which will be regularly reviewed. In March 2008 the updated list of ILO instruments included 76 of the 188 conventions passed by the ILO. There is a basic classification of updated conventions drawn up by the Governing Body (GB) of the ILO which draws a distinction between those which are considered fundamental (8), those considered as priorities (4), and the remainder (64). Of the 199 recommendations which were passed, 78 have been updated.[32] [33]

The core conventions are as follows:

On Freedom of Association:
- Freedom of Association and Protection of the Right to Organize Convention, 1948 (Nº 87)
- Right to Organise and Collective Bargaining Convention, 1949 (Nº 98)

On Forced Labour:
- Forced Labour Convention, 1930 (Nº 29)
- Abolition of Forced Labour Convention, 1957 (Nº 105)

On Child Labour:
- Minimum Age Convention 1973 (Nº 138)
- Worst Forms of Child Labour Convention, 1999 (Nº 182)

On Discrimination:
- Equal Remuneration Convention, 1951 (Nº 100)
- Discrimination (Employment and Occupation) Convention, 1958 (Nº 111)

In the updated list of conventions, recommendations and other ILO instruments, those which are classified as "priority" by the 2008 Declaration are as follows:

- Labour Inspection Convention, 1947 (Nº 81)
- Employment Policy Convention, 1964 (Nº 122)
- Labour Inspection (Agriculture) Convention, 1969 (Nº 129), and
- Tripartite Consultation (International Labour Standards) Convention, 1976 (Nº 144).

The ILO emphasises that in future updated lists of conventions could be granted priority status.[34]

It is interesting to note that for purposes of applying the 2008 Declaration, the organisation, if requested to do so, can assist Members who wish to promote jointly the strategic goals within the framework of bilateral or multilateral agreements (provided that they are compatible with their obligations to the ILO).[35]

3. LABOUR STANDARDS AND BILATERALISM

3.1. The US route

3.1.1. The unilateral route

As a result of difficulties experienced by the US and other countries in placing labour commitments on the international trade agenda, such countries opted for a unilateral system. In effect, such a system was set up by the US in 1984[36] in regulations known as the Generalised System of Preferences (GSP).[37] Similar provisions were set up in a 1983 law on preferential trade and tax benefits with respect to the Caribbean countries[38] and in the Law on Preferential Trade in relation to the Andean countries in 1991.[39] Under these standards, in order to be eligible or in order to remain eligible for these benefits, the countries benefiting from preferential tariffs must comply with certain definite requirements, amongst which is included a guarantee of *"internationally recognised labour rights"* understood as the following:

- The right of association;
- The right to organise and collective bargaining;
- Prohibition of all forced or obligatory labour;
- Minimum age for employment of children,

  and

- Minimal working conditions in relation to minimum wage, working hours, health and occupational safety.

There are precedents for this type of legislation going back to at least 1890 in the US. For example, the law known as the *Mckinley Tariff Act* which forbade the import of goods produced by convicts, repeated in the *Smoot-Hawley Tariff Act (section 307)* of 1930, which prohibited the import of products manufactured by prisoners or people forced to work, giving authority to the US President to raise tariffs to match production costs.[40] The rationale behind these regulations was the desire to avoid trade based on unfair competition because of lower costs deriving from failure to respect labour standards which might introduce unjustified distortions in international trade.[41]

3.1.2. The route via bilateral and regional agreements

On the basis of GSP standards, and under the powerful pressure of public opinion, the US has vigorously promoted the inclusion of labour agreements in its trade negotiations, trying out various models which include the possibility of trade sanctions in its most recent agreements, based upon the North American Free Trade Agreement (NAFTA), the trade agreement with Jordan and later those with Bahrain, Central America, Chile and Singapore. The US negotiating position was newly revised as a result of the bipartisan agreement reached in 2007, under which the US Administration was authorised to reach trade agreements on the basis of a modified version of the rigid mandate imposed upon US negotiators. Under this agreement, however, only one free trade agreement (FTA) (that with Peru) has been negotiated and approved.

3.1.2.1. The experience of the North American Free Trade Agreement

The North American Free Trade Agreement concluded in 1993 between Canada, Mexico and the US entered into force on 1 January 1994. One of its main objectives is to "strengthen *the development and enforcement of environmental laws and regulations; and protect, enhance and enforce basic workers' rights.*" The Member countries concluded two co-operation agreements: a labour agreement and an environmental agreement.

The North American Agreement on Labour Cooperation (NAALC), in parallel with the FTA, lays down the following goals: a) to improve working conditions and living standards, b) to promote to the greatest extent the labour principles laid down

in Appendix 1, c) to stimulate co-operation to promote innovation, both in terms of productivity and increasing quality, d) to encourage the publication and exchange of information, the development and coordination of statistics, as well as joint studies for promoting mutually-beneficial understanding of the laws and institutions covering labour in the territory of each of the signatories, e) to continue co-operation relating to work in terms of mutual benefit, f) to promote the observance and effective enforcement of labour legislation in each of the signatory countries and g) to promote transparency in the administration of labour legislation.

For its part, Appendix 1 to the NAALC laid down the following labour principles as characteristics to be promoted by each country's internal legislation: liberty of association and protection of the right to organise, the right to collective bargaining, the right to strike, the prohibition of forced labour, restrictions on child labour, minimum standards for working conditions, elimination of discrimination in employment, equal remuneration for men and women, prevention of accidents at work and occupational illnesses, compensation in the event of accidents at work and occupational illnesses, and protection of migrant workers.

Both NAFTA and NAALC came into force on 1 January 1994.[42] Procedures for settling disputes are laid down by which, provided ministerial consultations have taken place and the relevant Expert Evaluation Committee has intervened, an arbitration panel can order the payment of financial compensation, initially up to 20 million dollars in the case of the NAALC between the United States and Mexico. This money must be used for improving compliance with labour regulations in the relevant country if failure to comply has repercussions on trade. If the financial compensations are not paid, they can be collected via tariffs.[43]

The agreement does not guarantee labour mobility across frontiers and expresses a common desire on the part of the signatories to co-operate, so that the economic opportunities opened by NAFTA should be translated into the development of human resources and improvements in working and living conditions in the respective territory. The protection of workers' fundamental rights is considered to be an important element of an economy with high productivity, the shared goal of all the Parties.

It is worth stressing two important commitments to be found in NAALC: 1. each Party shall ensure that its labour laws and regulations provide for high labour standards, consistent with high quality and productivity workplaces (Art. 2) and 2. each Party shall continue to strive to improve those standards in that light (Art. 3).

The focus of this treaty is tri-national rather than supranational. It lays down fundamental principles for the operation of administrative and jurisdictional bodies, and includes definitions of labour principles.

The North American Agreement on Labour Cooperation focuses on the application of domestic labour law. At first, it was not well received by the main Canadian and US trade-unions, basically because it did not provide for a permanent central body charged with correcting infractions and because the sanctions only guaranteed respect for laws relating to child labour, health and safety at work, and minimum wage (since they were the only ones subject to a possible arbitration panel), whilst questions of collective rights were subject only to ministerial consultation, and because the time limits as they appeared in the agreement were very long. The Confederation of Mexican Workers, on the other hand, expressed its satisfaction with the agreement and with its respect for national sovereignty.

It is interesting to note that although there have been numerous cases of co-operative consultations under the NAALC provisions, to date there have never been any cases which have gone to the second level of the dispute process, let alone to the arbitration panel.[44]

In spite of the fact that a labour question has never come before an arbitration panel, in the NAALC there are 37 cases[45] in which consultation procedures were initiated, subject

to specific procedures; the only cases in which labour matters have been raised in the context of international trade.[46]

3.1.2.2. The Cases of US – Cambodia and US – Jordan

Under President Clinton's Administration, the US did not manage to go beyond NAFTA on the agenda of trade liberalisation because the president could not get authorisation from Congress for *fast track* procedures. However, towards the end of his presidency, he did reach an agreement with Jordan, known as *United States–Jordan Free Trade Area Agreement*.[47] In this agreement, labour matters were dealt within an additional clause, in Article 6, appearing for the first time as a commitment to respect the 1998 ILO Declaration and equally as a commitment that national legislation would include such principles and protect them by domestic legislative means.

A non-derogation clause was introduced[48] as well as a commitment to attempt to ensure that labour standards were consistent with internationally-recognised workers' rights (understood as the right of association, the right to organise, the right to collective bargaining, forced labour, child labour and acceptable conditions of work with minimum wages, working hours, and health and safety at work).

However, the most important point of principle achieved by the US in these negotiations was to submit labour matters to the same dispute settlement procedures as those negotiated for trade questions (Art. 17).

A further experiment, developed by the US with Cambodia in 1998, consisted in a "Textile Agreement" which defines import quotas for textiles from Cambodia to the US on the basis of prior certification by the ILO of compliance with basic labour standards. There was some debate as to whether the ILO could accede to such requests but doubts were finally dispelled and the ILO agreed to participate in the project.[49]

3.1.2.3. The Experience of the Chile – US Free Trade Agreement [50]

From *fast track* to TPA.[51] The relationship between labour standards and trade liberalisation gained considerable importance as a result of the approval by the US of the so-called *Trade Act* and the inclusion of a *Trade Promotion Authority* (TPA). This authority originated in a law dated 2002 which granted a new mandate to the president of the US to conduct trade negotiations with third countries, whether in multilateral or bilateral contexts, and with the particular characteristic that the agreements reached could only be discussed (and approved or rejected) as a whole. With this measure, one of the most serious difficulties slowing the process of US trade liberalisation was removed.

There was clear evidence of powerful resistance from a number of sectors not wishing to open the country's economy and rejecting trade liberalisation and free movement of capital. The biggest trade union organisation in the US, the powerful AFL-CIO (American Federation of Labor and Congress of Industrial Organizations), was radically opposed to the initiative by the TPA, fearing negative consequences for US workers, for their employment and working conditions. Even so, although in general representatives from the democratic wing of Congress voted against the measure, various congressmen who voted in favour only did so when it was promised that a *Trade Adjustment Assistance Law* would be passed at the same time and as a precondition. In virtue of this law, a new programme was set up to help people affected in their employment as a consequence of international trade.

The TPA mentions compliance with fundamental labour standards as a goal to be pursued by the US, corresponding to the principles to be found in the Generalised System of Preferences of the United States, in other words, labour standards relating to freedom of association, collective bargaining, forced labour and child labour, as well as working conditions covering minimum wages, working hours, health and safety at work. Special mention should also be made of ILO convention N° 182 on the prohibition of the worst forms of child labour and immediate action for its elimination. Section 2102 (b) (17) makes it a main principle of negotiation, incorporating it as one of the priorities in Section 2102 (c) (2).

In addition, the TPA states in its section on the furtherance of priorities (Section 2102 (c)) that, whenever there is an attempt to implement any trade treaty in accordance with the authorisation in the TPA, the US Administration must consult with the interested country concerning their respective labour laws and must give technical assistance to such countries if necessary, and especially concerning compliance with current standards on child labour.

At the same time as setting up consultation and bilateral co-operation mechanisms for protecting workers' rights in each country with which the US has free trade agreements, the TPA lays down that the labour impact of future agreements in the territory of the US must be researched and the results made available to the public.

Against this backdrop, negotiation on labour questions took place in the context of the US-Chile Free Trade Agreement. We will analyse this agreement in detail in Section 3.10.3.

3.1.2.4. The Case of the Central America-Dominican Republic Free Trade Agreement and other Agreements Post-TPA

Following the FTA agreed with Chile, the US has concluded trade negotiations with various other groups or countries, and has begun negotiations with others still. Negotiations have been concluded with the Central American countries of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, under the Central America Free Trade Agreement (CAFTA). The main novelty in these negotiations was that not only did the Central American countries contract bilateral agreements covering labour matters with the US, but also with each other. This is the first time that an FTA covered labour obligations between countries in the southern hemisphere. In other respects, fundamentally the agreement follows the lines already established between Chile and the US, even though the commitments with regard to procedures are more developed.

It should be pointed out that the Dominican Republic has attached itself under similar terms to the FTA with Central America, thus agreeing to the terms adopted by CAFTA. After the TPA, the US Administration negotiated other agreements with similar clauses with Australia, Morocco, Oman and Bahrein.[52]

3.1.2.5. Free Trade Agreement US – Peru

The slight majority in Congress enabled the US Administration to advance its international trade agenda. However, once this majority disappeared, the US Administration had to negotiate a new agreement with the Democrats which is known as the Bipartisan Agreement on Trade Policy (BATP).[53]

In virtue of the BATP, and in spite of the fact that different treaties with Colombia, the Republic of Korea, Panama and Peru were already in place, these treaties had to be renegotiated to comply with the new model, in particular in relation to clauses dealing with environmental and labour matters. This new model can clearly be seen at work in the negotiations with the above-mentioned countries. The only agreement to have been approved so far is the US-Peru Trade Promotion Agreement (PTPA), which forms the current model for the negotiations with that country.

The terms of the new agreement reached by Republican and Democrat leaders in the US Congress with the Office of the US Trade Representative derive from the majority held in both Houses of Congress by the Democrats.

The first test of the new US domestic agreement was the renegotiation of the agreement reached on labour matters with Peru.

Under the terms of the PTPA, both Parties are obliged to adopt and maintain in their laws and regulations the core labour rights already mentioned, as set out in the 1998 ILO Declaration, and to enforce them. It is important to emphasise the subtle point that there is no mention of the eight ILO core conventions, which is explained by the fact that the US has only passed two of them. In spite of that, one of the results of this agreement with Peru has been that there is now greater pressure for the US to comply with international labour legislation, since it has also committed itself to respecting

the "rights" given in the 1998 ILO Declaration coinciding with the eight conventions already discussed. This is in contrast to more generic allusions to the "principles" of the Declaration previously manifest in other treaties.

Furthermore, the regulatory obligations to be found in the PTPA are at a higher level than the formulation originally agreed with Peru, since the phrase "adopt and maintain" is far stricter than the phrase "attempt to ensure" when speaking of the incorporation of such rights.

In addition to the incorporation of new and stricter obligations at the regulatory level, the greatest change is to be found in the dispute settlement procedures. The new formulation makes no distinction between labour obligations which are subject to these procedures, nor as to the consequences or trade sanctions which can be applied. The result is that whatever the infraction may be, it can be taken to the relevant arbitration panel after consultation procedures have been followed. In the event of verifying the failure to comply, the panel is obliged to take the same measures. This reflects a recurring demand from the trade union sector in the US which had been charging earlier treaties with adopting a double standard with respect to labour standards. In practical terms, this means that authorisation is granted to the plaintiff to suspend the application of benefits equivalent to those of the defendant, in accordance with Article 21.16 of the PTPA, until any failure to comply which may have been determined by the panel has been redressed (Art. 21.16.8).

