

Trade and industrial policy: implications for development and international labour standards



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Study for IndustriALL Global Union

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Foreword

The study, **Trade and Industrial Policy: Implications for development and international labour standards**, is part of IndustriALL Global Union's effort to implement the "Action plan: towards trade for the benefit of the people", approved at the Executive Committee meeting in Mexico, November 2018. IndustriALL affiliates in the Asia Pacific, Latin America and Caribbean regions approved regional specific action plans in 2019.

The study captures the interplay between trade and industrial policies and its implications for the development of labour standards, focusing on Africa, Latin America, Asia-Pacific and the Middle East Asia. Through regional analysis, the study highlights binding commitments undertaken particularly through a new generation of trade and investment agreements that have significantly limited governments' abilities to use industrial policy tools.

Simultaneously, there has been an erosion of international labour standards in the era of hyper-globalisation, in which trade policies have facilitated a rapid growth of global value chains. Attempts to protect and promote labour standards through trade agreements have not yielded desired results, due to a lack of enforceable provisions, absence of institutional mechanisms and political will.

With various regional examples, the research underlines the need to protect policy space, as governments require a wide array of policy instruments at their disposal to test, develop strategies and select appropriate policy approaches suitable for the social, economic and political situation. Renegotiating, termination of harmful agreements and being vigilant of ongoing negotiations are key to regain lost policy space and not to concede new grounds. Among other issues, authors recommend for participation of trade unions in developing industrial policy in the framework of social dialogue, linking social and economic upgrading, revitalising multilateralism and just transition towards decent work and sustainable livelihood.

The social and economic crises caused by Covid-19, with a drastic reduction of international trade and the general flow of foreign direct investments, reiterate the need for a decisive role for trade unions in the policy making processes. Unions need to have a place at the table, build capacity, actively participate in national forums, sectoral councils and demand that governments create inclusive and transparent institutional mechanisms and decision-making processes. In this process, this study will help IndustriALL affiliates in understanding regional-specific trade and industrial policy issues. It will contribute to raise awareness, help build intra and inter-regional solidarity among trade unions and take actions to resist the corporate trade agenda, promote an inclusive and sustainable industrialization process and influence policy outcomes to defend workers interests.

Valter Sanches

IndustriALL Global Union general secretary

December, 2020

Global trends and the need for industrial policy

Hansjörg Herr and Christoph Scherrer

The current neoliberal trade and investment rules favour large corporations and limit the possibilities for a just transition to decent work and secure livelihoods. With the foundation of the World Trade Organization (WTO) in 1994, all countries were obliged to follow the same rules ('single undertaking') after a transition period, i.e., discontinue with the previous differential treatment of developing countries. Furthermore, the WTO added rules for trade in services (GATS), trade-related investment measures (TRIMS) and intellectual property rights (TRIPS). These rules favoured corporations from developed countries, which commanded a lead in advanced services, transnational presence and technology.

In 2001, on behest of the United States and the European Union (EU), the WTO started a new negotiation round for further liberalization. Although called the Doha development round, corporate interests dominated the negotiation agenda. Since the countries of the Global North were not willing to consider the demands of the Global South, the Doha round ended in a stalemate. Prevented from realizing their agenda, the US and the EU launched new plurilateral initiatives among WTO members, Regional Trade Agreements (RTAs) and International Investment Agreements (IIAs). Vis-à-vis individual countries or a small group of countries, they were more successful. By August 2020, 305 RTAs and 2659 IIAs were concluded. IIAs protected the interest of foreign investors, e.g., the right to transfer profits abroad and to be treated in the same manner as domestic firms. These agreements went substantially beyond the already far-reaching deregulations possible under WTO (see Section 1.4).

Even traditional mainstream theories acknowledge that free trade leads to many losers besides winners. Only when losers are completely compensated, a general increase in welfare from trade can be claimed. Such compensations hardly ever took place. Furthermore, the deregulation of international capital flows created pressure in all countries to deregulate labour markets. Low labour and ecological standards were seen as an instrument to attract foreign direct investments (FDIs); that not all FDIs have positive effects was forgotten. Free capital flows resulted in financial crises

and the over-indebtedness of many countries. The creditors forced upon the latter structural adjustments. Countries which did not follow the neoliberal agenda were sanctioned by capital flight. In the last decades, real wages increased in many countries of the Global South. But the gains were very unequally distributed. Precarious working conditions—e.g., the evil of temporary work—and increasing informality became ever more prevalent. Millions of women performing repetitive tasks in world market factories are facing especially harsh working conditions (for details see Gallas et al., 2016).

The Covid-19 pandemic has fundamentally worsened the situation. For example, lead firms in the garment global supply chains did not pay for already-ordered products or reneged on the contractual price. Workers, mainly women, lost their jobs without any compensation (Anner, 2020). Overall, the pandemic puts additional pressure on workers and burdens governments with ever more debt which limits their capacity to fight the economic and social crisis. On top of massive debt relief, the rules of global economic governance must be changed to allow for more economic policy space to address not only the crisis but also to lay the foundations for sustainable development. These rules must be set in an equitable way and in multilateral fora. The necessary changes will only come about by strong international trade union solidarity.

1.1 Impact of regional trade agreements on workers

RTAs go beyond WTO rules and call for deeper liberalization commitments concerning investment, government procurement, subsidies for state-owned enterprises, electronic commerce and digital trade issues (see Section 1.4). They are driven by a corporate agenda. As RTAs cover many sectors, the whole labour movement feels the impact of increased corporate power.

Generally, trade and investment agreements foster competition among production sites. Even the workforces of production sites owned by one company are brought in competition against each other for new assignments and investments.

Public-sector unions and their members are most directly in the focus of new RTAs since these agreements aim at opening the public sector for private competition. These measures have the potential to lead to further privatizations, thereby undermining collective bargaining.

In manufacturing, the impact varies according to competitive strength and size. Members of trade unions in large companies, which are highly competitive, expect that the output of their companies will expand and the overall employment levels within their companies will increase. However, it is not guaranteed that additional employment will accrue in factories where the trade unions have a strong presence. RTAs increase the discretionary powers of the management to allocate work across borders.

Members of trade unions are not only producers but also consumers. As consumers, they might profit from low prices. However, privatization of public services usually lowers the quality of the services. Protection of intellectual property rights, especially for pharmaceutical companies, increases medical bills. Workers are also taxpayers. RTAs lower tariffs and reduce thereby the income for states. By easing cross-border investments, they make tax avoidance easier.