3.1.2.6. Free Trade Agreement US – Panama and other agreements following the Bipartisan Agreement on Trade Policy

The US had already reached agreement with Colombia, the Republic of Korea and Panama before the BATP but without managing to gain approval by Congress. In the new scenario, once the agreement had been reached, it had to be renegotiated with its trade partners to incorporate the new requirements put forth by Democrats in Congress. This was fully achieved at the negotiating table by the Administration. However, up to the present, for various reasons, no agreements of this type have yet been approved by the US Congress.

3.2. The Experience of Canada

Canada followed its initial negotiation model with the US in NAFTA[54] for negotiations with Chile. These were very similar, although trade sanctions played no part in the provisions. On the other hand, provisions for financial compensation were included to cover certain failures to comply. Further negotiations with Costa Rica included the possible use of suspension of co-operation as a sanction. Later, it developed its model, adjusting the content of the labour standards to be protected and abridging procedures, although not to the degree of the FTA between Peru and the US. The model excludes trade sanctions, but does lay down financial compensations. The same model was followed in the negotiations with Colombia, although this agreement has yet to be approved.

3.2.1. Chile – Canada Agreement on Labour Co-operation[55]

Along with the free trade agreement agreed between Canada and Chile, both countries also agreed to draw up a parallel labour agreement, similar to the Labour Agreement concluded by Canada, Mexico and the US complementing NAFTA. The Chile-Canada Agreement on Labour Cooperation (CCALC) was signed in Ottawa on 6 February 1997. The three agreements, including an environmental one, came into force on 5 July 1997.

The CCALC sets up a Ministerial Council to supervise the implementation of the agreement and to make recommendations. National secretaries serve as contacts, established at Ministry of Labour level.

3.2.2. Canada and Costa Rica Labour Co-operation Agreement

The agreement between Canada and Costa Rica was negotiated as a result of the 2001 FTA between Canada and Costa Rica. Essentially, it is similar to NAFTA and to the agreements between

Canada and Chile, although it differs in some specific and substantive respects. In effect, in the NAALC and the CCALC all the principles in Appendix 1 can lead to consultations: some can go to the Expert Evaluation Committee (except the right of association, collective bargaining and the right to strike) and only a few can go to the arbitration panel (minimum wage, child labour, and health and safety at work). On the other hand, in the agreement with Costa Rica the principles which can give rise to consultations and an arbitration panel are those covered in Appendix 1 which include liberty of association, collective bargaining, the right to strike, prohibition of forced labour, protection of children and young people, elimination of discrimination and equal pay for men and women. Likewise, in this agreement there are no provisions for procedures by Expert Evaluation Committee, nor for financial assessments or trade sanctions. On the other hand, in the most serious cases of failure to comply with the agreement, co-operation can be terminated.

3.2.3 Canada and Peru Labour Co-operation Agreement

On 29 May 2008, Canada and Peru signed a Free Trade Agreement (CPFTA) and two parallel agreements on labour and the environment. The agreement covering labour matters is centred on co-operation between the Parties for promoting and applying fundamental labour rights. It also provides for open and transparent procedures for settling disputes. These procedures, in the most extreme cases of failure to comply, which have been duly established by an independent arbitration panel, can lead to financial sanctions in the form of monetary contributions. Any such contributions must be paid into a fund for eliminating such breaches of labour standards.

The basic principles of the CP ALC are as follows:

- Commitment to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1988).

- The Parties commit themselves on matters of health and safety at work, migrant workers, minimal working conditions, minimum wage and payment for overtime work.

- The agreement allows the public to make complaints to either of the Parties regarding compliance with labour laws relating to the ILO Declaration or failure to comply with the legislation of either country. As a last resort, an arbitration panel can impose on the offending Party to pay of up to USD 15,000,000. The quantity of the monetary is paid into a fund which will be used to make a rectification of the relevant problem.

With respect to dispute resolution procedures, time limits are shorter than those to be found in NAFTA and in the agreement on labour co-operation between Canada and Chile. The time limit for consultations can reach a maximum of 180 days, and in matters of fundamental importance the panel has 120 days, and possibly 60 more, within which it can issue its initial report (Art. 17.3) and 60 additional days within which to issue its final report (Art. 18). It is interesting to note that this agreement provides for a time limit of 30 days within which the review panel must rule as to whether the supposed infringement of labour legislation is connected with trade (Art. 15.1(b)).

The content of the agreement on labour matters took shape both in the FTA in Chapter 16 Articles 1601 and beyond, and in the *Canada Peru Agreement on Labour Cooperation between Canada and Peru* referred to in Chapter 16.[56]

3.3. The Asian Context

There have been a number of varying experiments linking trade matters with labour concerns in the Asia-Pacific region.

Naturally, the agreements reached by the US with Australia and Singapore in 2004 and 2003 can be mentioned. Chile and New Zealand have also promoted the incorporation of labour matters in trade agreements. New Zealand for example, reached an agreement with Thailand which is reflected in the *Memorandum of Understanding on Labour*, concluded in 2005

in parallel with an Association Agreement (AA) between the two countries.

A similar scheme can be found in the *"Memorandum of Understanding on Labour Cooperation among the Parties to the Trans-Pacific Strategic Economic Partnership."* This agreement was signed by Brunei Darussalam, Chile, New Zealand and Singapore in July 2005 in Wellington.[57]

Coverage of labour matters can also be noted in the Free Trade Agreement between Chile and China via a *Memorandum of Understanding on Labour Cooperation and Social Security between The Ministry of Labour and Social Security of China and the Chilean Ministry of Labour and Social Security,* concluded in November 2005, and to which reference is made in the FTA between the Parties in the chapter on co-operation (Art. 109).[58] Later, in 2008, New Zealand also reached an agreement with China, including labour provisions, in a Memorandum of Understanding on Labour Cooperation, subscribed by both governments.[59]

3.3.1. New Zealand – Thailand

In accordance with the agreement signed between New Zealand and Thailand in 2005, both Parties reaffirmed their commitments to the ILO and in particular to the 1998 ILO Declaration. Each Party also agreed to work actively to ensure that its labour legislation, regulations, policies and practices were in harmony with internationally-recognised rights and principles. On the other hand, the agreement stipulates that labour standards should not be used for trade protectionist ends and that neither Party shall attempt to obtain profits by means of trade or investment by weakening or allowing exceptions to its labour laws. Finally, the Parties undertake to promote public knowledge of labour laws and to see that their procedural rules and institutions provide for procedures which are fair, equitable and transparent.

3.3.2. China – New Zealand

New Zealand reached an interesting agreement with China in the FTA signed in April 2008 and in force since 1 October of the same year, after negotiations which lasted for more than three years.[60]

In the agreement, both China and New Zealand reaffirmed their commitments to the ILO and in particular to the 1998 ILO Declaration. Both Parties also recognised the non-derogation clause and its rejection of protectionism. They agreed to co-operate for the promotion of better labour policies and practices including labour relations and conflict resolution procedures, working conditions, development of human capital, professional training and employability as well as the promotion and protection of the rights and obligations of migrant workers.

A mechanism for consultations was set up by which each of the Parties designates a coordinator to facilitate communication between the Parties. The Parties also committed themselves to setting up discussions on questions which might arise in this area and to seeking to resolve them.

In addition, the agreement provides for possible consultations or help to non-governmental sectors, making it possible for representatives of civil society to make their views known on the operation of the agreement.

3.4. European Union

Naturally, it is also necessary to mention integration processes which have included a social labour dimension, such as EU processes.

3.4.1. The process of European integration and its social space

Europe is developing its own integration process, whose beginning lies with the creation of the Iron and Steel Community (EISC) in 1951.[61] After the signing of the Treaty of Rome (1957), which in the beginning consisted of the six originating countries of the EISC (France, Germany and Italy) and the Benelux countries (Belgium, Luxembourg and the Netherlands), the European Economic Community began to take shape. Later adherents included Denmark, Greece, Ireland, Portugal, Spain and

the United Kingdom. These countries came to form a powerful political, legal and economic entity, based first on the Treaty of Maastricht (December 1991) and on later amendments in the Treaty of Amsterdam (1997),[62] with later additions in the Lisbon Treaty in 2007.[63]

The EU States decided from the beginning to promote lasting and balanced social and economic progress, setting up for the purpose a space without internal frontiers, and strengthening social and economic cohesion. So, for example, Article 3 of the Treaty of Maastricht points out that the jurisdiction of the EU covers amongst others:

- Measures concerning the entry and movement of persons in the internal market;
- A policy in the social sphere comprising a European Social Fund;
- A policy in the sphere of economic and social cohesion;
- A policy in the field of the environment;
- A contribution to the attainment of a high level of health protection; and
- A contribution to education and training of quality and to the flowering of the cultures of the Member States.

Article 2 of the EU Treaty states that its objectives consist in *"the harmonious and balanced development of economic activity, sustainable non-inflationary growth, which should respect the environment, a high degree of convergence in the behaviour of their economies, a high level of employment and social protection, improvement in the level and quality of life, economic and social cohesion and solidarity between member States."*[64]

In order to achieve its aims the EU has developed a number of institutions, of which the following are the most important:

- the European Assembly, or Parliament, with powers of decision and mandated control to revise treaties, formalise international agreements, develop secondary community law, and budgetary development and inspection.
- the Council whose function is to lay down the main policies of the EU.
- the Commission, whose task is to ensure that Community rules and the principles of the common market are respected and applied.
- the European Court of Justice, whose role is to guarantee uniformity in the interpretation of Community law, and
- the Economic and Social Committee which plays a consultative role with regard to the Council and the Commission.

However, to reach both this structure and the social goals previously mentioned, the EU had to tread a lengthy path that originated towards the end of the 1950s with the goal of limiting interventions necessary for coordinating social security policies for migrant workers. From 1974, Community social policy showed a particular interest in the principle of non-discrimination in employment as applied to men and women (Article 119 of the Treaty of Rome). Several bodies of rules regarding labour legislation were laid down. Of particular interest were those relating to collective dismissals (75/129, 1975), protection of remuneration in cases of transfers of ownership of businesses or organisations (77/187, 1977) and worker protection in cases in which the employer goes bankrupt (80/987, 1980).

In 1986 a new period in the policies of the EU began, as it paid greater attention to the social dimension. Harmonisation of multiple minimum standards began, not an easy task given the requirement of a qualified majority laid down in the Treaty of Rome. From this work emerged the Community Charter, proposed by the Commission and signed in Strasbourg in 1989. This Charter includes fundamental rights of workers and proposed the adoption of minimal European Standards on weekly rest days, holidays, part-time work, minimum wage, security at work, child labour, social security, freedom of association and collective bargaining. Although the Charter only had the status of a recommendation, it gained considerable moral and political force, clearly establishing fundamental principles on the so-called fundamental human rights at work.

As pointed out by Sala[65] successive European legal instruments together with a set of social policies have clashed both with labour aspects of integration and with employment policies. Although the founding treaties, and particularly the Treaty of Rome, make very clear their economic objective, it is important to point out that three freedoms of movement were established: freedom of movement of capital, of goods and services, and of persons. However, in a context which was generally speaking passive, some examples of interventionist principles designed to avoid cases of "social dumping" by means of lower social costs within the trading group of countries can be noted. Thus, Article 117 of the Treaty of the European Community notes that "*Member States agree with the necessity of improving the living and working conditions of workers, in order to equip them for the path of progress.*"

The process of European integration made clear advances in the economic field. But at the same time labour regulation was growing, together with the common employment policies. This was in spite of the economic crisis in the 1980s, which had a powerful effect on the economy and on employment. Amongst the landmarks in the development of labour regulations, both the Treaty of Maastricht of 7 February 1992 and the Treaty of Amsterdam of 1997 must be discussed. The European States were advancing, in general, towards a policy of regulatory harmonisation by means of directives which did not, however, extend to freedom of association, strikes, lockouts or remuneration. More generally, the role of the Community Funds for Financing Social Policy (the European Social Fund and the Regional Development Fund) was important to combat existing socio-economic inequalities between different Member States.

The Social Charter

The European Economic Community (as it was then known) conducted an intense debate in various institutions on the adoption of a Social Charter, which finally took shape in June 1988 in what is known as the "Community Charter of the Fundamental Social Rights of Workers", as a means of coming to terms with the so-called social dimension of the European integration process.

It is important to point out that the Social Charter originated in a report by the Economic and Social Committee in 1989, in which the representatives of employers, workers, the professions, farmers, and small and medium businesses, meeting in the Economic and Social Committee, gave a description of a framework for "fundamental community social rights," a report which was approved by a large majority, with 135 votes for and 22 against.

On 9 December 1989 at the Strasbourg Summit, the Heads of State or Heads of Government of the eleven Member States approved, in the form of a declaration, the text of the "Community Charter of the Fundamental Social Rights of Workers". The European Council noted that the Commission had developed an action programme and charged the Commission with the task of suggesting, as quickly as possible, initiatives incumbent on the Community.[66]

The United Kingdom, however, did not sign the Community Charter of the Fundamental Social Rights of Workers in 1989, which emphasised its symbolic character (although in 1998, after the election of Tony Blair, it eventually decided to sign).

Principles

The Community Charter of the Fundamental Social Rights of Workers lays down the major principles upon which the European model of labour law should be based, and more generally, lays down the place of labour in society. It covers the following:

- free movement;
- employment and remuneration;
- improvement of living and working conditions;
- social protection;
- liberty of association and collective bargaining;
- professional training;
- equality of treatment between men and women;

- information, consultation and participation of workers;
- protection of health and safety in the workplace;
- protection of children and adolescents;
- persons of advanced age;
- persons with disabilities.

The European Union has provisions which have led to the creation of European Labour Councils in all businesses with more than 1,000 workers and operating in more than one European country, with the aim of facilitating communication between workers of different countries, providing information to workers' representatives and involving them in decisions made by the business.[67]

Despite reservations from Member States concerning the Social Charter and some of the legislation pertaining to the Councils, the ICFTU[68] considered, before its fusion in the International Trade-Union Confederation (ITUC), that the EU was probably the best example of the inclusion of workers' rights in a process of economic integration.

With regard to some types of legislation, the decision-making process is subject to a consensus procedure within the Member States; in other cases it is subject to a simple majority vote.

The social and labour considerations included in the European integration processes must be borne in mind when attempting to understand the ways in which this group of countries is confronting and will confront trade negotiations with other groups or countries. Over and beyond purely trade considerations, it should also be remembered that fundamental labour rights, together with the rule of law and human rights, are part of a European ideology.

3.4.2. Experience of the EU with Third Countries

3.4.2.1. Unilateral System

By means of Council (EU) Regulation n° 980/2005(1), dated 27 June 2005, relating to the application of a system of general preferential tariffs, a system of labour standards for developing countries was developed for the purpose of allowing the movement of certain goods, with lower tariffs or even exemptions. The system is known as the GSP PLUS.