Workers are also citizens, with the rights to participate in the political process. Many of the RTA's clauses aim at making the agreed upon liberalizations irreversible ('ratchet' or 'standstill' clauses). The investor-to-state dispute settlement (ISDS) process limit policy space, since public bodies face costly lawsuits and high claims for compensation in ad hoc arbitration courts. Raising the minimum wage has already triggered such a lawsuit by foreign investors with claims that the resulting higher wage bill will lower their profit expectations. In sum, the broad scope of the RTAs means that their impact will not be limited to the export and import businesses, but will affect workers as producers, consumers, citizens and as collective actors (Scherrer and McGuire, 2015: 5-8).

Finally, the RTAs limit the space for sustainable industrial policies which are important for economic and social upgrading. This is the main argument in the rest of the paper.

1.2 Workers' rights in trade agreements

Contrary to widespread expectations that the efficiency gains from the global division of labour will benefit all those involved, globalization also produces losers, and working conditions, wages and environmental standards have deteriorated in many emerging market economies. The international labour movement has, therefore, called for making liberalized trade conditional on the enforcement of workers' rights by including labour-related chapters in trade agreements (Scherrer and Beck, 2017). However, initiatives to bring labour standards into the WTO have so far failed. Instead, they found entry in RTAs. In mid-2019, 85 mostly North-South trade agreements contained labour provisions and covered 138 economies (ILO, 2019: 15, 17).

The enforcement of internationally recognized workers' rights by respective clauses in trade agreements is supposed to impede developing countries' economic catch up (Grossmann and Michaelis, 2007). But is this argument plausible? Institutional economics provide arguments for a positive impact of workers' rights. From the Keynesian demand-oriented perspective, a highly unequal distribution of income blocks development. This makes the emergence of a mass market for consumer durables more difficult. The concentration of national income in the hands of a few people leads to a too high savings rate, so that growth-enhancing investments are often too low. A blatantly unequal distribution of income also increases the risk of capital flight (Herr and Ruoff, 2016).

The enforcement of core workers' rights also has a positive effect on the supply of labour. Low wages prevent workers from investing in their children's education and are often insufficient for covering healthcare expenditures. Higher wages not only enable workers to maintain and improve their skills, but also increase the incentive to attend school and engage in performance-oriented behaviour. Moreover, it can be shown theoretically and empirically that the implementation of higher standards induces firms to use labour more efficiently, thereby increasing the overall labour productivity (Card and Krueger, 1995).

Econometric studies confirm the institutional claim that respect for workers' rights does not hinder economic development. However, they also reveal that in the competition for purchasing orders of transnational corporations, violations of workers' rights can provide a static competitive advantage. Therefore, the fierce competition among the catching-up countries, the South-South competition, prevents the enforcement of

core labour standards. Developing countries face the constant risk that new regions will break into the world market. For example, in the 2000s, Chinese exporters lowered the ratio of labour-intensive manufacturing to primary output in other developing countries by 7–10 per cent and the ratio of exports by 10–15 per cent (Scherrer, 2017). For these reasons, developing countries cannot raise their social standards in isolation but only in conjunction with other countries through multilateral agreement. That is why it is important to enforce fundamental labour standards in an internationally binding manner. Individual competitors would then no longer have to fear that they would be worse off by complying with the standards. In view of the significant difference in labour costs compared with the rich countries, a general decline in demand for products from developing countries is not to be feared.

Among the many workers' rights clauses, the North American Agreement on Labour Cooperation (NAALC) of 1994, the so-called NAFTA Side Agreement, has been for long one of the potentially more effective agreement. While sanctions in case of labour rights violations were available, they involved, however, cumbersome procedures. More and more cases have been declared inadmissible, withdrawn, or stalled in the review or consultations phase. The implementing authority for NAALC was not only underfunded, but also lacked the rights of inspection and subpoena (IILS, 2015: 43-57, 80). Overall, studies rated it as ineffective (Blecker et al., 2017: 98f.). Even if overall effectiveness is limited, such clauses in RTAs facilitate the cooperation among trade union federations across borders and lead to mutual support in some cases. None of them are available in IIAs.

A key issue is the implementation and enforcement. Even when workers' rights chapters foresee sanctions, they are rarely invoked as governments prefer dialogue and cooperation. The process leading up to sanctions is highly political and involves calculations beyond the trade relationship. Pre-ratification obligations seem to be more effective in bringing a country's labour law more in line with ILO conventions, but do not guarantee effective implementation (Moore, 2017).

The recent labour-related clauses in the United States-Mexico-Canada Agreement (USMCA) of 2020 address some of the shortcomings. The likely effectiveness of the USMCA's clauses related to Mexican labour law reform in line with ILO conventions is enhanced by its ex-ante conditionality, workers' direct access to a complaint procedure and a Rapid Response Labour Mechanism of on-site verification of workers' rights violations. While the monitoring and complaint procedures are 'rule-based', and, therefore, constitute a major improvement over ambiguous language about dialogue in most workers' rights clauses, they still leave room for discretion by leaving the ultimate decision in the hands of US interagency committees (Scherrer, 2020; see also chapter on Latin America in this volume).

Focusing solely on workers' rights clauses, involves risks to provide legitimacy to otherwise harmful trade agreements. The RTAs reflect a corporate agenda. Therefore, it is necessary to challenge this agenda.

1.3 Need for industrial policy

Manufacturing seems to be better suited to stimulate productivity increases rather than only the service sector for catching-up economies. The formal sector manufacturing can absorb many relatively unskilled workers (that is, those coming out of agriculture), allows for learning by doing, provides for spill-over effects into the rest of the economy, and its workers are easier to organize (Rodrik, 2013).

Industrial policy's key function is to improve the innovative power of countries and create new comparative advantages by violating the market mechanisms which push developing countries into low value-added economic activities. The belief that countries should concentrate on their comparative advantages is based on a static understanding of efficiency. Instead, dynamic efficiency is required. The development of productive and innovative powers "involves explicit public policies aimed at 'doing what rich countries are doing' in terms of production profile of the economy" (Cimoli et al., 2009: 544). It must be combined with social and ecological sustainability which includes preventing high inequality, precarious working conditions and participation of all stakeholders in industrial policy formulation including trade unions and civil society. All countries need industrial policy. For developing countries, industrial policy is a necessary ladder to overcome underdevelopment (Dünhaupt and Herr, 2020).

For industrial policy with the aim of *economic upgrading*, which is a precondition for and a result of long-term social upgrading, the following arguments are essential.

- 1 Development of technology and investment in new productions is risky and can fail, making it difficult for firms to invest. Major innovations are especially risky and depend on government support.
- 2 A new product or a new technology may need specific research, new infrastructure (from transportation to new communication technologies), specific education and skills, firms which produce complementary goods, long-term financing and so on (Rodrik, 2004).
- 3 Many technologies make sense for firms only when the production volume is high, so-called internal economies of scale. External economies of scale are based on synergies among firms. They can lead to strong economic clusters with high innovative power. In case of these economies of scale, latecomers require industrial policy to compete or even to enter markets (Krugman, 1981).

- 4 Within GVCs, lead firms occupy oligopoly positions and suppliers face hyper-competition. The FDI flowing to the South results frequently in profits flow outs at a later stage. This repatriation of profits burdens the current account and reduces the consumption and investment power in the FDI host country.

Social upgrading, including social protection, is an important element of industrial policy. Besides, the demand and supply arguments for workers' rights and standards (as mentioned earlier in section on Worker's Rights in Trade Agreements), sectoral wage bargaining can stimulate productivity as it punishes inefficient firms. Furthermore, as economic upgrading leads to structural changes in the economy, the victims of these changes deserve compensation for reasons of fairness and for political reasons as they may block social change (Chang, 1994).

1.4 Restriction for industrial policy under WTO and additional trade and investment agreements

In the following we provide an overview about regulations in trade and investment agreements and how they restrict industrial policy. Table 1 in the annex provides an overview about the different regulations. In the following sections 2. to 5., the general remarks will be exemplified for key regions in the Global South: Africa, Latin America and the Caribbean, Asia-Pacific, and Middle East Asia.

1.4.1 Trade in goods

Tariffs and trade restrictions: Each WTO member is required to specify tariff ceilings for at least part of their product lines. These maximum tariffs (bound tariffs) represent an upper limit to which applied tariffs can be raised. WTO rules prohibit quantitative trade restrictions in the form of import quota, import licensing and voluntary export restraints for goods. However, if product lines are not covered and bound tariffs are high, tariffs can be used.

Export taxes: WTO rules allow for export taxes on goods such as natural resources.

Safeguards: In case of balance of payment problems, harmful imports affecting certain industries, critical food or medical products shortages, controls of imports via quantitative trade restrictions and tariffs above the bound tariffs for a limited time period can be imposed as allowed by WTO rules. Quantitative restrictions are also permitted on national security grounds (but not President Donald Trump's tariffs on steel from friendly neighbouring countries). Countries which feel hurt by such measures can complain at the WTO Dispute Settlement Body.

Anti-dumping measures: If a country feels injured by unfair price practices, it can implement anti-dumping measures compensating completely the dumping for a maximum duration of five years, however with the possibility of prolongation.

RTAs limit or even eliminate the policy space left by these WTO rules.

1.4.2 Agreement on subsidies and countervailing measures (SCM)

WTO rules forbid subsidies which directly support exports or are made dependent on the use of domestic content, e.g., force a subsidised firm to use domestic inputs. For very poor developing countries, there are exceptions which are however actionable. Actionable means that other WTO members can respond by implementing countervailing measures. The limits on subsidies for agriculture are separately regulated and not very strict, however, they are stricter for subsidies prevalent among developing countries (Hawkes and Plahe, 2013: 25). Similarly, export credits are allowed if they follow the OECD guidelines. The guidelines fix maximum repayment terms, minimum risk premiums and interest rates. The rules favour the development banks of rich nations (Naqvi et al., 2018).

In substance, all subsidies which do not directly support exports and enforce local content are allowed. However, all subsidies are actionable if another country thinks the subsidy has trade-distorting effects. Subsidies for (a) research and development; (b) regional development assistance; and (c) environmental protection are widely accepted (UNECA 2016: 125).

RTAs tend to reduce the scope of action in the field of subsidies. However, they do not eliminate it.

1.4.3 Trade in services

The General Agreement in Trade in Services (GATS) in the WTO leaves countries with considerable freedom concerning trade in services unless they have committed themselves otherwise. Countries can decide which sector to open and which restrictions such as local equity or content requirements should still apply. If committed, then the principles of most-favoured-nation treatment and national treatment apply.

RTAs usually include more service sectors. Especially dangerous is the use of a negative list. In such a list, the sectors are mentioned which are not opened. This implies that new service areas are automatically integrated in global markets.

1.4.4

Trade related investment measures

The WTO's Agreement on Trade-Related Investment Measures (TRIMS) regulates trade-related activities of FDI firms. FDI as such is not regulated. Local content and trade balancing requirements are forbidden (i.e., limiting imports of an FDI firm to the value of its exports) and access to foreign exchange, etc. is restricted.

Allowances are granted for the following: requirements to employ local labour and to put nationals on boards of directors or in senior management; locate regional headquarters in the host country; establish research departments in the host country; force the foreign investor to use local service providers; compel the foreign investor to accept joint ventures and domestic equity participation; invest only in a certain region.

IAs usually prohibit many of the restriction allowed by TRIMS. They are enforced by Investor-State Dispute Settlement (ISDS) proceedings which allow a company in one country to sue the government of another country in a private arbitration panel. Hearings of panels are not public, and decisions are usually kept secret.

1.4.5

Intellectual property rights

The WTO agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) covers copyright and related rights, trademarks, geographical indications, patents, etc. TRIPS forces WTO members to establish national patent laws for all inventions, both for products and processes, with a coverage of at least 20 years. However, a country is free to set the standards for patents high, to establish far-reaching exceptions for research, to grant compulsory licenses, etc. (Correa, 2015). Investment agreements tend to force countries to implement stricter intellectual property rights than required by TRIMS.

1.4.6

Agreement on government procurement (GPA)

The GPA's fundamental objective is to open government procurement markets among its members. It regulates those specific activities of the government procurement including supply of goods, services and construction, which are committed under the agreement. In comparison to the above-mentioned WTO agreements, the GPA is a plurilateral agreement signed among several countries, but do not involve all WTO members. If they sign, they are still free to determine in their schedule of commitments the areas and levels (nationwide or regional) that they would like to open for offers from foreign firms.

1.4.7

Ratchet effect

WTO agreements allow for termination and renegotiations but call for compensation. If no agreement with the other WTO members can be reached, the other countries have the right to retaliate. Some RTAs and IAs forbid renegotiations of the individual stipulations of the agreements.

Africa: industrialization, trade and investment policy and workers' rights

Kwabena Nyarko Otoo and
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In the 1960s, many independent African countries adopted Import Substitution Industrialization strategies through high-level effective protection as the most preferred framework for achieving economic transformation. They were accompanied by heavy reliance on the state machinery to deliver the task of industrialization and economic transformation. Despite the establishment of several industries, countries failed to achieve any appreciable industrial capabilities to facilitate the transformation of African economies. By the beginning of the 1980s, most countries in Sub-Saharan Africa (SSA) found themselves in economic difficulties with almost collapsed economies. This unpleasant economic situation forced countries to embrace Structural Adjustment Programmes, which entailed abandoning the state-led industrialization and overall economic policies in favour of market-driven economic policies. A key element of the market reforms was the liberalization of trade and capital accounts within the context of existing intra-African regional as well as regional bilateral trade agreements.