The special development regime for protecting workers' rights is open to countries who adapt to "fundamental labour standards." Here, we are dealing with eight ILO conventions relating to the four fields in the ILO Declaration of 1998 on fundamental principles and rights at work and its Follow-up: N°s 29 and 105 on the elimination of all forms of forced or obligatory labour, N°s 87 and 98 on liberty of association and the effective recognition of the right to collective bargaining, N°s 100 and 111 on the elimination of discrimination with regard to employment and profession, and N°s 138 and 182 on the effective elimination of child labour.[69]

3.4.2.2. EU Association Agreements with Social Clauses

3.4.2.2.1. The Cotonou Agreement

Of the agreements subscribed by the European Union, the *Association Agreement between the States of Africa, the Caribbean and the Pacific, and the European Community and its Member States* signed in Cotonou on 23 June 2000 and amended on 25 June 2005 is particularly noteworthy. It will be referred to henceforth as the "Cotonou Agreement." Its predecessor is the Lomé Convention dating from 1975, whose original purpose was to establish a co-operation agreement and preferential tariffs.

This agreement binds the Member States of the EU, and the EU as a whole, with the Community of African, Caribbean and Pacific States (ACP) made up of 78 countries including 15 from the Caribbean.[70]

In accordance with Article 50 of the Cotonou Agreement, and under the heading of Trade and Labour Standards, the Parties to the agreement reaffirm their commitment to internationally-recognised fundamental labour standards, as defined in the relevant ILO Conventions, and

in particular to liberty of association and the right to collective bargaining, abolition of the worst forms of child labour, abolition of forced labour and non-discrimination in employment. At the same time, they state that labour standards shall not be used for protectionist purposes. The Parties agree to co-operate on labour matters and to exchange information on questions of regulation and compliance with legislation, amongst others.

All matters in the Cotonou Agreement are subject to general procedures which lay down that any matter may be drawn to the attention of the Council of Ambassadors or the Council of Ministers. If no agreement can be reached, a review panel consisting of three members will be set up.

3.4.2.2.2. Association Agreement with Chile

The EU also signed an Association Agreement with Chile in 2002. In this example, which will be discussed later in Chapter 3.10.2, fundamental labour rights are included under the heading of co-operation in social matters.

3.4.2.2.3. EU – CARIFORUM [71]

After internal discussions and consultations with its civil society, and specifically with the European Economic and Social Committee, EU authorities came out with a new mandate in 2006 to negotiate association agreements with its partners, including social aspects. An initial negotiation which came to a conclusion with this new mandate was with CARIFORUM, an ad-hoc negotiating group which covers 15 independent States, namely: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Surinam, and Trinidad and Tobago. The members are largely drawn from members of CARICOM (Caribbean Community), to which the Dominican Republic was added so as to create a single Caribbean group. The negotiations had as their predecessors the Lomé and Cotonou Conventions. The Association Agreement includes trade aspects compatible with the WTO as well as aspects relating to regional integration and development.

This agreement has acquired particular relevance since it was the first of a series of negotiations initiated by the EU in which a clear new EU policy on labour matters emerged. It did so in the context of a bilateral negotiating campaign, initiated by the EU in response to the deadlock of the Doha Round negotiations. For this reason, the results of the negotiations must be considered as an obligatory point of reference when considering any negotiations with the EU in the near future.

In the introductory section, reference is made to *"the necessity of promoting social and economic progress for its citizens in harmony with sustainable development, and respecting fundamental labour rights in accordance with the commitments they have undertaken under the auspices of the International Labour Organisation..."*

In Chapter 5, under the heading of "Social Aspects", Articles 191 and beyond develop various issues with regard to social matters, particularly the reiterated commitment to comply with fundamental labour standards recognised at the international level, as laid down in the ILO conventions and in their commitments to the ILO, notably under the 1998 ILO Declaration. However, with respect to obligations, this agreement goes even further by sealing the commitments with the addition of a 2006 Ministerial Declaration of the Economic and Social Council of the United Nations, under the heading of *"Full employment and decent work for all, including men, women, and young people."* A non-derogation clause completes this commitment.

The Parties also *"recognise the beneficial role that core labour standards can have on economic efficiency, innovation and productivity, and they highlight the value of greater policy coherence between trade policies, on the one hand, and employment and social policies on the other"* (Art. 191.3). It is interesting that the Parties should have formulated this type of recognition, a completely new phenomenon in trade agreements which is more typical of political declarations.

On the other hand, the signatories rule out the use of labour standards for protectionist purposes.

Under point 5 of Article 191, they formulate a further novel recognition, referring to: *"the benefits of commerce in fair and ethical trade products and the importance of facilitating such commerce between them."*

With respect to obligations, and together with a recognition of the right of the signatories to set up their own regulations and policies in accordance with their social development priorities, the agreement binds them to guarantee *"that their own social and labour regulation and policies provide for and encourage high levels of social and labour standards consistent with the internationally recognised rights set forth in Article 191, and shall strive to continue to improve those laws and policies"* (Art. 192).

No definition is given, either in this agreement or in others with similar wording, of what is understood by "high levels of social and labour standards", but it may be inferred that the reference is to the latest ILO standards. With regard to maintaining levels of protection, Article 193 lays down that

> *"the Parties agree not to encourage trade or foreign direct investment to enhance or maintain a competitive advantage by:*
>
> *a) lowering the level of protection provided by domestic social and labour legislation:*
>
> *b) derogating from, or failing to apply such legislation and standards."*

Without prejudice to the obligations previously mentioned, and with regard to regional integration, Article 194 recognises the importance of establishing policies for social cohesion and measures to encourage decent work at the regional level.

This agreement, unlike some, does not contain guarantees for standards of due process; nor does it contain provisions guaranteeing access to administrative or judicial procedures for the interested Parties.

On follow up mechanisms, Article 195 insists upon *"the importance of monitoring and assessing the operation of the Agreement on decent work and other areas of sustainable development through their respective participative processes and institutions, as well as those set up in the Agreement."*

Article 195 also states that the Parties will be able to mutually consult with each other, and sets up a Cariforum–EU Consultative Committee by means of which the social questions covered in Articles 191 to 194 can be discussed. Social control mechanisms are thus introduced for compliance with labour regulation, a key incentive for compliance with these provisions, since, as will be seen later, the dispute settlement procedures explicitly exclude the adoption of trade sanctions in the event of failure to comply with these regulations.

The members of the Cariforum–EU Consultative Committee will be able to present oral or written recommendations to the Parties for spreading and sharing good practice in the areas covered by the labour Chapter (Art. 195.2). Yet another novel characteristic of the agreement is the possible intervention of the ILO, provided for in points 3 and 4 of Article 195.

Article 195.3 lays down that:

> *"On any issue covered by Articles 191 to 194 the Parties may agree to seek advice from the ILO on best practice, the use of effective policy tools for addressing trade related social challenges such as labour market adjustment, as well as the identification of any obstacles that might impede the effective implementation of core labour standards."*

Its point 4 further states:

> *"A Party may request consultations with the other party on matters concerning the interpretation and application of Articles 191 to 194 The consultations shall not exceed three months. In the context of this procedure, any Party may independently seek advice from the ILO. In this case,*

the limit for the period for consultations is extended by a further period of three months."

If such consultations should fail, then in accordance with point 5:

"If the matter has not been successfully resolved through consultations between the parties pursuant to Paragraph 3, any Party may request that a Committee of Experts be convened to examine such matter."

As we shall see, the provisions in Paragraphs 3, 4 and 5 of Article 195 are very important, since they function as facilitators for subsequent procedures as part of the dispute settlement process.

The Committee of Experts, made up of three members with specialist knowledge, will present a report to the Parties within three months of being set up. The report will be made available to the Cariforum–EU Consultative Committee (Art. 195.6).

Pursuant to Article 196, co-operation mechanisms on social and labour matters are set up, for comprehensively achieving the goals of the AA. The agreement does not lay down any precise time limits, procedures or arrangements for developing co-operation on these matters.

Insofar as avoidance of disputes and dispute settlement is concerned, Article 203 of part III of the AA notes that "*the field of application covers any difference over the interpretation of the present Agreement*" and therefore, labour matters are not excluded from its provisions.

Consultations in this case are special in that they are drawn up with a copy to be forwarded to the Cariforum–EU Trade and Development Committee. The copy indicates the measure in question and the provisions of the agreement with which the measure is considered to be in conflict.

There will then be a brief period for consultations of forty days from the presentation date of the request. Consultations will then be considered as terminated after sixty days from the presentation date of the request, unless both Parties agree to continue consultations.

If consultations do not take place within the time limits laid down in Chapter 3 or Chapter 4, or if they terminate without having reached a mutually-agreed solution, the complaining Party will be able to request the setting up of a review panel under Article 206, point 5.

It is important to remember that, on the possibility of applying consultation and mediation procedures, point 6 anticipates an exception in the case of labour matters. According to this exception the consultation procedure can lead to a review panel stage only if it has already passed through the procedures provided for in Sections 3, 4 and 5 of Article 195, in other words through involvement with the ILO as part of the consultations between the Parties, which can include consultations in the Cariforum–EU Consultative Committee (Art. 206.6).

Another original provision of this agreement is the possibility of recourse to a mediator, decided upon by the Parties, whose mandate will be the matter mentioned in the consultation request, unless the Parties decide to formulate it in other terms (Art. 205.1). For such purposes, use will be made of the list of mediators referred to in Article 221 (Art. 205.2). The mediator will have to issue a ruling within a short period of time (45 days after his/her nomination) and will be able to include a recommendation on how the dispute can be resolved. The ruling will not be binding.

Chapter 2 lays down a review procedure for dispute settlement procedures. Such procedures begin once the consultation and mediation procedures have come to an end. In labour matters, the procedure is particular in that it includes on the panel at least two members with specialist knowledge from a list of 15 experts decided upon by the Cariforum–EU Trade and Development Committee. To set up the panel, an additional list of fifteen people with specialised knowledge of the specific labour matters in question will be drawn up.

Pursuant to Article 208, the panel will present a provisional report which will consist of a descriptive section, a verification section and conclusions. As a general rule, it will be issued within 120 days from the date on which the panel is set up. Any Party will be able to make observations on concrete aspects of the provisional report within 15 days.

Notification of the findings must be given within 150 days from the nomination of the panel. In some cases, the president of the panel may extend the period to 180 days, but must give duly justified reasons.

In accordance with point 3 of Article 209, any Party may request the panel to make a recommendation, which in labour matters will relate to *"how compliance with the relevant provisions in the Chapter"* on labour matters can be achieved.

The panel can decide, in the event of disagreement, on the time limit within which the defendant must comply with its decision. It is interesting to note that in Article 211.3 *"the arbitration panel shall also take into consideration demonstrable capacity constraints which may affect the adoption of the necessary measures by the Party complained against."* Even though the obligations to which this Agreement gives rise are substantially greater than others recently created, trade sanctions are explicitly excluded.

In effect, if the time limit for compliance is exhausted without verification, the AA provides that the complaining Party may adopt "appropriate measures" ten days after the notification date. However, it must attempt to select a measure from among those possibilities which least affect the achievement of the objectives of the agreement and will take into account its impact on the economy of the Party complained against. Article 213, number 2, on the review of any measure taken to comply with the arbitration panel findings, provides that in labour matters *"...appropriate measures shall not include suspension of trade concessions under this agreement."* The complaining Party may adopt the appropriate measures from ten days following the notification date. The agreement does not specify what such appropriate measures might be. In any event, the panel must give a ruling on the appropriateness of the measures in each case (Art. 214). Various questions naturally arise: If there are no trade sanctions, what might "appropriate measures" be? Might they be only in the field of labour or perhaps measures which correct the specific labour situation? Or would they be what the panel or both Parties might judge as appropriate?

A further particular and novel regulation is to be found in point 2 of Article 216, which lays down how meetings of the arbitration panel will be open to the public in accordance with its own internal regulations, unless the panel decides to the contrary. Article 217 also permits the interested Parties to take part in the process by presenting observations as *amicus curae* [72] to the arbitration panel in accordance with the internal regulations. With regard to transparency, the general rule is that the findings must be published (Art. 220).

As far as institutional questions are concerned, in Part V, under the heading of "Institutional Provisions", Article 227 sets up the Joint Cariforum–EU Council which will supervise the application of the agreement. This Council will meet at ministerial level at least every two years.

Pursuant to Article 229, the Joint Cariforum–EU Council has the power to make binding decisions on all questions covered by the agreement, obliging the Parties to take all necessary measures for carrying them out in accordance with the internal regulations of each Party and each State which is a signatory to the agreement. But with respect to issues on which the signatory States have not agreed to act collectively, the adoption of any measure will require the agreement of the affected State or States which are signatories to Cariforum.

Further provisions differing from those of other treaties can be found in Article 231, setting up a Cariforum–EU Parliamentary Commission as a forum in which members of the European Parliament and of the legislative assemblies of

the Cariforum States can exchange their views. It will meet at intervals fixed by the Parliamentary Commission itself. It will co-operate with the Joint Parliamentary Assembly provided for in Article 17 of the Cotonou Agreement.

The institutional provisions in Article 232 set up the Cariforum–EU Consultative Committee whose purpose is to "*promote dialogue and cooperation between representatives of organisations of civil society, including the academic community, and social and economic partners. Such dialogue and cooperation shall encompass all economic, social and environmental aspects of the relations between the EC Party and the Cariforum States, as they arise in the context of the implementation of this Agreement*."

This provision is intended to encourage political incentives for guaranteeing the application of labour standards by means of citizen and political control, which amounts to compensation in exchange for the EU not having sought to impose trade sanctions for failures to comply.

3.5. Southern Common Market (MERCOSUR)

The Treaty of Asunción (26 March 1991), which set up the Southern Common Market (MERCOSUR), was initially focused on economic and trade aspects. In these areas, it made important progress in a relatively short time by reaching agreements in the automotive and sugar sectors. Following the Ouro Preto Protocol, which created an international legal personality for the organisation, it had included 88 percent of the goods subject to tariffs under a common tariff by as early as 1995.

Antecedents to the Treaty include the Brazil–Argentina Customs Tariff of 1940, the Latin American Free Trade Association, the Latin American Integration Association and the Treaty for Integration, Cooperation and Development between Brazil and Argentina in 1988 (known by the names of Presidents Sarney and Alfonsín). The purpose of the latter is to create a common market between the two countries (it was reviewed in 1990 to include Paraguay and Uruguay). The Treaty of Asunción came into effect on 29 November 1991. However, it only came into being as a legal entity with the Ouro Preto Protocol, concluded on 17 December 1994. These instruments were criticised, notably because the Treaty "*did not correspond to any social concern, but only to economic concerns.*"[73] Nevertheless, in the Preamble to the foundation treaty of Asunción, the signatory Parties declared the following as the ultimate ends of the integration process: "*to accelerate their economic development in conjunction with social justice, to improve the living conditions of their inhabitants and to achieve a closer union between their peoples*", thus establishing the grounds for a discussion on the social and labour dimensions of the integration process.