2.1

Regional trade and investment agreements: an overview

The intra-African regional trade agreements are sub-regional in nature and are intended to promote trade within specific sub-regions. Since the creation of the South African Customs Union (SACU) in 1910 and the East African Community (EAC) in 1917, Regional Economic Communities (RECs) have proliferated in Africa. The continent currently has at least eight regional economic communities with the African Union as its key constitutive bloc¹ and at least 30 regional trade agreements (RTAs) with each African country. The RECs remain the backbones of these RTAs and are often conceived as free trade areas, with the ultimate objective of transitioning into a customs union. However, they also spun completely on non-economic objectives (UNCTAD, 2019), which incidentally have tended to override the pursuit of the economic objectives of trade and investments.

The RECs in Africa have traditionally focused on elimination of trade barriers, including tariffs and facilitation of free movement of persons. Some have also focused on liberalizing investments rules and giving investors the right of establishment in participating economies and territories. The ECOWAS Trade Liberalization Scheme (ETLS), adopted in 1979, theoretically guarantees free movement of goods and persons between member states with no quantitative restrictions and total exemptions from import duties and taxes. The SADC Protocol on Trade, first adopted in 1996, seeks to gradually reduce price (customs duties) and non-price barriers to trade among member countries. The EAC became a Custom Union (CU) in 2005, then a common market in 2010 (Melo and Tsikata, 2014).

¹ The recognized RECs: the Arab Maghreb Union (AMU), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel-Saharan States (CEN-SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).

There are also significant regional bilateral trade agreements between the regions and external partners and the now Africa Continental Free Trade Area (AfCFTA). The six major Economic Communities of Sub-Saharan Africa (SSA) or their member countries have either concluded trade agreements with the European Commission (EC) or are in the process of doing so. This is within the framework of the Economic Partnership (EPAs) and in the context of the European and Africa, Caribbean and Pacific Development Cooperation.

The EPAs were conceived to bring EU-Africa trade in line with the rules of the WTO. The Cotonou preferences offered to the African, Caribbean and Pacific (ACP) countries were declared incompatible with the most favoured nations (MFN) principle of the WTO because the preferences it offered were not based on objective criteria such as income levels, but on history (colonial ties) and geography. Other countries at the same levels of income complained about being denied similar preferences simply because they were not colonized by Europe nor located in Africa, Caribbean or Pacific. Instead of extending the same preferences to such countries, the EU chose to pursue EPAs that must comply with Article XXIV of the GATT, which allows a customs union or free-trade association under far-reaching liberalizations.

However, as currently structured, the EPAs go far beyond the obligations of the partners under Article XXIV of the GATT. The EU offers African countries 100 per cent access to the European market duty-free and quota-free. In return, participating African countries have committed to eliminate custom duties on between 70 and 80 per cent of their tariff lines over a 25-year period. This would suffice for WTO compatibility. This already entails substantial loss of government custom revenues and high possibility of European products displacing African products in the home market. But the EPAs now incorporate other trade-related protocols with significant adverse implications for the development of the African partners. These include, the so-called MFN clause, a standstill clause, the sanitary and phytosanitary measures, elimination of export taxes and national treatment on domestic taxation and regulation among others.

The SADC EPA with the EU came into force provisionally 2016. In Central Africa, Cameroon signed the EPA in 2009 and ratified it in 2014 with tariff liberalization occurring in 2016. In West Africa, Cote d'Ivoire and Ghana signed their respective EPAs in 2016, in the backdrop of EU's threat to withdraw GSP benefits. An ECOWAS global EPA has been signed by 15 member countries with Nigeria, the biggest economy in the sub-region yet to sign. In Eastern and Southern Africa, Mauritius, Seychelles, Zimbabwe and Madagascar have signed interim agreements that are provisionally applied since 2014 and to Comoros since 2019.

The non-reciprocal US preferential trade preference programme, the African Growth and Opportunities Act (AGOA), allows countries to export certain products duty-free to the US market. Essentially, AGOA is like the Generalized System of Preferences (GSP), which is available to more than 120 developing countries globally, except that AGOA covers more products than GSP and incorporates other trade and development objectives.²

The African Continental Free Trade Area (AfCFTA) responds to the aspirations of African Union Agenda 2063 to create a single African market for goods and services, facilitate free movement of persons and mobilize regional investment and ultimately to establish a Continental Custom Union.

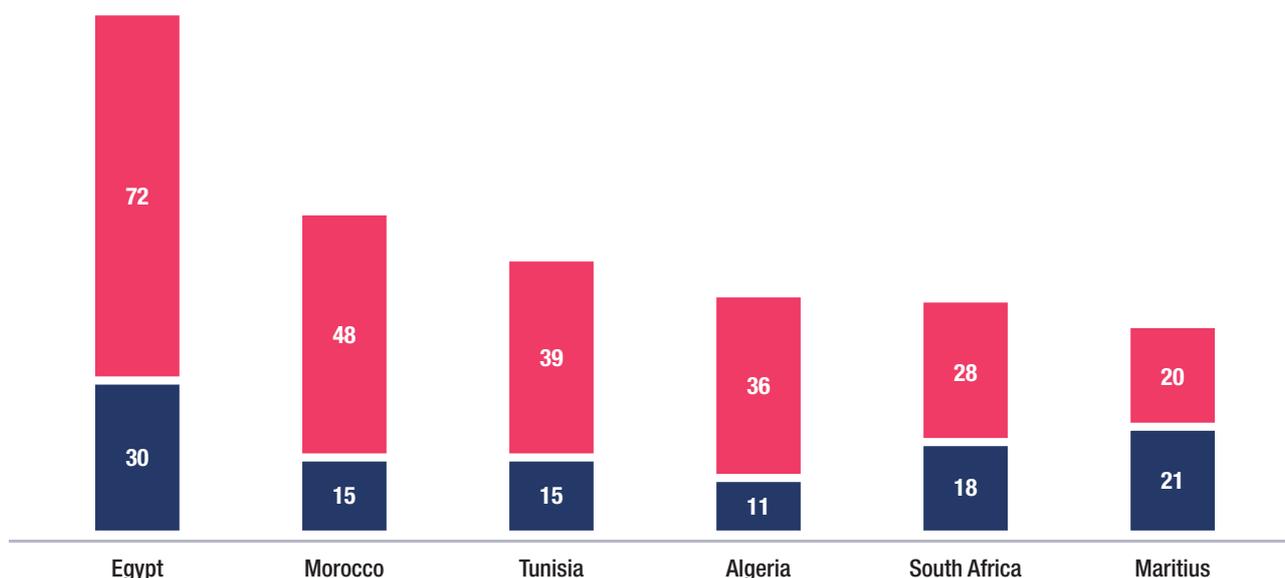
The AfCFTA negotiations have two phases: Phase I, which was launched in July 2015 and was signed in May 2018, covers trade in goods and services. For trade in goods, the main issues negotiated include tariff reductions, non-tariff barriers, rules of origin, customs cooperation, trade remedies, standards and technical barriers to trade. The second phase of the negotiations covers investment, intellectual property rights and movement of businesspersons. The outbreak of the COVID-19 pandemic forced the rescheduling of the commencement date for trading under the AfCFTA and negotiations on its key elements. Negotiations on rules of origin, sensitive sectors, trade in services and exchange of tariff concessions have had to be suspended. The start of implementation has now been shifted to January 1, 2021.