In 1991 the Common Market Group created the Working Subgroup Nº 11, on "Labour Matters", by means of Resolution 11/91. On 27 March 1992, at a meeting of the Delegates of the Party States, it was decided to bring, as the first recommendation to be made to the Common Market Group, a modification to the name and function of Working Subgroup Nº 11, whose name was changed to "Labour Relations, Employment and Social Security". Tripartite functioning was considerably developed in its first years, from the initial session on 27 May 1992 and, despite the fact that it was concerned with labour matters, it was also joined by the Economics and Foreign Affairs Ministries.

Within Working Subgroup Nº10 three commissions were set up: one on "Labour Relations", another on "Employment, Migration, Qualification and Professional Training" and the last on "Health, Safety, Work Inspection and Social Security."

The Commissions have worked on, and produced, a number of studies on the following subjects: a) labour costs, b) implications of the integration process for employment, c) free movement, d) professional training, e) social security, f) list of ILO agreements which could be ratified, g) Charter for Fundamental Rights of Workers, h) reaffirmation of free movement of labour, fundamental rights of the person and of workers, collective rights and the right to social security.

Nevertheless, it should be emphasised that, as a result of the Ouro Preto Protocol there emerged a permanent organisation within Mercosur which was clearly concerned with labour matters, namely, the Economic and Social Consultative Forum (FCES, by its Spanish acronym), which formally confirmed participation by social actors in the process of social integration. This organisation was also accompanied by the setting up of the Joint Parliamentary Commission, also intended to encourage wider possibilities for citizen expression. The members of the Mercosur Trade Union Commission, part of the Coordinating Committee of Trade Union Head Offices of Southern South America (*Coordinadora de Centrales Sindicales del Cono Sur*) played some part in this development.

However, particular importance should be given to the signing of the MERCOSUR Social Labour Declaration (Declaración Sociolaboral) on 10 December 1998, which contains a minimum level of labour rights which the countries commit themselves to respect. They also set up the so-called MERCOSUR Social Labour Commission, for follow up and control.[74]

The Protocol setting up the FCES highlights its consultative function, noting that it is a "*representative institution of the economic and social sectors*" made up of representatives of business, trade unions and the "third sector", with an equal number of members for each Party State. The institution is comparable to those organisations for social dialogue of which the most successful example is perhaps Spain's Economic and Social Council, in which debates on a wide range of economic and social subjects have taken place, attended by both specialists and social actors, yielding interesting results. Various comparable institutions exist in other European countries, generally speaking those which possess permanent institutions, either with a tripartite representation or with the inclusion of various sectors which are not necessarily part of the organisational world of labour, such as consumers or co-operatives.

3.6. The Andean Community of Nations

Preceded by the Latin American Free Trade Association (Treaty of Montevideo 1960) and later the Latin American Integration Association (1980), the Andean Community of Nations (ACN) has been developing under the protection of the Cartagena Agreement of 1969 which also created the Andean Pact initially including Bolivia, Colombia, Chile, Ecuador and Peru. Chile joined in 1969 as a founding Member, but withdrew in 1976, returning as an observer in 2008. Venezuela, which joined in 1976, withdrew in 2008.

The goal of the Andes Pact is to widen the limited benefits obtained under the framework of the Latin American Free Trade Association. Around 1990 they established a free trade area and finally, on 1 February 1995, a shared common tariff wall. In 1996 the Trujillo Protocol was approved and in 1997 the Sucre Protocol. These Protocols meant that the four countries making up the group introduced institutional reforms and, as a consequence, have been achieving important increases in Andean trade.[75]

The agreement makes explicit reference to "*continuous improvement in the living conditions of the inhabitants of the sub region*", to policy and legislative harmonisation, increase in employment, professional training, productivity and other similar factors. Linked with labour matters, the following have been concluded: the Social Labour "Simón Rodríguez" Convention, with intervention from the Labour Ministers in the region, the Labour Migration in the Andes Instrument, and the Andean Commissions on Professional Training and Social Security. However, in spite of the activities and concerns of the Labour Institute of the Andes, representing the workers of the region, the labour organisations created by the Pact have not been active.

In the labour field, they have organised meetings of ministers and have also created the Business Consultative Council of the Andes and the Labour Consultative Council of the Andes, as means of encouraging participation by those sectors of civil society in the process of integration. The Labour Charter of the Andes also implies an advance with respect to consensus on standards which could help to contribute to a shared regional tradition.

3.7. The Caribbean Community

The Treaty of Chaguaramas, dated 4 July 1973 and initially concluded by Barbados, Guyana, Jamaica, and Trinidad and Tobago, laid the foundations for the Caribbean Community (CARICOM). But at the tenth meeting of the Conference of Heads of Government in 1989 a further impulse was given whereby the process of economic integration was redesigned and relaunched, a process which has made significant advances in the last few years and which now includes 15 countries of which 14 are Members of the OAS The CARICOM countries have set up a novel process for regulatory harmonisation, including labour regulations, which is tending to eliminate differences between them and to favour a common position. This experience is founded on the common roots of its Member States and their relatively recent independence. They are reaching agreements at the highest levels, with employers' and trade union representatives present at the Heads of States' meetings. In this way, the meetings allow an interesting degree of transparency.[76]

3.8. Central America

Starting with the creation of the Organisation of Central American States in 1951, followed by various agreements encouraging trade liberalisation between the countries of the isthmus, and the Presidential Summit held in 1990 in Guatemala, a plan was approved for renewing economic integration. The result was that in 1991 the Tegucigalpa Protocol was signed by the Presidents of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama (joined later by Belize, on 4 December 2000). The Protocol set up the System of Central American Integration. As part of this process, the Ministers of Labour have been holding recurrent meetings, whose purpose is to take account of questions arising from the social dimension of integration, particularly in the context of globalisation and of trade negotiations with the US, and currently with the EU, Canada and other trade partners.

3.9. Africa

In Africa we should mention another interesting integration process which groups together the southern African States, known as the Southern African Development Community (SADC) which includes Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The SADC was founded in 1992 and is an association agreement with broad political and development aims, rather than a trade agreement, although it includes trade as a component. The agreement contains a section on "work and employment" and a tripartite commission for labour and social affairs which in 2001 adopted a Social Charter on Fundamental Labour Rights in Southern Africa.[77]

3.10. The Experience of Chile

The experience of Chile is noteworthy as it has undertaken a number of important steps on issues of labour and trade. We list a few here:

- incorporating labour matters in its internal trade agenda since the signing of the FTA with Canada by means of an Agreement on Labour Cooperation (CCALC);
- taking part as observer in the labour institutes of MERCOSUR;
- included labour commitments in its Association Agreement with the European Union;
- concluded a demanding clause on labour in Chapter XVIII of the FTA with the US;
- agreed a Labour Cooperation Memorandum of Understanding, in parallel with the Trans-Pacific Strategic Economic Partnership, with Brunei Darussalam, New Zealand and Singapore;

- concluded a Memorandum on Labour Cooperation and Social Security, in parallel with the FTA agreed with China;

- has a Labour Cooperation Agreement with Panama, in parallel with a FTA with that country;

- has a Chapter on Labour as part of its FTA with Colombia;

- has concluded a Memorandum of Understanding on Labour Cooperation and Migration, in parallel with its FTA with Peru;

- at the chancellery level, it has concluded a Joint Declaration with Japan, on the occasion of the signing of the Agreement on a Strategic Economic Association with Japan;

- has included commitments on labour co-operation in the Chapter on Cooperation as part of the FTA with Australia,

- has recently included labour commitments in the Chapter on Cooperation as part of its FTA with Turkey.

Chile has thus included the subject in its relationships with both developed and developing countries and has demonstrated its desire to include this discipline in its trade negotiations.

The outcomes have been positive: interesting co-operation programmes have been implemented with varied trade partners so that best practices have been learned across the most diverse fields. Models for negotiations have been very heterogeneous, both in their format and in their content.

Trade liberalisation in Chile, which had begun unilaterally under the military government, could only achieve unilateral tariff lowering. However, once democratic governments had come to power (from 1990 onwards) foreign governments agreed to negotiate with Chile on a wide range of agreements, including trade agreements. As well as pursuing unilateral and bilateral routes, Chile pursues a multilateral trade policy, particularly as part of the WTO forum. It is in favour of general opening up of markets, accompanied by suitable processes for dispute settlement.

In addition, it has made numerous efforts to encourage the participation of civil society with regard to international agreements, by means of a wide range of instruments, such as seminars, appeals to the public for suggestions, sector and regional meetings, participation by social actors in the so-called "briefing room", as well as many others. The result has been that a majority of citizen opinion has approved the negotiations and that in parliamentary debates these negotiations have generally been supported unanimously or by a cross-party majority. The fact that Chile had opted early on to include labour and environmental commitments in its search for benefits, not just for exporting businesses but also for the country's citizens in general, displaying a particular concern for respect for workers, also meant that there was a wider acceptance of the trade liberalisation which had been initiated in the nineties.

In the first experiments begun for purposes of international economic integration, the question arose with respect to MERCOSUR: if Chile became a member of the group, what would happen with labour matters? From the beginning, and even before it had become part of the group, Chile had no hesitation in becoming a member of the fledgling MERCOSUR labour institutes. Chile was also present in the various meetings organised by Group 11, later Group 10, on social-labour matters and even proposed to MERCOSUR that it should support the Social Labour Declaration and become a member of the Social Labour Commission (1998). However, that was not possible because MERCOSUR and Chile could not agree on the incorporation of Chile as a full member of MERCOSUR.

Later, given that at the 1994 Miami Summit Chile had been offered the possibility of becoming the fourth member of NAFTA, an analysis was made of the various contents of the aforementioned agreement, particularly with regard to labour issues.

However, President Clinton failed to gain the authorisation of Congress for negotiating so called "*Fast Track*" trade agreements, which impeded Chile's inclusion, with the consequence that Chile and Canada subscribed to a Free Trade Agreement and an Agreement on Labour Cooperation similar to NAFTA. Chile also negotiated another similar trade agreement with Mexico.

After this experience, a wide range of agreements came about within which such clauses could be incorporated in many different ways.

Once the terms of the NAALC had been taken care of, different social actors at first took up different positions.[78] For example, business circles in Chile were, generally speaking, hostile to the inclusion of labour matters in trade agreements. They were particularly hostile to the trade sanctions demanded by industrialised countries, particularly by the English-speaking countries in the northern hemisphere. In trade union circles, on the other hand, voices could be heard demanding the inclusion of such labour matters with the aim of giving a more human face to globalisation.

However, it was with Canada that Chile first concluded a labour agreement within the context of trade negotiations, in parallel with but separate from the FTA, and by means of which commitments were set up which were in general similar to those adopted between Canada, Mexico and the US in the NAALC. However, there was a significant difference in that no trade sanctions were agreed between Canada and Chile. Moreover, with regard to institutional matters, because of the bilateral nature of the agreement, there was a need only for two National Executive Secretaries instead of the Joint Secretariat and the National Administrative Offices put in place by NAALC.

Both the FTA and the Agreement on Labour Cooperation negotiated between Chile and Canada were submitted to the test of parliamentary approval necessary for ratifying the treaties. The result was a large majority in favour of both agreements together with an environmental agreement. With this positive political judgement made by both the Executive Branch and the National Congress, the acceptance of these matters became part of Chile's international trade agenda. The FTA was concluded in Santiago on 5 December 1996. The Agreements on Labour Cooperation and on the Environment were concluded in Ottawa on 6 February 1997. In Chile, the ratification process was completed, with the approval of the Senate, on 2 July 1997.[79] However, it is necessary to point out that the labour agreements were signed as "parts of a larger trade package" in which preferential tariffs were agreed as well as a series of other matters.

In parallel, Chile had on its internal agenda the development of labour reforms, which widened and improved legislation on trade union rights and collective bargaining as well as on individual and workers' rights. In addition, numerous ILO conventions were on the agenda which, once approved, provided Chile with a better "calling card" in this field. Emphasis was placed on domestic labour reforms, based on largely ethical and political justifications. The subject of the link between trade and labour did not really appear in the mass media. The labour reforms were finally approved after a difficult debate. Once passed, more coherence was given to national legislation with the help of the ILO conventions, especially with conventions 87 and 98 on the right of association and collective bargaining, respectively. In general, the reforms were adjusting to a more regulatory outlook and moving away from the excesses of "de-protection" which had occurred before the democratic regimes began in 1990.

At the multilateral level, Chile had also been developing an active role in the organisation of the Heads of State Summit in Copenhagen. This had been facilitated by the Presidency of ECOSOC, at which Chile's Permanent Representative to the United Nations, Juan Somavía, played an important role. The process culminated in 1995 with a relative consensus on core labour standards. This consensus was reiterated and deepened at the Conference of Trade Ministers in Singapore, in 1996, and at which Chile acted as a nexus between the WTO

and the ILO. Chile played an active role at the Singapore meeting in creating an international consensus on the core labour standards which should constitute the social basis of economic globalisation.[80] Chile would also promote, from within the ILO, the debate which led to the ILO Declaration on the Fundamental Principles and Rights at Work and its Follow-up, finally approved in 1998.

Another variant of the ways in which the American continent has dealt with labour matters has been the Summit Process, at the level of heads of State, and the Inter-American Conference of Labour Ministers, a specialised organ of the Organisation of American States (OAS), in which there have also been intense debates on labour matters, particularly at the time when the possibility of negotiating a Free Trade Area of the Americas was being studied.

Since the Conference of Ministers of Labour held in Viña del Mar, in Chile, in 1998, there has been a great deal of work on the social dimension of globalisation. A complete work plan was adopted, which was followed at subsequent conferences in Ottawa in 2001, Salvador de Bahía in 2003, Mexico in 2005, and Trinidad and Tobago in 2007. The work done has been reiterating and deepening the consensus reached. These conferences accompanied the process of the Inter-American Summits, at which the question of decent work was raised, particularly in Mar del Plata, Argentina. However, in trade matters there were strong disagreements between Members, who were unable to reach an agreement on continuing negotiations about the FTAA, which was due to come to an end in January 2005. This lack of agreement also meant that the discussion on the relationship between labour and trade could not be broached on this occasion, as it had been at the Quebec Summit in 2001. On this occasion, the Heads of State recognised the importance of labour matters and instructed their ministers to work on the areas of disagreements, which later became the subject of interesting reports.[81]

In 2002, Chile reached an Association Agreement with the European Union, in which labour issues were treated in the field of co-operation. The result was a democratic and social agenda making specific reference to fundamental labour standards, which were to be treated on a co-operative basis.

In 2003, Chile concluded a Free Trade Agreement with the US. Labour matters were included in the text in the form of a Chapter (XVIII), in which dispute resolution on labour issues was approached in a manner equivalent to that used with regard to trade issues (Chapter XXII).

In addition, Chile has concluded a large number of labour co-operation agreements with many countries in the region, such as Argentina, Brazil, Ecuador and Mexico, among others. These agreements include provisions for analysing better labour practices, exchanging information leading to better observance of core labour standards as well as for advancing the social economic goals of the States in question. All these developments have fostered co-operation and in particular have fostered better understanding of the existing systems in the region. However, all these agreements have been unconnected with trade relations, and their basic purpose has been to exchange information on labour markets, legislative systems, public policies, and relevant experiences in the field of labour relations.

Chile has adhered to the OECD's (Organisation for Economic Co-operation and Development) "Guidelines for Multinational Enterprises" (2000), which follow in the tracks of the ILO Declaration of 1977 on the same subject. In virtue of these regulations, a National Point of Contact has been set up. Paragraph IV refers to recommendations on employment and labour relations. Although it includes core international workers' rights, as well as internationally-recognised labour rights, it also mentions other concepts of interest such as the right to information, the promotion of consultations, co-operation between businesses and trade unions, local employment of staff, making professional training available in the host country, taking care not to close down organisations without due and reasonable consideration given to

worker representatives and collaboration in reducing adverse effects. In addition, there is a recommendation not to threaten workers with transferring them outside the country for the purpose of influencing collective negotiations or the right to organise. Although these are merely recommendations, the instrument has been an interesting one for trade union organisations in that they dispose of a local Point of Contact which they can address.[82]

Next, we shall give a summary of the most relevant agreements signed by Chile. Although these agreements can be placed in the context of the negotiating experience of other countries, we think that the perspective of a developing country may be of greater interest than the experience of the developed world. For this reason, we shall treat these agreements in relation to the negotiating experience of Chile. Although this experience includes cases which are very different, we should remember that Chile is at the present time the country with the greatest number of bilateral trade agreements negotiated in the international community, and the country with the highest number of labour agreements in that context. The agreements are with countries with very different economic structures in the most diverse regions of the world. For reasons of space we will deal only with the most important negotiations.

3.10.1. Canada – Chile Agreement on Labour Co-operation

This agreement was established between Canada and Chile in 1996 in parallel with the Free Trade Agreement and the Environmental Cooperation Agreement between the two countries. The agreement was produced against the backdrop of attempts by the US to use "*fast track*" procedures, which were not successful. Faced with this situation, Chile negotiated a FTA with Canada. One of its elements was an agreement on labour matters, consisting of a text which was separate from but related to the FTA, and very similar in general terms to the ALC of the NAFTA, but lacking the trade sanctions in the agreement planned between Mexico and the US. In contrast with NAALC, it had no Joint Secretariat but was provided with two National Executive Secretaries.

The application of the agreement has facilitated a better development of relations between Canada and Chile, one of its principal achievements being the opening up of opportunities for the governments, businessmen, workers and other social groups to appreciate, in a transparent fashion, the countries' respective systems of labour relations and social security, including systems of legislation, work inspection and other mechanisms particular to each.

The contacts between Canada and Chile fostered by the ALC have facilitated the maintenance of a permanent forum, consisting of bilateral consultations for handling more general aspects such as the participation of civil society in public labour policies, the social dimension of globalisation, and child labour, as well as more technical aspects of international labour matters in many contexts.

The Agreement provides for a Ministerial Council, made up of the Ministers of Labour of both governments (or their representatives) who meet periodically to follow up on the implementation of the Agreement and to plan future initiatives. The annual meetings of the Ministerial Council have taken place regularly since 2 October 1998, the date on which the first meeting was held in Santiago.

The implementation of the Agreement on Labour Cooperation between Canada and Chile has the following main parts:

a) In the first place, a work plan for co-operation was developed, with the purpose to promote the exchange of information and knowledge of each of the respective bodies of legislation. This work plan allowed both countries, in agreement with the Ministers of Trade and Labour, to co-operate in labour matters. This can involve conferences, seminars, workshops, research, the production of comparable data, exchange of experience and information, and other co-operative practices in fields such as: labour relations, employment standards, health and safety at work, work training and social security.

The activities pursued within the framework of the agreement have been the subject of successive

work plans which at first dealt with knowledge of the two systems and bodies of legislation by means of technical seminars with tripartite participation organised in both countries.

The programmes have provided for exchange visits, specialist seminars, public conferences, field trips or trips to regional or provincial centres including government representatives of the respective ministers or civil servants from inspection agencies, trade union and business leaders, scholars and academics.

b) The second aspect has been the application of procedures for dealing with subjects of interest to both countries.

The ALC between Canada and Chile has been a fertile source of exchange of information and has been influential in promoting dialogue between the two administrations, businesses and trade union contacts, in seeking points of agreement regarding the subjects discussed in international fora and especially in creating institutional links based on confidence with regard to these matters. Although it provides for complaint and conflict resolution procedures similar to those in NAALC, up to now no formal complaint has been received in relation to failure to observe labour laws in either country, thus displaying clearly its co-operative features. However, informal contacts between both structures have facilitated solutions to concrete cases, without the necessity of resorting to the formal channels provided for in the agreement.

3.10.2. The Chile – European Union Association Agreement

The Chile–EU Association Agreement contains numerous provisions on co-operation in the field of labour, and formulates the goals pursued by the agreement. In Part III Article 16 point 1, b) the text makes clear the commitment of the Parties to "*promote social development*" and states that "*the Parties will give special priority to respect for fundamental social rights.*"

Under heading V, "Cooperation in Social Matters," the Parties deal with social matters in Articles 43, 44 and 45. In Article 43, the Parties recognise that they must promote the participation of social partners, as well as avoid discrimination in the treatment of citizens of one country legally resident in the territory of the other Party.

Article 44 emphasises the importance of social development. The Parties undertake to give priority to job creation and respect for fundamental social rights, promoting ILO conventions relating to liberty of association and the right to collective bargaining and non-discrimination, abolition of forced labour and child labour, and equal treatment between men and women, amongst others. For such purposes, the Parties list a series of measures to which they will give priority, under point 4, letters a) to j).[83] Finally, Article 45 provides for co-operation on gender matters for the purposes of improving, guaranteeing and increasing the equitable participation of men and women in all sectors of political, economic and cultural life.

A further aspect to be noted is that in accordance with Articles 10, 11 and 48 of the Chile–EU Association Agreement, the Parties have accepted obligations concerning the participation of civil society.

Article 10 lays down the obligation to set up a Joint Consultative Committee, but so far the Chilean institution has not been given formal status, so that this provision has not yet been fulfilled.

Article 11 obliges Parties to hold periodic meetings of representatives of civil society from both sides, so that the said representatives can be informed and can make suggestions concerning improvements to the application of this agreement.

For its part, Article 48 lays down the right of civil society to be informed and to take part in consultations on co-operation, to receive financial resources, and to take part in the application of projects and programmes.

3.10.3. Free Trade Agreement US – Chile

The FTA between Chile and the US, concluded on 6 June 2003, displays a new variant of inclusion of labour matters in the trade agenda.

Labour matters are included under a chapter of the FTA and are subject to dispute settlement procedures similar and equivalent to those provided for with regard to trade questions. This is a far-reaching conceptual step of great importance for debates on the question. The Chilean government's reasons for including these matters in the FTA were grounded in various factors, including demands from Chile's trade unions and from civil society, and the positive experience with the ALC between Canada and Chile. The Chilean position had to be given particular consideration because the trade legislation approved in the US had to confront enormous resistance to trade liberalisation, grounded in particular on fear of the impact on employment which trade liberalisation could cause to workers in the US. The AFL-CIO, the national trade union centre, lobbied public opinion vigorously on the question. In addition, given that there had already been unilateral legislation in the US, which in some cases included tariff sanctions on countries which did not comply with fundamental labour standards, it was considered preferable to agree on standards accepted by both Parties rather than have unilateral ones. On the procedural side, it appeared preferable to agree on independent and impartial panels rather than accepting the results of the jurisdiction of US authorities which were more likely to be permeated with US culture.

The most important obligation is that to comply with the Party's own domestic labour legislation: "*A Party shall not fail to effectively enforce its labour 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*" (Article 18.2 (1) (a)). It is the only obligation for which a failure to comply can be brought before an arbitration panel. For these purposes, "labour laws" refer to rules relating to the right of association, the right to organise and negotiate collectively, the prohibition of any form of forced or obligatory labour, the minimum age for employment of children, the prohibition and elimination of the worst forms of child labour and acceptable conditions of work regarding minimum wages, working hours, and health and safety at work. Furthermore, the actual level of the minimum wage is explicitly excluded from the obligations, which refer only to compliance with the regulatory minimum in force in each country.

The principle of sovereignty is explicitly safeguarded with respect to the modification of domestic legislation and the determination of supervisory regimes for labour matters by the Administration. As a corollary, no official regulatory approval is required and consequently each Party maintains its regulatory autonomy. Nevertheless, it is implied that the exercise of discretion in supervisory matters must be performed in good faith.

Respect for the autonomy of both Parties' judicial branch is also recognised, in that the provisions of the FTA do not allow decisions by the courts to be revised or reopened in the light of provisions of the treaty (both for outstanding cases and for cases which have already been decided).

The Parties reaffirm their commitments to the ILO, particularly with regard to the 1998 ILO Declaration, and confirm their undertaking to attempt to ensure that they are recognised and protected by national legislation, at the same time declaring that such protection will not be weakened or reduced in the interest of promoting trade or investment. These commitments, as with the remainder included in the chapter on labour, can be the subject of consultations, without prejudice to the application of general ILO standards.

In accordance with the substantive obligations, mechanisms for procedural guarantees are set up for exercising labour rights in each country, which protect due process in accordance with the various treaties covering the question.

Institutional organisation is kept straightforward and simple, in order to avoid costs and unnecessary bureaucracy, with points of contact for both Parties at Ministry of Labour level, and a Ministerial Council for supervising the implementation and revision of the relevant

agreements reached, with regular meetings and a work schedule. Consultancy and advice is made available to working groups, specialists and NGOs.

A labour co-operation mechanism is set up for promoting respect for the 1998 ILO Declaration and in particular for promoting compliance with ILO Convention 182 relating to the Prohibition and Elimination of the Worst Forms of Child Labour. An appendix lays down a specific and comprehensive agreement on labour co-operation covering all the subjects on the current labour agenda, especially those concerned with the social dimensions of trade liberalisation, and economic globalisation and integration.

The chapter on labour also provides for a system of consultations for avoiding disputes and seeking mutually-acceptable solutions for any difficulties that might arise between the Parties, with the possibility of having recourse to specialists, arrangements for the operation of good offices, mediation or conciliation. The consultation mechanism can be rapidly set up but there are time limits which allow for the study of the cases presented, which must be duly documented and supported. This mechanism comes before any dispute settlement procedure.

In numerous provisions, participation by civil society is provided for. Examples include participation by trade union and business organisations, NGOs, academic or legal associations specialising in various types of petitions or mechanisms, such as the National Consultative Committee, participation in bilateral co-operation activities, the right to participate as *amicus curae* in the event of dispute settlement procedures and, in the event of monetary assessments being levied by the arbitration panel, the possibility of presenting proposals for the best ways in which compliance with labour legislation can be achieved. The principle of sovereignty is safeguarded once the active entitlement for making consultations is established in the Parties. The office holder entitled to receive a formal consultation is the respective point of contact in the relevant Ministry of Labour.

During the first year following the coming into force of the FTA, there was one public hearing of the Labour Affairs Council, held in Santiago with the active participation of a large number of trade union and business organisations as well as NGOs concerned with labour affairs.

The principle of the specificity of labour affairs is safeguarded once a mechanism to implement a decision by the arbitration panel is contemplated (but when drawing up a list of panellists to be available for dispute settlement by an arbitration panel, the participation of experts in labour law and its application must be considered). This principle is taken up once again in the obligatory character of the requirement for prior consultations before a case is transferred to the dispute settlement phase.

As far as dispute settlement is concerned, the mechanism is the same in general terms as that contained in Chapter 22 on "dispute settlement", and which is applicable to all obligations under the treaty. However, some special provisions are provided for, particularly in Article 22.16. In this way, once the arbitration panel has been set up, and a preliminary and final report have been drawn up proving that one of the Parties has not complied with its obligations under Article 18.2(1)(a), the Parties can reach an agreement within 45 days of receiving the final report.

If the Parties are unable to reach an agreement within the aforementioned time limit or if they have reached an agreement but the complaining Party considers that the agreement has not been complied with, the plaintiff can request that a new arbitration panel be set up and that it should impose a monetary compensation on the other Party. The maximum assessment amounts to USD 15 million per year, readjusted for inflation (Art. 22.16 (2) final subsection). This compensation must be paid in equal quarterly quotas beginning 60 days after notification of the relevant decision. The panel shall deliver its decision within 90 days of being formed.

This provision does not appear fair in the context of a bilateral relation between the Parties. In effect, the sanction is not equally

balanced: a fine of USD 15 million may appear insignificant to the US or other developed countries, but is significant for a developing economy. This parameter, reached only on the basis of a more powerful balance of interests during the negotiations as a whole, should be reassessed as part of a multilateral negotiation.

Exceptionally, given the special nature of the disputes under discussion, criteria for fixing a monetary assessment are set up which are different to those governing commercial matters. The criteria are:

- the effects on bilateral trade generated by the failure to comply;
- the persistence and duration of the failure to comply;
- reasons for the failure to comply;
- the level of compliance which could be reasonably expected from the Party complained against, taking into account any limitations in its resources;
- the efforts made by the Party complained against to begin correcting the failure to comply after receiving the final report of the arbitration panel, and even by means of implementing a mutually-agreed action plan, and
- any other relevant factor.

If the assessment is not paid within the time limit, the complaining Party can adopt "*other appropriate steps to collect the assessment or otherwise secure compliance*." In such a case, the complaining Party may suspend "*tariff benefits under the Agreement as necessary to collect the assessment*." As a limitation, the complaining Party must "*seek to avoid unduly affecting parties or interests not party to the dispute*" (Article 22.16.5). At any time the Party complained against can claim that it is complying with its obligations and can request that the arbitration panel be convened to revoke the suspension of benefits or cancel the monetary assessments (Article 22.17).

3.10.4. Trans-Pacific Strategic Economic Partnership Agreement

Chile has also played a proactive role in negotiations with Brunei Darussalam, New Zealand and Singapore for incorporating labour matters in a form which is satisfactory for relatively small economies. This was achieved under the terms of an agreement signed in July 2005 in New Zealand.

In this *sui generis* MoU undertakings are made concerning compliance with basic labour standards, but with mechanisms for follow up and control which are less strict than those in the FTA concluded with the US following the Trade Promotion Authority. The relevance of the agreement lies in the fact that relatively small economies voluntarily agreed in trade negotiations to assume certain obligations with regard to labour matters. The agreement can serve, and in fact has served, as a benchmark for negotiations between other economies in APEC (Asia Pacific Economic Cooperation).