The AfCFTA is seen in some quarters as an opportunity to address the vulnerabilities of African economies. It offers an opportunity for Africa to circumvent the constraints it faces in the unbalanced rules of the WTO and the emerging Mega Regional Agreements (ECA, 2017). The United Nation Economic Commission for Africa (UNECA) estimates that the agreement has the potential to boost intra-Africa trade by 53 percent. Currently, Africa trades far less with itself than it does with the rest of the world. Others, however, regard the AfCFTA as overly ambitious in its scale, content and objectives. It does not cohere with the lessons of history, which show that all countries that have developed did so behind high tariff walls and not through free agreements (Berthelot, 2017).

The Africa is also home to several investment treaties. The continent has some 854 Bilateral Investment (BITs) and 400 Double Taxation Treaties (DTTs) Treaties. There are 157 intra-African BITs and 696 BITs with the rest of the world, with North African states having the highest numbers (Figure 2.1, and Section 5)

2 See Congressional Research Service Report, 7-5700 www.crs.gov R43173

FIGURE 2.1:
Countries with the most BITs in Africa



Source: ECA compilation from UNCTAD Investment Policy Hub online database, <http://investmentpolicyhub.unctad.org/IIA>

Most of the RTAs have investment components that guarantee free movement of capital and give right of establishment in each other's economy or territory. Examples include the Investment Agreement for the COMESA Common Investment Area and the Supplementary Act adopting Community Rules on Investment and the Modalities for their Implementation within ECOWAS. The SADC Protocol on Finance and Investment (FIP), which became operational in 2010, is a typical BIT that offers free movement of capital, MFN treatment and protections against expropriation. The EPAs contain a Rendezvous Clause, which commits countries to negotiate a range of issues including investments as part of concluding a full-fledged RTA with the EU. The US has signed Trade and Investment Framework Agreements (TIFAs) with about a dozen African countries³ and regional bodies.⁴

Despite all these agreements, the continent's performance on both trade and investment remains dismal. Africa accounted for 2.6 per cent of world trade in 2016, down from 6 per cent in the 1980s. Intra-African trade remains at 15 per cent compared to 68 per cent in Europe, 37 per cent in North America and 20 per cent in Latin America (UNCTAD, 2019).

2.2 Restrictions of industrial policy by free trade, bilateral investment agreements

While the RTAs and investment agreements contain clauses mentioning support for industrial development in Africa (ECOWAS Treaty Article 26⁵; EAC Treaty Article 79), industrial policy objectives are undermined by these and other agreements. For example, EPAs severely restrict the use of export taxes to encourage the domestic processing and value addition. EPAs permit Africa countries to protect infant industries only under very onerous requirements. Countries seeking to invoke the infant industry clause must first report to the Joint EPA Implementation Committee, which is an intergovernmental body, and offer evidence that links EU exports towards the destruction of an infant industry. Measures taken must also prioritize those that least effect the implementation of the EPA agreement. Countries cannot use quotas or a ban on imports in order to protect their industries facing import surge that threatens to suffocate them. The SACU Agreement (Article 26) is more lenient as it allows comparatively weaker economies relative to South Africa to use trade policy measures to protect infant industries (Gathii, 2009).

³ Angola, Ghana, Liberia, Mauritius, Mozambique, Nigeria, Rwanda and South Africa

⁴ COMESA, EAC, ECOWAS and WAEMU

⁵ The revised ECOWAS Treaty (Cotonou, 1993) has a section on industrial policy—Chapter 5.

Furthermore, standstill, most favoured nation and national treatment clauses constrain industrial policy tools. The 10 BITs Burundi has signed offer foreign investors both National Treatment (NT) and MFN treatment. Kenya's 19 BITs provide foreign investors basic protections in addition to NT, MFN, Fair and Equitable Treatment⁶ (FET) and Full Protection and Security Standards (FPS). It also restricts expropriation, guarantees compensation for loss and affords investors the right to freely transfer of capital and returns. Poor African countries also have enormous fiscal risks as investors can sue for claim on just about anything that disrupts their businesses. In the wake of COVID-19, there is heightened possibility for investors to sue countries under FPS rules for failing to protect their investments by not adopting containment measures quickly and early enough (CEO, 2020).

2.2.1 Investor state dispute settlement (ISDS)

Practically all BITs and to some extent RTAs in Africa have provisions for the settlement of disputes. ECOWAS features an ECOWAS Court of Justice, while SADC has the SADC Tribunal and COMESA the COMESA Court of Justice. The judicial processes allow investors to sue member states for breaches of their Treaty obligations. The ECOWAS court has power to act as Arbitration Tribunal of the Community until member countries establish such a tribunal. The scanty information on the operations of these courts suggests much higher transparency than in the typical ISDS (Happold, 2020). Many BITs in Africa make reference to ICSID for dispute settlement.⁷ Other investment treaties make reference to the United Nations Commission on International Trade Law (Poland-Egypt BIT, 1995), while others refer to the International Court of Justice in The Hague (France-Libya BIT, 1977).

Affording investors the right to sue states and to bypass domestic courts have led to proliferation of investor-state arbitrations in Africa. Between 1972 and 2014, there were a total of 111 investor-state disputes involving African countries. The investor-state dispute involving Wena Hotels and Egypt, invoked under the Egypt-UK BIT of 1975 cost the state of Egypt US\$8 million in compensation and US\$11.4 million in accrued interest charges.

In many ways BITs limit use of industrial policy tools and restrict countries from imposing performance requirements such as local content rules, joint venture requirements, R&D requirements, export requirements and rules related to employment to local people. It is important to learn from the experience of South Africa which has terminated several of its BITs after its assessments found no correlation to FDI inflow and liabilities due to ISDS arbitration proceedings.