In the preamble to the MoU the governments make clear their desire to deal with labour matters on a basis of co-operation, consultation and dialogue. The Parties also make clear their determination to improve working and living conditions and to protect, improve and apply fundamental labour rights, making use of such concepts as "*decent work and employment associated with basic principles of the ILO*."

In the section on goals, the Parties agreed to promote better understanding of their respective labour systems, policies, and established customs in the field of labour, and to improve the abilities of the Parties, including non-governmental sectors (participation of civil society, including trade unions).

One of the objectives is to provide a forum for discussion and exchange of views on labour matters of interest or concern, and to promote better understanding and compliance with the principles of the 1998 ILO Declaration (the right of association, collective bargaining, elimination of forced labour, minimum working age and non-discrimination).

In virtue of the agreed text, the Parties, if Members of the ILO and in that capacity, reaffirm their obligations; they also affirm their commitment to the 1998 ILO Declaration, which has a special importance in the case of Brunei Darussalam, which was not a Member of the ILO and which had never adhered to the said Declaration. Each Party will attempt to ensure that its labour laws, regulations, policies and practices shall be consistent with its international labour commitments (they recognise that it is inappropriate to lay down or make use of their domestic labour laws to promote trade or investment by weakening domestic protection of labour) and they will promote public knowledge of their own labour laws.

In order to promote co-operation between the Parties the MoU sets up mechanisms which may refer to matters such as laws and labour practices, including promotion of labour rights and obligations, "decent work", labour inspection and dispute resolution.

Under the title of "Institutional Arrangements", points of contact are set up in each country, and regular meetings between high-ranking persons are planned (the first within a year of the coming into force of the Agreement). The purposes of the latter are to set up a work schedule, to supervise co-operation activities, to audit the operation and results of the agreement, and to provide a discussion forum and exchanges of points of view on subjects of interest and concern between the Parties involved. This paragraph also includes the possibility of consultations with members of civil society (in each country).

If any matter arises concerning the interpretation or application of the text, any Party may request consultations with the other Party or Parties via the national points of contact, and any matter may be communicated to a joint meeting of the interested Parties, which can include Ministers, for mutual discussions and consultations.

It should be emphasised that both the title of the MoU, the preamble and its provisions make clear the connection of the MoU with the general agreement.

The value of this agreement is that it has widened possibilities for incorporating labour matters in negotiations between countries that have no significant economic differences, and in which important commitments have been accepted, with serious arrangements for supervision, points of contact and even meetings at ministerial level to deal with subjects that may arise. It was an agreement in which the conviction of the actors was more important than their economic weight. The agreement has been successfully implemented and the Parties have had annual tripartite meetings in Geneva, coinciding with meetings of the ILC at the ILO.

3.10.5. Chile and China

Labour matters were discussed as part of negotiations to reach a FTA between Chile and China. These matters were then included in the agreement developed by both Parties in a Memorandum of Understanding on Labour Cooperation and Social Security between the Ministries of Labour and Social Security of Chile and China, concluded on 2 November 2005, in Santiago, by authorities from both Ministries.

In the MoU, both Parties commit themselves to carrying out co-operative activities in the following fields: employment, decent work, labour legislation, work inspection, improvement of working conditions and worker training, globalisation and its impact on employment, the working environment, labour relations and social security.

These activities will be carried out by means of exchanges of information and experiences, visits, events such as seminars and workshops, and meetings of specialists. Institutional requirements include coordinators within each Party who will meet every two years.

As a result of the agreement, various visits from high-ranking Chinese authorities have taken place, especially in the field of social security.

3.10.6. Chile and Peru

Chile and Peru concluded a *Memorandum of Understanding on Labour and Migration*

Cooperation, which includes agreements on both labour matters and on migratory workers. The latter in this case is particularly important since people of Peruvian origin make up the largest group of foreign residents in Chile, with around 58,000 people, out of an approximate total of 247,000 immigrants currently resident in the country.

The memorandum underlines the importance both countries give to labour and migratory issues. The signatories affirm their respect for the legal rules of both Parties and signal their intent to co-operate in these fields, with particular emphasis on innovation and on increasing productivity and social capital.

One of the shared commitments of the Parties is their commitment to the 1998 ILO Declaration. At the same time, the Parties recognise as inappropriate any attempt to promote trade or investment by reducing or weakening the protection afforded by labour legislation or by refraining from proper inspection.

Secondly, and a novelty, this agreement also incorporates respect for the UN International Convention on the Protection of Migrant Workers and their Families (1990), highlighting the importance both Parties give to the subject of migration, particularly in relation to the human rights of migratory workers. The relevance of this Convention lies in the fact that it establishes a series of rights common to all workers, independently of their migratory status, and guarantees minimal standards which can be demanded of all ratifying States. Together with the foregoing, the Convention, lays down a series of rights whose purpose is to deepen the process of integration for immigrant workers and their families in the host country, by means of regularising their migratory status.

The establishment of a minimum standard of rights for all migrant workers, respect for workers' rights and the regularisation of the situation of migrant workers, are elements which should lay the foundations for work by governmental institutions charged with administering policy towards migrant workers and other public policies directly related to migration.

The memorandum also lays down respect for the principle of sovereignty, in the sense that it safeguards the constitutional and legal rules of both Parties as well as the exercise of its domestic rights. At the same time, it allows discretion in regulatory and inspection issues.

As far as institutional arrangements are concerned, the agreement sets up a Joint Committee for Labour and Migratory Cooperation, made up of representatives of the Ministries of Foreign Affairs, Interior and Labour, who will meet annually to set up a co-operation programme. In addition, the Committee serves as a channel for dialogue, for making proposals to the relevant authorities in both Parties, for informing social actors on the application of the memorandum and for receiving suggestions for improvement, amongst others.

The most important co-operation activities are those on fundamental rights at work and their effective enforcement, decent work, rights of migratory workers, programmes for retraining, implications of economic integration between the Parties and the relation between social rights and international trade.

4. CONTENT OF THE AGREEMENTS

Although as far as the multilateral agenda is concerned, the subject has not yet been resolved, with regard to the bilateral agenda, various States have negotiated either separate agreements on labour questions, or clauses on labour matters, of various types and with varying degrees of reach, as part of free trade agreements or treaties, association agreements or other such agreements. While there are still many governments that continue to be unwilling to include such matters connected with international trade, on the whole there is a certain trend towards better acceptance of social clauses, even between developing countries.

The general declarations contained in the preambles make clear the Parties' intentions, ends or objectives, which help to better interpret what has been agreed. In general, reference is made to the idea of improving, protecting, enforcing and/or promoting the fundamental rights of workers or labour standards and/or improving the living conditions and employment of citizens or to the ILO concept of decent work.

In general, all the agreements reiterate ILO commitments, the majority making reference to fundamental rights and principles, especially to liberty of association and the right to collective bargaining, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in employment. Some later agreements contain commitments to apply the core conventions of the ILO. A number also make reference to the concept of decent work, as developed by the ILO. Recently, some agreements have included commitments to full employment.

Commitment to the ILO Declaration has been a constant feature of the great majority of agreements signed after the said Declaration.

Various conventions have, in addition, established obligations regarding acceptable conditions of work with regard to minimum wage, working hours, and health and safety at work, as well as obligations on the concept of internationally-recognised labour rights. Some conventions have also included protection of migrant workers.

The obligation to enforce domestic labour legislation is the most important one in the majority of cases, since it is subject to consultations and, in various cases, to dispute settlement which can lead to monetary assessments and even, in the case of agreements with the US, to trade sanctions.

Various agreements recognise that it is inappropriate to use labour laws for protectionist ends. It should be remembered that the 1998 ILO Declaration explicitly rejects the protectionist use of labour standards in trade.

The commitment to not eliminate labour protection is recognised in the majority of agreements. It is often known as the non-derogation clause.

In exchange, in various agreements mention is made of the principle of sovereignty in relation to the right of the State to make its own legislation and also to the principle of discretion relating to inspection powers.

In various agreements, guarantees of due process with fair, equitable and transparent procedural rules, are also covered.

With regard to respect for transparency, various agreements establish a commitment to publish and communicate labour legislation.

In many of the agreements various arrangements for establishing the seriousness of the commitments undertaken are set up. Common features are the nomination of points of contact, regular meetings with high-ranking civil servants and arrangements for co-operation on the most varied subjects, including employment, work and even social security or labour migration. In other cases, additional arrangements have been set up, such as Committees of Experts, which in cases of failure to comply can be used as arbitration panels. In various agreements provision is made for financial sanctions whose purpose is to further compliance with local legislation. Trade sanctions are provided for in agreements negotiated with the US.

5. SOFT LAW

In many countries there is also pressure to strengthen social responsibility, including in labour matters. With respect to labour, the following are worthy of mention: the Global Compact, promoted by the United Nations, the Tripartite Declaration of Principles on Multinational Companies and Social Policy (dated November 1977, amended in November 2000 and revised in 2006) the OECD Guidelines for Multinational Enterprises and the Social Accountability Standard (SA) 8000. We have recently seen the development of a process for creating an ISO Standard 26000 on social responsibility, which covers labour matters amongst others, and which is expected to be definitively approved in 2010. We shall deal in particular with the Global Compact and then with ISO Standard 26000.

5.1. United Nations Global Compact

In response to a call formulated by the then Secretary General of the United Nations, Kofi Annan, work began in 1999 on a so-called Global Compact ("the Compact"). The Compact consists in an appeal to subscribing enterprises to adopt ten universal principles covering, amongst other matters, labour standards.

In the words of Kofi Annan, the initiative aspired to contribute to the emergence of *"shared values and principles, which will give a human face to the global market.*[84] *"*

As part of that goal, the ideal was to construct a global market which should include the observance of fundamental labour standards, thus leading to a more inclusive and fair global society.

In this initiative there are many actors entitled to take action, beginning of course with the companies which volunteer to join the scheme and which now number more than 6,000 throughout the world. It also includes workers and civil society organisations that may benefit from or monitor observance of the provisions by means of arrangements for transparency and responsibility.

With regard to the enterprises taking part in this initiative, most are large business concerns which have an interest in showing their commitment to the principles of the Compact at an international level, and in particular to the labour matters contained in it.

The Compact does not have any regulatory function and its code of conduct has no legal force. It is an initiative whose aim is rather to work towards progress, convincing the main actors in the market of the importance of adhering to its principles. Since the initiative stems directly from the Secretary General of the UN, the office of the Compact in New York plays an important role, together with four other UN Agencies: the Office of the High Commissioner for Human Rights, the International Labour Organization, the United Nations Development Programme and the United Nations Environment Programme.

Those taking part enter the Compact on a voluntary basis. The initiative provides a general framework for encouraging sustainable growth and civic responsibility on the part of creative and committed enterprises.

The Compact contains ten principles which the enterprises must accept, support and carry out, in their respective fields of influence, as a set of fundamental values in the sphere of human rights, working conditions and the struggle against corruption.

The principles of the Compact derive from legal instruments of universal application, such as:

- The Universal Declaration of Human Rights;
- The ILO Declaration relating to The Fundamental Principles and Rights at Work and its Follow-up (1998);
- The Rio Declaration on the Environment and Development;

- The United Nations Convention against Corruption.

In labour matters, the Compact states that the enterprises must respect:

- liberty of association and recognition of the right to collective bargaining;
- the elimination of all forms of forced and obligatory labour;
- the abolition of child labour, and
- the elimination of discrimination in employment and occupation.

5.2. ISO Standard 26000 on Social Responsibility

Pressure exerted by public opinion, the media, NGOs, trade union organisations, consumer organisations, academia, and research centres for multinational companies to commit themselves to ethical behaviour, sustainable development and so-called "socially-responsible behaviour" has been growing in recent years.

Certain countries have passed laws (in the case of the UK for example, a 2006 law known as *The Companies Act* introduced a requirement on public companies to make information available on social and environmental matters) and nominated a minister responsible for social responsibility. Sweden, in 2008, announced that its 55 State enterprises would have to draw up Corporate Social Responsability (CSR) reports based on the *Global Reporting Initiative*, a highly respected synopsis in the field. A majority of the 500 largest companies in the US and the UK have adopted some code of conduct, many making reference to ILO Standards.

In addition, there have been many voluntary initiatives, such as codes of socially-responsible conduct, which are aimed at improving the quality of life at work. This phenomenon is linked to the increasing importance of image, but also to the emphasis on human resources, the environment and other aspects relating to other "*stakeholders*", in which we can see a growing demand for ethical conduct in the world of business. An example is the German Commercial Fruit Association, which has developed a code of conduct requiring its suppliers throughout the world to observe standards mentioned in the Compact. Suppliers can be certified by various mechanisms, such as Standard SA 8000.[85]

In principle, voluntary certification goes beyond the requirements of the law. Obligatory certification fundamentally refers to technical standards or aspects which can affect the safety and/or health of people (for example, health certificates which allow the circulation of certain food products or medicines).

Perhaps the most important certifications of this type are the various families of ISO standards. The ISO is a world federation of standards organisations, covering 140 countries, with headquarters in Switzerland. It is a non-governmental organisation, founded in 1947, with the aim of promoting standards of universal value, whose ultimate purpose is to facilitate the exchange of goods and services. It is made up of the "most representative" national standards organisations, whether these are governmental or private organisations. There are also "corresponding members" and "subscribers", who receive information on the work of the ISO without being active in the technical committees charged with drawing up the standards.

The most important groups of ISO standards (at least for the purposes of this paper) are: 9000 for quality and 14000 for the environment. Established on a similar model are the British Standard–Occupational Health and Safety Assessment Series (BS OHSAS) 18000.

In recent times, the most important development in the field has been the progress made with ISO Standard 26000, which is presently in its final approval phase and is being discussed, with a high degree of consensus, by the members of the working group. The standard covers a number of areas such as human rights, labour rights, the environment, organisational government, trade practices (market rules), participation by the community, proper relationships with consumers and final product responsibility.

Seven plenary meetings have already been held for ISO Standard 26000. According to the work schedule, the standard is expected to be launched in May 2010 in Denmark.

However, it is important to remember that some critics have argued that there is no consistency between what many companies report and reality, that internationally-accepted minimal principles are not observed, and that the relevant concepts are dissipated as they rise through the chain of added value.

Even if the standard were not certifiable, the fact is that it can have an important influence on how exporting companies relate to global markets, since it is becoming more and more common for the large wholesale chains to demand observance of labour standards in order to protect themselves from charges that they benefit from *social dumping*.

The content of this standard coincides fully with the 1998 ILO Declaration, with the ILO Decent Work provisions, and with its core conventions. When it is promoted, generating incentives in the world of business and in the private sector, and leading to multiple social actors working for its application with arrangements for ensuring transparency and demands for compliance from citizens, it will be added to the list of instruments with which we have been dealing in the course of this study.

6. THE IMPLEMENTATION OF THE AGREEMENTS

Implementation of agreements can be through two possible routes: either by means of co-operation or by means of conflicts generated by complaints of failure to comply with agreed actions.

The initial aim of co-operation between the Parties to the various agreements is to understand and exchange information on the various systems of labour relations, on social security, on legislation and on arrangements for ensuring legislative observance.

Generally speaking, various activities, often tripartite in nature, are developed for exchanging points of view or better practices on questions of interest, such as: employment of young men and women, measures to be analysed when faced with economic crises, unemployment insurance systems, systems of vocational training, employment systems or arbitration of labour disputes.

These activities are often in the form of visits, sometimes tripartite, for attending seminars or other activities.

As far as more conflictual processes are concerned there have been no demands or complaints, other than in the case of NAALC, with reference to which there have been 37 complaints presented to the agreement's two institutions, the Joint Secretariat and the National Administrative Office. Even in the case of NAALC there has never been an instance of a case going as far as an arbitration panel, under any agreement or any clause dealing with labour matters.

Notwithstanding the activities previously mentioned, some of the more complex agreements (notably those concluded with Canada and the US) require the drawing up of supplementary instruments such as rules for consultation procedures, or codes of conduct for mediators or arbitrators, which must be implemented in accordance with the agreements or clauses in the treaty. Some of these texts are unilateral and others mutually agreed.

7. THE ROLE OF THE ILO IN THE NEW SETTING[86]

Before analysing the role that the ILO could play in the new circumstances created by multiple bilateral trade agreements including provisions on labour matters, it would be useful to give a brief summary of the organisation and how it functions.

The ILO has at present 183 members. An International Labour Conference takes place once a year, made up of its tripartite principals, for the purpose of agreeing the general policies of the ILO and possibly agreeing new international labour standards or revising those already in existence, the work schedule or the budget. The ILO is governed by the Governing Body, made up of 28 government Members, 14 employer representatives and 14 trade union representatives.

As we have observed during the course of this study, when social clauses are included in free trade agreements and integration processes, it is common for there to be references to the ILO, its 1998 ILO Declaration and the concept of "decent work" developed by the ILO.

Once a country has ratified a convention, it must file regular reports every two years on the measures put in place for applying it. This applies both to core conventions and priority conventions. In the case of other conventions, reports must be filed every five years.[87]

In 1926, a Committee of Experts was set up to examine the reports, but also for scrutinising the observance of international labour standards. The Committee formulates its observations and direct requests, together with a commentary which is published in the Committee's annual report. Direct requests are communicated to the relevant governments. The annual report of the Committee of Experts is presented in June to the International Labour Conference where it is examined by the Conference Committee on the Application of Standards. This permanent Committee is of tripartite form. The Committee selects the observations and Member States who will be the subject of particular scrutiny and debate. Governments are then invited to respond. In many cases, the Committee directly adopts conclusions with specific recommendations for solving particular problems, but it can also recommend missions or technical assistance from the ILO. The observations and conclusions are published in regular reports. Particularly serious situations are emphasised in special paragraphs of the general report.[88]

In addition, employers' and workers' organisations have the right to make *representations* to the Governing Body against any Member State which *"has failed to secure the effective observance within its jurisdiction of the said Convention*" to which it is a Party. A tripartite committee can be set up to examine the representation and then submit the matter to the Governing Body with a commentary on the facts and law of the case, an examination of the case, and its recommendations. If the Governing Body does not consider the government's response as satisfactory, it has the right to publish the representation and the response. In the special case of conventions 87 and 98, the matter is sent to the Committee on Freedom of Association, for particular scrutiny.[89]

The complaints procedure governed by Articles 26 to 34 of the ILO Constitution is more significant. According to this procedure a complaint can be presented by an ILC delegate or by the Governing Body, within its jurisdiction, against a Member State for not complying with a ratified convention by another Member State. Once the Governing Body has received the complaint, it can set up a "Commission of Enquiry" to examine the case, made up of three independent members. The Commission must carry out an investigation into the case, taking into account all the relevant facts, and must make recommendations on possible measures to be taken. The Commission of Enquiry is the highest level investigation procedure available within the ILO, and resort to it is undertaken when there are serious and recurrent violations together with a refusal to address them. Up to the present, there have been 12 ILO Commissions of Enquiry.

If a country refuses to comply with the recommendations of a Commission of Enquiry, the Governing Body can take measures in accordance with Article 33 of the ILO Constitution, which states: "*in the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Enquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.*" This Article 33 has been invoked only once in the history of the ILO, in 2000, when the Governing Body requested the ILC to arbitrate measures so that Myanmar should put an end to forced labour.[90]

As has already been pointed out, within the ILO there is also a Committee on Freedom of Association, set up in 1951 under the Governing Body for the purposes of examining complaints on violations of Freedom of Association even in cases in which the convention had not been ratified by the country in question. If this committee decides that there has been a violation of the relevant standards it can issue a report through the Governing Body and can draw up recommendations requiring a report from the relevant governments on how the situation has been remedied. The case can also be sent to the Committee of Experts if the country has ratified the relevant convention. The result has been that in a little over ten years more than two thousand trade unionists have been freed after the Committee on Freedom of Association examined their cases.[91]

Under these new circumstances, there is no doubt that the ILO could come to play an enhanced and more important role, since the reports on compliance with standards by ILO experts now constitute the best means of proof of the degree of compliance or non-compliance with ILO standards, and in particular with those contained in the 1998 Declaration or on "decent work".

Moreover, bilateral agreements increasingly refer to the ILO and its instruments thereby making the demand for adherence to labour rights, especially fundamental rights, more effective.

In this way, the regulatory and international control role played by the ILO has been strengthened by the advances in labour matters that have begun to take place in the field of trade negotiations, particularly because the subject has now become an obligatory one on the international trade agenda. This is because in effect consumers in industrialised countries are applying what amount to trade sanctions by boycotting products from countries which face serious accusations of damaging core labour standards.[92]

Until the present, the use of sanctions against States violating core labour standards has been absolutely exceptional, with Myanmar being the most drastic case in spite of the fact that there were other earlier situations in which serious violations had been denounced. This has meant that States are beginning to take more care that complaints made against them should be duly dealt with and that their legislation should not be the subject of objections when compared with international standards, especially when arrangements for inspecting and applying standards are more effective.

International competition between countries depends on many factors, but increasingly on compliance with labour standards in the system of production of goods and services. The inclusion of labour matters in some free trade agreements reinforces this notion. Due to their increasingly important role in international trade, labour rights are coming to be not just a question of ethics, but a factor in economic competition, especially in export sectors that comply with them.

8. IMPLICATIONS FOR DEVELOPING COUNTRIES

Free trade could increase and improve consumption by the population, with the consequence of potentially creating more and better work opportunities and quality employment, promoting positive changes in working conditions and remuneration, and strengthening and expanding social protection.

Regional trade alliances are one of the most characteristic features of our time. Integration processes and/or trade liberalisation present a serious challenge to all countries in all continents. Their creation should take into account the historical context, the specific characteristics of each region or sub-region, asymmetries between different countries and the key concepts accepted by negotiators. Just as globalisation can have positive or negative consequences, integration or free trade agreements may or may not be beneficial. The difference is that globalisation without rules means that the market, not always perfect, governs the movements and cycles of economies, in which the most powerful countries or the biggest multinationals enjoy a wide margin for manoeuvre to the detriment of smaller scale actors. On the other hand, in integration processes or trade liberalisation, countries, through their governments, can and should exercise a collective will so that the design of trade liberalisation projects increases the opportunities and advantages, and eliminates or diminishes the threats and disadvantages. In this way, the construction of *"social resilience"* is furthered.[93] Such collective decisions reveal political leaders' degree of success. In the middle of difficult negotiations, it is of great importance that the agreements reached should be of benefit to all the countries concerned, and that they should take into consideration possible responses for those sectors benefiting least or even damaged by the treaties.

Confronting the social dimension of these processes is therefore at present unavoidable. It is clearly an obligation of the greatest importance to weigh carefully the positive and negative consequences of trade liberalisation and/or integration initiatives, particularly on employment and working conditions. This concern is so much the greater in those sectors of labour which are very exposed. While advanced sectors of the economy involved in export, with highly specialised workers, can find themselves considerably strengthened by these processes, small, medium and micro businesses, together with their workers, operating in less prominent areas of the economy, can suffer negative consequences.

In the field of public policy, rapid changes in technology and in the international exchange of goods and services, have led to an overwhelming need to adapt. This means that we must measure the impact of the changes and identify mechanisms for making good use of the advantages which they offer, as well as avoiding their negative consequences. Many businesses have found their competitiveness affected and have consequently been forced to increase productivity. The search for better productive performance has come to have as its goal not merely the search for higher profits but the goal of simple survival, since unproductive enterprises find themselves forced to shut their gates. The result is that many people have become, and will become, unemployed. Furthermore, in the search for greater productivity and profitability, many enterprises have diminished the workforce indefinitely, importing more technology to lower their production costs. With the same aim of lowering costs, we have seen measures for reducing both remuneration and non-remuneration costs in the field of labour.

However, in the relationship between North and South it also appears inevitable that a compromise must be reached on how to deal with the political pressure on trade based on labour standards, where consumers in North America, Europe and other developed countries shun products which have been produced in countries where fundamental labour rights are infringed.[94]

Since each country has their own laws and standards according to their history and its economic, social and political reality, nor is there any doubt that it is impossible to put in place equal labour standards in different countries. It follows that one way of balancing the relationship can be to make use of the concept of compliance with domestic legislation. This is the central concept in the arrangements made by various agreements, but it is also possible that thanks to the anticipated benefits of trade liberalisation and of general progress in the development of nations, prosperity will reach all and specifically help workers achieve better working conditions and better pay. It can also be hoped that together with the benefits hopefully emerging from trade liberalisation and investment flows, clear advances can be made in the degree to which the world of labour can feel the effects of improved development, especially in those areas regularly reviewed by the ILO. It also appears obvious that with greater development should come greater ratification and observance of the labour standards drawn up by the ILO, and particularly of the core conventions, priority conventions and, to the degree possible, the remaining conventions on the current list.

In accordance with the above, it would also appear to be both strategic and indispensable to grapple with arrangements for securing effective compliance with workers' rights, and more particularly with core rights, using the classic instrument of work inspection which have been developing since the beginnings of the Industrial Revolution and labour law, this is, the labour inspection[95] and the labour judiciary.[96]

Independently of the relationship which is being created between trade and labour standards as a result of new free trade agreements, these will energise internal processes further, leading in turn to new transformations which must be situated within the framework of each country. Mechanisms for social dialogue at different levels – national, sectorial, territorial and company level – are required. Such mechanisms can be used to cover both general and specific questions. In this manner, open conflict can be avoided, thus creating a more positive climate in labour relations, in which problems and difficulties, and especially those typical of processes of change, can be discussed. In addition, work is proceeding to avoid open conflict by using alternative forms of conflict resolution, such as mediation and conciliation.[97]

In short, there are a number of converging trends for improving the work environment in a number of countries by means of standards and institutions promoting such standards, especially with regard to universally-agreed core labour standards. On the other hand, there is also a similar consensus on the importance of achieving the greatest possible degree of trade liberalisation. No great difficulties stand in the way of reaching high levels of agreement on labour standards between countries with similar economies. However, the atmosphere becomes more tense when discussing labour standards in the context of North–South international trade, when social justice appears to some as a pretext for protectionism, whose aim is to raise barriers, temporary or otherwise, to trade. Whether countries will finally accept such commitments when discussing future integration or free trade agreements depends on the terms of such liberalisation and on the character of the agreements as a whole.

Regulations must respond to the challenges posed both by the social dimension of trade liberalisation and integration, and to all the requirements posed earlier. Certainly, these demands have changed since the beginning of the century, but their humanist essence has not changed since the Declaration of the aims and purposes of the ILO (1944) better known as the Philadelphia Declaration, although today that essence is expressed in the simple, but no less important concept of decent work.

In the end, the concern is to enable the benefits of free trade, but at the same time to ensure that these benefits do not destroy the social advantages enjoyed by the most developed countries. At the same time, such advantages should allow the less industrialised societies to enjoy the benefits of economic and social development, together with all that implies in

terms of democracy, good government, social fairness and economic sustainability.

In facing the challenges on the trade liberalisation agenda and labour clauses or parallel agreements, countries, and especially less developed countries, face various types of challenges. Some of those challenges relate to institutes for compliance with regulations (such as those noted in connection with work inspection and legal institutions dealing with labour matters), others relate to the appropriate capacity for regulation (to modernise labour legislation and adapt it to new circumstances created by constant change linked to globalisation in the world of production). Such processes should take place in a context of due social dialogue, in an inclusive manner and with respect for international standards, especially those promulgated by the ILO.

Employability must absolutely be taken into account as it is an essential element of the "decent work" agenda. This implies a suitable agenda enabling good education and vocational training, suitable systems of qualification and efficient employment services. In addition, countries must, as best they can given their resources, seek to protect their citizens from a range of market fluctuations, and from the globalisation of those markets, including financial ones. This implies suitable safety devices for various risks, such as redundancies.

What is expected from developing countries is that, if they prosper as a result of trade liberalisation enabled by free trade agreements, then the benefits arising from such liberalisation should be distributed, and working conditions and pay should be improved, thus improving the general level of development in a manner that can be observed and assessed.

Consumers in developed countries on the other hand, fear that the source of their labour should be placed in danger by competition from developing countries which, thanks to infringement of core labour standards, can lower production costs to an excessive degree, leaving them out of the market or provoking capital flight.

9. COMMENTS AND FINAL CONCLUSIONS

Through negotiating trade liberalisation agreements countries seek to be competitive so that they can sell their products and improve the added value of their goods and services. This contributes to improving international trade, thereby achieving growth with consequent positive impacts on employment. The result, through a multiplier effect, is a virtuous economic cycle.

There remain outstanding issues with respect to the link between international trade and work, particularly differences of opinion between countries concerning the inclusion of these matters on the international trade agenda, especially in the multilateral context of the WTO.

Nevertheless, bilateral and regional negotiations are increasingly including labour issues in a large majority of agreements, and this trend appears to be expanding and deepening.

The lessons learnt from the growing inclusion of labour agreements in integration and economic liberalisation processes and the trends which derive from it, allow us to draw some interesting conclusions.

Developed countries, in spite of their hesitations with regard to labour clauses in free trade agreements, have finally accepted them, on the basis of the overall balance in the subjects negotiated.

Agreements reached on labour matters display some points of agreement with more uniform clauses, but there are still many differences, especially with regard to commitments and arrangements for compliance and for dispute resolution.

Although it is true that there has been a wide-ranging conceptual debate on the link between international trade and labour standards, and on its effectiveness, negotiators have in practice

approached negotiations from a pragmatic, economic, commercial and political point of view, rather than from an academic standpoint.