2.2.2 Limits on public procurement for industrial policy

Since the EU faces obstacles for its demand for liberalizing government procurement within the WTO, it pursues its objectives via EPAs. In the ECOWAS-EU EPA, public procurement comes under rendezvous clause where the parties commit to negotiate later a range of trade-related issues including public procurement.

2.2.3 Public services included in binding commitments

Nearly all the existing RTAs in Africa exclude trade in services. The AGOA agreement is limited to trade in goods. Apart from the issues listed in the Rendezvous Clause, the EPAs generally exclude provisions on services. The Africa Continental Free Trade Area, however, has binding commitments on trade in services which might impact also public services.

2.2.4 Limits to rule-based trade remedies

Most of the RTAs in Africa afford countries the use of trade remedies including the anti-dumping and measures against trade distorting subsidies. Article 42 of the ECOWAS Treaty mandates member states to prohibit the practice of dumping goods within the Community. The COMESA Treaty has provisions for anti-dumping (Article 51), countervailing measures (Article 52) and a safeguard clause (Article 61).⁸ The EPAs have both multi- and bilateral safeguard measures that allow countries threatened by import surge to suspend further reduction of import duties, increase import duties or introduce tariff quotas to protect their producers. The requirements to activate these provisions, however, are onerous and frequently above the technical capacity of most African states. It is not easy to prove dumping practices or subsidies as being trade distorting.

2.2.5 Strict intellectual property rights preventing development

The TRIPS agreement requires WTO members to set minimum standards for the protection of Intellectual Property Rights (IPRs). The US and the EU demand strict and stronger protection of IPRs in their RTAs and preferential trade agreements. Protecting IPRs unlike removal or reductions of tariffs creates temporary monopolies that could distort trade.

6 The judges in the MTD v. Chile case on provisions of the BIT, defined fair and equitable treatment to encompass such fundamental notions as good faith, due process, non-discrimination and proportionality.

7 For example, the UK-Egypt BIT (1975), the UK-Lesotho BIT (1981), UK-Ghana BIT (1982), UK-Congo BIT (1989) and UK-Cameroon BIT refer to ICSID in the settlement of investor grievances.

8 Kenya in 2002 sought and was granted a sugar safeguard as the country demonstrated that its sugar sector would be unable to compete with sugar from other COMESA Member States.

In the negotiations for the EPA, the EU consistently pressured poor countries in Africa to accept the inclusion of a clause to protect the right holders of intellectual property. It managed to place it under the Rendezvous Clause as one of the issues on which treaty partners have agreed to negotiate in future. TRIPS denies African countries policy tools for innovation that were available to developed countries in their industrialization phase (Gopakumar, 2015). TRIPS disrupts technology transfer and restricts access of poor countries to life-saving medicines in the name of protecting intellectual property. The product patent protection regime makes it harder to produce generic drugs at cheaper cost.⁹ The expensive patented drugs are inaccessible to the poor. Until 2001, strict enforcement of TRIPS agreement resulted in the death of thousands across Africa because they could not afford Antiretroviral (ARV) drugs. Called for by developing country WTO Members, the Doha Declaration on the TRIPS Agreement and Public Health (Doha Declaration) in 2001 led to the production of generic versions of critical drugs including ARV making them reasonably accessible to the poor.

2.2.6 Limits on policy space to pursue national development objective

RTAs are most deleterious for policy space compared to multilateral agreements. In RTAs, such as the EPAs for example, African countries have agreed to open negotiations with the EU on trade-related issues such as competition, investments, and intellectual property rights, public procurement, current payment and capital movements, among others. The standstill clause freezes tariffs at their current levels and forecloses introduction of new tariffs. Given that poor countries are characterized by high levels of both economic and social instability such encroachment on policy space can be most detrimental to national development. For example, in 2003 the Parliament of Ghana approved a 100 percent increase in tariffs on poultry products as part of measures recommended by a government study aimed at saving the domestic poultry industry. WTO rules allowed Ghana to implement such tariff increase. However, under the terms of Ghana-EU EPA, Ghana would not have been able to propose a tariff increase unless it invokes the onerous safeguard measures. Across board African parties to the EPA cannot introduce new taxes or tariffs even if their development trajectory requires of them to do so. But in the poultry case, it was not the EPA, but the IMF who prevented the tariff increase because it violated the terms of the country programme with Ghana.

2.3 Democratic processes in trade agreements and enforceable labour rights

Trade negotiations are often characterized by power plays. Undemocratic tendencies in trade negotiations are most pronounced in bilateral trade agreements where powerful regional bodies such as the EU negotiate with groupings of poor countries such as ECOWAS or EAC. Africa's position is further weakened by the fact that the European Commission finances the processes associated with the negotiations including the payment of allowances to negotiators of its partner countries and regions. These countries are also recipients of large amounts of aid from the EU. Above all, the European Commission has much higher technical capacity in matters that are the subject of negotiations.

This has afforded the EU to secure agreement on issues for which its bilateral negotiating partners in Africa have joined forces with others to reject in the WTO. In 2007, as the ACP regions were balking at the EPA negotiations, the EU abandoned the sub-regional negotiating structures and proceeded to secure interim agreements with separate member countries under threat of imposing crippling tariffs and ending European Development Assistance. Ghana and Cote d'Ivoire parted ways with the official position of ECOWAS and signed separate Interim Economic Partnership Agreements (IEPA) with the European Union. Nigeria asked for GSP+.

Few of the existing trade agreements in Africa refer to labour standards. SADC has a protocol on employment and labour that outline commitment of member countries in several areas including Freedom of Association, Social Protection and Health and Safety among others. The ECOWAS Treaty urges harmonization of labour and social security laws as well cooperation on training and employment. The SADC EPA with the EU, mentions the importance of the parties working together on environmental and labour policies, commit to exchanging information and experience, and cooperate trade aspects of labour or environmental policies in international fora, such as the ILO Decent Work Agenda. These are best endeavour clauses that are not amenable to any strict enforcement. All the other EPAs and RTAs in Africa are silent on labour standards.

Under the tenets of AGOA,¹⁰ country eligibility is contingent on progress towards protection of worker rights among others and is at the discretion of the US President. For instance, Swaziland (Eswatini) lost its eligibility in 2015 due to labour rights abuses. In 2017, it was restored by President Trump against the recommendation of the AFL-CIO.¹¹

9 Countries will have to invoke compulsory licensing rules or declare such production as being for government use.

10 See Section 104 of AGOA (19 USC. 3703).

11 See <https://agoa.info> and <https://afcio.org/sites/default/files/2019-10/FINAL%202019%20AFL-CIO%20Swaziland%20AGO.pdf>

2.4

Trade union's action and recommendation in the field of trade and industrial policy

Across the board, African trade unions have consistently opposed policies of free trade. For example, COSATU insisted on the right of South Africa to “maintain external tariff, quotas and other trade instruments” that are necessary for jobs, industrial development and diversification. The Secretary General of Central Organization of Trade Union (COTU), Kenya, labelled the EPAs as an extension of the colonial past and urged all progressive governments to reject them. In 2014, the Trades Union Congress (TUC)-Ghana described the EPAs as inimical to national development and urged ECOWAS to pursue trade policy that encourages domestic industry.

The unions have urged their government to adopt policies that industrialize the continent as a priority. They argue that countries entering RTAs must have something to trade. As exporters of primary commodities, countries do not need RTAs for selling their commodities. For trade to be beneficial, countries must develop manufacturing and move up the value chain. Premature opening of economies to trade devastate employment and livelihoods.

Most of the unions, however, support regional trade arrangements among countries of a similar level of development.¹² African unions are also supportive of industrial policies. They put industrial development ahead of trade policy. In addition, to pursuing investments in education and healthcare for skills and productivity growth, countries must be afforded the full range of policies including trade policies that have served the industrial ambitions of industrialized countries.

Generally, unions are not opposed to having labour standards clauses in trade agreements but have two concerns in terms of labour standards and trade. First, it is often made to seem that insertions of labour clauses are not enough to address the fundamental flaws that have become the hallmark of trade agreements. Second, given the existing low capacity to implement labour standards, the unions are concerned about the fact that in trade agreements, labour standards could become another protectionist instrument for developed partner countries to deny Africa market access. The unions, therefore, recommend that labour standards in trade agreements ought to be done without sanctions that accompany violations. Instead, there ought to be mechanisms in the agreement to upgrade capacity and assist poor countries to enforce labour standards.

¹² The only exception being Nigeria Labour Congress, which now opposes even the ACFTA. The NLC backed the government's hesitancy in signing the ACFTA agreement.

Latin America and the Caribbean: industrialization, trade and investment policy and workers' rights

Bruno De Conti and Arthur Welle

Since the 1990s, many countries in Latin America and the Caribbean initiated a series of reforms aiming at opening their economies. Despite this general trend, there were obviously differences in the national strategies. While a group of countries (e.g., Chile, Mexico and Colombia) signed regional trade agreements (RTAs) with developed countries, Brazil, Argentina and the smaller countries in South America avoided it.

In 1991, Brazil, Argentina, Paraguay and Uruguay formed the Southern Common Market (MERCOSUR). In 1994, an RTA was concluded between Mexico, USA and Canada, the North American Free Trade Agreement (NAFTA). In 1996, Colombia, Peru, Ecuador, Venezuela and Bolivia created the Andean Community of Nations. Simultaneously, 211 international investment agreements (IIAs) were signed in Latin America (LA) during the 1990s (Table 3.1).

TABLE 3.1:
RTAs and IIAs enter into force in the world and in LA

| Decade | FTA | | IIA | |
|--------|-------|----|-------|-----|
| | Total | LA | Total | LA |
| 1980 | 18 | 9 | 124 | 16 |
| 1990 | 147 | 7 | 926 | 211 |
| 2000 | 174 | 40 | 853 | 162 |
| 2010 | 110 | 40 | 220 | 32 |
| 2020 | 4 | 1 | - | - |

The table lists only treaties still in force, by date of entry into force

Source: WTO Regional Trade Database; UNCTAD International Investment Agreements Navigator

At the turn of the century, the USA proposed a Free Trade Area of the Americas (FTAA) encompassing all the Americas (except Cuba). However, worried about the likely impact on national sovereignty, this proposal was rejected by the progressive governments, a mobilized population and cross-border unity in the early 2000.

The USA responded to the rejection of the FTAA proposal with bilateral RTAs and IIAs (Table 3.1). The USA secured RTAs with Chile, Colombia, Peru, Panama and the Caribbean countries, and recently ratified a new version of NAFTA (USMCA). The EU has trade agreements with Mexico and Chile and has concluded (but not ratified) an agreement with MERCOSUR. The Trans-Pacific Partnership (TPP) was signed in 2016,¹³ though with the withdrawal of USA by President Trump, it was not brought into force, thus leading to the creation of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) with the other members of TPP.

In general terms, the RTAs with developed countries transformed the industrial sectors of LA countries, bringing the following changes in working conditions: a decline of the share of workers in the industrial sector (e.g., in Chile), a substantial increase in the share of informal workers (e.g., in Colombia), and/or the maintenance of average real wages at low levels for decades, despite increasing productivity (e.g., in Mexico).

¹³ By Chile, Peru, Mexico, USA, Canada, New Zealand, Australia, Singapore, Malaysia, Brunei, Vietnam and Japan.

3.1 Restrictions on industrial policy Created by free trade, bilateral and investment agreements

The RTAs and IIAs generally generate several restrictions on industrial policy (Rodrik, 2004), and it is especially evident in LA and the Caribbean. Nevertheless, following the recommendation by Alshareef (2017), the North–South and South–South agreements need to be distinguished, since the first category is generally more binding than the second one.

NAFTA set the precedence. Being the first RTA between a LA country and developed nations, consisting of an investment chapter and coming in the wake of the WTO Uruguay Round discussions that led to the promulgation of the TRIMs and the TRIPs, this agreement has imposed serious bindings on national policies, much more than those implemented by WTO. Its content was replicated in other US RTA agreements signed with Colombia, Peru, Chile and some Central American countries. Moreover, it established a threshold from which new agreements tended to increase obstacles for industrial policies, notably regarding investment and intellectual property.

US RTAs investment chapters generally limit the promotion of domestic investments (e.g., there are no restrictions on FDIs or to the number of foreign firms in some sectors), enhancement of linkages and spillover effects of foreign investments (e.g., equity, performance, reinvestment or value added related requirements) and quotas for local workforce and managers. The EU RTAs ratified before 2015 did not contain investment chapters because the European Commission, until then, lacked such a mandate. Nevertheless, many LA countries have IIAs with EU member countries with many of the above-mentioned restrictions.