From the point of view of developed countries, their negotiators are often under pressure both from the Administration, which demands concrete results and whose approach is very rigid, and from parliamentarians, trade union organisations and public opinion. In spite of that, some interpretation of these mandates is possible, and positions can become more flexible, but with only a narrow margin for manoeuvre.

In some cases labour issues have been a serious obstacle to the initiation of trade negotiations, or to approval by the legislature of what has been agreed at the negotiating table.

In other cases, there have been prior requirements with respect to labour matters, often of a regulatory character, which have made it easier to reach agreement or to gain approval from the legislature.

In the case of the main negotiating powers, the EU and the US, their mandates for negotiations can run into difficult internal negotiations, which is why they are often very rigid. Something similar can occur in the case of developing countries, especially the so-called emerging countries.

Developed countries have been exhibiting a trend towards greater depth in their proposals with respect to labour clauses, (although the case is quite different with regard to the existence and character of sanctions in the event of failure to comply), in FTAs.

A further observation on the recent history of these clauses or agreements is that no accusations before arbitration panels have been noted, in contrast with the strictly business or investment fields. Furthermore there is no previous history of labour clauses or agreements being used for protectionist purposes. Instead, there were many experiences of cooperation between the parties.

With regard to the ILO, the imposition of trade sanctions on a State for failure to comply with labour standards is absolutely exceptional. There are extreme cases (such as that of Myanmar) but only when all other means of compliance and control, taken with the aim of leading the non-compliant State to compliance in good faith, have been exhausted.

In the ILO multilateral context, accusations of serious failure to comply with labour standards must be extremely serious for governments to decide on making formal complaints on labour questions.

In the multilateral context, within the WTO there is still no minimal consensus necessary for setting up a working group which could deal with the subject of the link between trade and work and to discuss a labour clause, even with reference to the ILO.

By contrast, in the ILO there have been broad advances on degrees of consensus and supervision of core labour standards. A nucleus of core labour standards, together with priority standards and updated agreements and recommendations, have been drawn up. At the same time, there is no doubt over the ILO's exclusive qualification for laying down regulations and verifying their observance.

In addition, a strengthening of the role of the ILO can be noted, to the extent that the rulings of the organisation on whether a country is infringing the provisions of the ILO, and in particular its core conventions and those that refer to the "decent work" agenda, now command greater respect.

It is to be hoped that the role of the ILO and of the WTO, as well as the relations between the two, will develop, so that greater consistency emerges in national public policies between economic authorities and social/labour authorities. Clearly, the final results of the Doha Round, yet to emerge, will be relevant to these developments.

At the same time, it can be noted that in all the declarations made by heads of State throughout the world there is an effective consensus on Fundamental Principles and Rights at Work and on the "decent work" agenda, including everything implied by that concept, as developed by the ILO.

This progress has meant that many diverse actors include the requirement of compliance

with core labour standards, as can be seen with private sector actors who buy products from developing countries and who demand proof of compliance with such standards (a development which coincides with the development of ISO Standard 26000).

In these circumstances, and going beyond ethical considerations, developing countries should assess the importance of compliance with labour standards and of responsible social behaviour, as an important element in guaranteeing their competitiveness. These elements play a part in attracting productive long-term investment, as a result of their impact on social peace, greater certainty and effective government.

In some cases, those countries which have adopted free trade agreements accompanied by labour agreements have had access to co-operation programmes for improving their capacity for inspection and control. In other cases, horizontal co-operation has made it possible to have access to exchange of good practices or *benchmarking* in the search for best practices. In this way, some countries have been able to incorporate innovative practices in human resource management and in labour or social security policies and regulations.

The above points notwithstanding, developing countries should be able to assess whether a multilateral discussion on this matter would not be better, for the purpose of avoiding the pernicious effects of distortions that multiple agreements of varying kinds between varying actors can cause.

Finally, all political social and economic processes, whether national or international, must have as their primary and fundamental aim the goal of improving the general level of living standards of citizens. In particular, all public policies should centre on improving opportunities for those who confront the greatest difficulties or who are the most vulnerable, and in generating decent work for all, with the aim of promoting better integrated and more socially cohesive societies which are essential elements for achieving social peace and effective government.

In labour matters, the fundamental rights of weaker parties should be duly guaranteed and protected, and the "decent work" agenda applied. If we wish to maintain and deepen trade liberalisation, we must promote and deepen this agenda for "social resilience."

It will be not be long before it will be both useful and possible to analyse the economic consequences of these clauses or agreements relating to trade and, *vice versa,* to analyse the impact of trade liberalisation on employment in countries which have not developed such agreements. It will also be important to identify whether the commitments adopted under these agreements have had any impact on countries' labour regulations and on their practical enforcement. At the same time, once the agreements have become more developed, it will be important to assess how they have functioned in terms of the co-operative measures agreed and whether they have proved to be useful.

To conclude with the words of Nelson Mandela: "*A nation should not be judged by how it treats its highest citizens but its lowest ones.*"

APPENDIX I

Table 1. Comparitive Table of Important Models

	Canada-Peru	New Zealand-China	Peru-US	EU-CARIFORUM
Preamble and Objectives	*	*	*	*
Ratification of commitments to the ILO and commitment to the 1998 ILO Declaration	*	*	*	*
Commitment to the Ministerial Declaration of 2006 ECOSOC-UN on decent work and full employment.				*
Commitment to adopt laws consistent with international standards	*		*	*
Additional rights not included in the 1998 ILO Declaration	*		*	*
Commitment to decent work	*	*		*
Compliance with own legislation	*		*	*
Rejection of protectionist use of labour standards		*		*
Non derogation of labour laws	*	*	*	*
Discretionary power of inspection	*	*	*	
Sovereign right to lay down labour regulations	*	*	*	*
Without right of carrying out control activities in the counter Party	*	*	*	*
Due process	*		*	*
Right to make internal complaints	*		*	
Transparency	*		*	*
High level Committee or Council	*	*	*	*
Points of contact	*	*	*	*
Mechanisms for labour co-operation	*	*	*	*
Social participation in co-operation mechanisms		*	*	*
Communication from society in labour matters	*		*	
Consultations for resolving disputes	*	*	*	*
Committee of Experts				*
Advice from the ILO in implementing labour standards				*
Advice from the ILO for setting up review panel	*			
Parliamentary participation				*
Financial assessments	*			
Trade sanctions			*	

ENDNOTES

1 The Ministers' Conference of the WTO is the highest authority in the institution. The Singapore Conference is a landmark in this area, because of the importance of its consensus and being the first of WTO as such.

2 US had also agreed FTAs with Colombia, South Korea and Panama, but even renegotiated according to the Bipartisan Agreement on Trade Policy they could not be approuved in US Congress.

3 Lecuyer 2000.

4 A group currently formed by Argentina, Brazil, Paraguay and Uruguay, can be clearly distinguished from

5 Doumbia-Henry and Gravel 2006.

6 Ermida and Racciatti 2003.

7 ILO 2002.

8 WTO 2007a, pages 380 onward and De Motta 2001.

9 De Motta 2001 and WTO 2007a.

10 Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, South Africa, Southern Rhodesia, Syria, the United Kingdom and the United States.

11 World Bank 2002, pages 463 onward.

12 Ibid ii.

13 WTO Ministerial (Doha, 2001): informative notes.

14 This Article XX reproduces Article XX of the initial formulation by GATT dated 1947.

15 See WTO Legal texts, page 24.

16 Highest authority in the ILO. It meets annually and is tripartite.

17 Alburquerque 2001.

18 At this conference, the debates were highly controversial, above all in journalistic circles and in parallel activities, with much participation by human rights, labour and environmental activists, to such a degree that in effect it was necessary to suspend the Conference.

19 Tokman 2003.

20 WTO Ibid see page 392

21 WTO 2007b, page 393

22 See the joint study in www.ilo.org and/or in www.wto.org Trade and Employment, Lee, Eddy and Jensen, Marion, 2007, Geneva, ILO-WTO.

23 Ibid, see page 393

24 Ibid, pages 393 and 394

25 Ibid, pages 196 and 380.

26 See the text of the ILO 1998 Declaration at www.ilo.org.

27 General Assembly of the United Nations, document A/RES/60/1.

28 See http://daccessdds.un.doc/undoc/LTD/GO6/625149/pdf/60662549.pdf?openelement

29 Complete text at: http://www.landcoalition.org/pdf/ev06-ecosoc-md-s.pdf

30 See text at *www.ilo.org*;

31 ILO, Decent work. General Director Memory to the 87th ILO Labour Conference, Geneva, 1999.

32 Ibid ii. See also *www.ilo.org/ilolex/spanish/subjectS.htm*; also see the updated list of agreements in the Appendix to this paper.

33 In the case of core conventions Governments must file reports with the ILO every year, and every five years for the remainder.

34 Author's italics. The phrase in italics gives a reference for proceeding to updated lists of current and recommended standards, leaving out those which have been revised or which have fallen into disuse.

35 ILO 2008 Declaration, paragraph IV, see at www.ilo.org.

36 Note of Author.Generally speaking, developed countries have been implementing GSP, and under WTO rules, in accordance with agreements adopted in the framework of UNCTAD Conferences. Nevertheless, the US GSP is better known and more widely applied.

37 19 USC 2462. GSPs are standards developed by individual developed countries and are applied for the exclusive benefit of developing countries. Hence they are unilateral rather than reciprocal. See UNCTAD 1989.

38 19 USC 2701

39 19 USC 3201

40 See: The social clause: issues and challenges. International Labour Organization. Bureau for Worker's Activities.

41 This system of control has developed considerably since its early beginnings, and has provided one of the reasons for which the AFL-CIO has been opposed to new free trade agreements, on the grounds that the US has at its disposal other instruments for altering the labour practices of other countries, via GSP, rather than relying on labour clauses in FTAs.

42 Verge 2002. In similar terms, Chile concluded a labour co-operation agreement with Canada. In this agreement, no role was allocated to trade sanctions which, although in a restricted form and only for extreme cases did play a role in the North American Agreement between Mexico and the US.

43 This possibility only applies to the agreement between Mexico and the US.

44 Bensusán 2006. The author, quoting DiCaprio (2005) claims that "until now there has been no evidence that the existing mechanisms for making complaints and requesting correction of labour violations under the possible threat of trade sanctions have ever been used for such purposes."

45 To see a summary of the complaints, see http://www.naalc.org/public_communications.htm

46 For an examination of the initial complaints, see Verge 2002.

47 See complete text at: http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta

48 An obligation not to relax labour legislation for the purpose of obtaining an advantage in international trade or investment flows.

49 Polaski 2004.

50 Note by AuthorThe example of Singapore is very similar, for which reason a detailed analysis is not given. The model was also applied to negotiations for CAFTA, Bahrain, the Dominican Republic, Morocco, and Oman.

51 Both legislative routes, Fast Track and TPA, granted a mandate to the president of the US and to his Administration to conduct trade negotiations whose results would be presented to Congress as a whole, which in theory can alone approve or reject agreements reached in negotiations. However, the mandates differed, and Congress was much more demanding with regard to the TPA. In spite of what was said earlier, in some cases Congress rejected the agreements and obliged the Administration to renegotiate it. This has occurred more particularly in relation to labour matters under NAFTA and with regard to labour matters in the agreements with Colombia, the Republic of Korea, Panama, Peru, and others.

52 See www.ustr.*gov/trade-agreements/free-trade-agreements*

53 It should be pointed out that the renegotiation also involved a revision of intellectual property rules and health in accordance with the bipartisan agreement, also covering social matters or having implications for them. See Revista Puentes 2007, page 3

54 In the case of the bilateral negotiations between Canada and the US on labour matters, there was one interesting peculiarity: no provision was made in the treaty in the event of failure to comply with labour standards. Such sanctions were reserved for failures to comply with labour standards in the case of Mexico, in which sanctions were possible by both countries, but with reciprocity.

55 See Lazo 1998.

56 To see the text of this agreement, see http://www.hrsdc.gc.ca/eng/lp/ila/index.shtml

57 See 3.10.4.

58 See 3.10.5.

59 To see the text, see http://www.chinafta.govt.nz/1-The-agreement/1-Key-outcomes/6-Labour-and-environment-agreements/index.php

60 http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/China/index.php

61 International Confederation of Free Trade Unions 2006.

62 See the work by Monteiro de Barros 1997.

63 At the present time, it is made up of 27 Member States: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

64 See http://eur-lex.europa.eu/en/treaties/index.htm#founding

65 Sala 2002.

66 http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/c10107_es.htm

67 Ibid. xxv.

68 Ibid. xxv

69 http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B6-2006-0579&language=ES

70 Angola, Antigua and Barbuda, Bahamas, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, the Comoros, Congo, Cook Islands, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, Marshall Islands, Mauritania, Mauritius, Federated States of Micronesia, Mozambique, Namibia, Nauru, Niger, Nigeria, Niue, Palau, Papua New Guinea, Rwanda, Samoa, San Kitts and Nevis, Santa Lucia, San Vincent and the Grenadines, Sao Tome et Principe, Senegal, Seychelles, Sierra Leona, Solomon Islands, South Africa, Sudan, Surinam, Swaziland, Tanzania, Timor, Togo, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia and Zimbabwe.

71 See http://ec.europa.eu/trade/issues/bilateral/regions/acp/pr220208_eu.htm

72 *Amicus Curiae*: (Friends of the Court) a person who is permitted to present arguments on the subject being dealt with by the court, even though they may not represent the interests of any of the Parties. Glossary, page xli of Brownlie 2003. Not to be confused with third parties before the Panel.

73 See Plá 1965, page 50.

74 Ferreira 2002.

75 Salazar and Robert 2001.

76 Mark 2002.

77 Blaauw 2003.

78 See on this debate: Mizala and Romaguera 1997.

79 See Lazo 1998.

80 García 2004, page 190

81 See www.oas.org

82 See Ecoceanos 2004.

83 To see the complete text of the Agreement see the web site: www.direcon.cl

84 See www.pactoglobal.cl

85 German Fruit Trade Association http://p57160.typo3server.info/fileadmin/pdf-dateien/jahresberichte/DFHV_GB_07-08.pdf

86 This section is largely based on the ILO text, Rules of the Game (www.ilo.org/wcmap5/groups/public/---ed_norm/---normes/documents/publication/wcms_108393.pdf).

87 Ibid. Page 76

88 Ibid. Page 76

89 Ibid. Page 80

90 Ibid. Page 82

91 Ibid. Page 85

92 See Freeman 2002.

93 The concept of social resilience refers to the capacity of a society for developing strengths which allow it to absorb shocks and to recover rapidly from adverse situations. The concept derives from physics, in which the concept is used to measure the resistance of materials to shocks, and from psychology, which has adapted the term to refer to the ability of persons to overcome painful or traumatic situations and to recover.

94 Freeman 2002.

95 Jatobá 2002.

96 Sappia 2002.

97 Morgado 2002.

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