A major limitation for industrial policy comes from the investor–state dispute settlement (ISDS) mechanisms, which are currently present in 99 per cent of the region’s IIAs and in investment chapters of RTAs. They prescribe the World Bank International Centre for Settlement of Investment Disputes (ICSID) as the forum for disputes in 89.7 per cent of the cases. By 2019, LA countries had received 27.5 per cent of all world claims, resulting in the payment of US\$ 29 billion for investors (29 per cent of the world total) (Table 3.2). In fact, 22 countries in the region have already received claims, including the first, third and sixth in world ranking in terms of cases (respectively, Argentina, Venezuela and Mexico). The claims are not limited to industrial policy only (e.g., claims filed by Cargill against the Mexican state due to the imposition of a tax over soft drinks with sweeteners to protect the national sugar cane industry).¹⁴

As for the intellectual property, agreements with the USA are particularly binding. Instead of engaging in any kind of technology transfer, they contain chapters

prohibiting the emulation of technologies, sanctioning violations of “industrial secrets”, and establishing long periods for patents (e.g., over 20 years). They foresee harsh penalties for contraventions. Agreements with EU are also obligatory, but normally they do not go beyond the restrictions that are already imposed by the TRIPs.

TABLE 3.2:
Investor–state dispute settlements—cases and amounts in each decade (world & Latin America)

| Decade | Cases | | | Amount awarded or settled (US\$ bi, nominal) | | |
|--------|-------|-----|------|--|------|-------|
| | World | LA | % LA | World | LA | % LA |
| 1980 | 1 | 0 | 0 % | 0 | 0 | - |
| 1990 | 43 | 14 | 32.6 | 1 | 0.1 | 10.0% |
| 2000 | 326 | 116 | 35.6 | 78 | 19.7 | 25.3% |
| 2010 | 653 | 151 | 23.1 | 20.7 | 9.2 | 44.4% |

Source: UNCTAD—Investment Dispute Settlement Navigator

For an assessment of future RTAs with the Global North, the recently ratified USMCA is of special interest. The investment chapter differs from NAFTA’s analogous chapter mainly in two aspects: (1) Canada is no longer party of the ISDS and (2) the scope of the ISDS is reduced to direct expropriations and to “covered government contracts” in a few sectors (e.g., oil). In other sectors, investors must first defend their claims in local courts. However, the USMCA has some additional bindings that are worth mentioning: more restrictions are related to intellectual property (e.g., for the digital economy); a clause against currency manipulation; a principle prohibiting restrictions for cross-border transmission of information related to the digital commerce; and an unprecedented clause requiring any member country to consult another while negotiating bilateral agreements with countries considered as a non-market economy by another member (leaving the possibility for the USA to interfere in eventual negotiations between Mexico and China).

The South–South agreements are in general less binding, with soft (or even inexistent) clauses for intellectual property and investment protection. MERCOSUR, for instance, has no important restrictions for industrial policy, keeping safeguards for national policies. The Pacific Alliance (Mexico, Colombia, Peru, Chile and Costa Rica), however, contains investment clauses similar to US agreements (maybe for the sake of harmonizing the investment rules, since the five countries have treaties with the USA).

Summing up, LA countries which have signed RTAs and/or IIAs with countries from the Global North have serious restrictions in designing industrial policies and, therefore, to pursue national development objectives.

¹⁴ <https://isds-americalatina.org/casos/cargill-v-mexico/>

3.2 Industrial policies followed in Latin America

During the so-called ‘developmentalist period’, many LA countries implemented effective industrial policies. Nevertheless, after the ‘External Debt Crises’ of the 1980s and the adoption of neoliberal precepts, most governments in the region followed the principle that ‘classical’ industrial policies distort the optimal allocation of resources.

Accordingly, industrial policies in LA changed radically in their scope and design. Instead of selection of strategic subsectors, horizontal policies prevailed supporting businesses in general, Small and Medium Enterprises (SMEs), intending to ‘correct market flaws’ (e.g., through credit).

After the turn of the century, some countries (e.g., Bolivia and Chile) designed policies based on their comparative advantages, i.e., natural resources (Perez, 2015). The main idea, therefore, was to internalize further stages of the productive chain related to the goods exported by these countries (namely, mineral and agricultural goods).

A general problem in the region has been the lack of institutions which can maintain industrial policies as strategic state policies instead of government policies. In fact, a change in government could easily have led to new industrial policies or to their abandonment (e.g. Argentina). Unlike Asia, in most LA countries, the industrial policies were not consistently carried out.

Another obstacle for industrial development has been the macroeconomic regime in many LA countries in the last decades. The devotion to low inflation rates undercut industrial policies efforts by leading to overvalued currencies, high interest rates and austerity policies (for instance, in Brazil).

This lack of effective industrial policies, allied to the process of opening up the economy and the reconfiguration of the world industry resulted in: i) fragilization of the industrial sector in many LA countries (e.g. Brazil and Colombia) and ii) redesign of the industrial sector through integration into Global Value Chains (GVCs) in other countries (e.g., Mexico), meaning specialization in low value-added tasks.

3.3 Democratic processes in trade agreements and enforceable labour rights

3.3.1 Democratic process in trade negotiations

An effective involvement of the unions in discussions that precede RTA negotiations depends mainly on the willingness of the government(s) (the LA country/ countries) to engage in social dialogues.

In Colombia, the unions are never invited to take part in these discussions. Where unions and unions leaders are persecuted, treaties are negotiated and implemented in a very non-democratic manner.

In Mexico, the participation of workers in trade negotiations is limited to trade unions connected with the government. Hence, ‘independent’ unions have historically not taken part in the trade negotiations. In the recent case of the USMCA, however, the involvement of the US and Canadian unions yielded potential (although very modest) benefits for the Mexican working class. Owing to these unions’ pressure, the new agreement imposed in Mexico a labour reform in 2019 with the potential of empowering ‘independent unions’.

As for the MERCOSUR, the participation of unions in the negotiations was subject to the (sometimes radical) swings in the openness of the governments for social dialogue. In 1994, the bloc created the ‘Economic and Social Consultative Forum’ (ESCF) with representatives of the member countries’ employers and workers. Beyond the limits of being only a consultative body, with the main task of providing recommendations, its operation has been somehow intermittent over the years. However, the creation of the common market reinforced the importance and the actions of the ‘Coordination of the Southern Cone Union Centrals’. After a long period of dialogues and pressure from this Coordination and owing to the convergence of progressist governments in the four countries,¹⁵ in 2015, labour clauses in the legislation related to MERCOSUR (see details below) were finally established. The recent extreme rightward drift in these countries terminated the dialogues with the workers’ representatives. The trade unions in the MERCOSUR were excluded from the MERCOSUR–EU negotiations in their home countries. They were only able to participate indirectly through a constant dialogue with unions in the EU, which, in principle, have more interlocution with their respective governments and/or with Brussels.

15 Before the coup d’état against Fernando Lugo, in Paraguay, in 2012.

3.3.2 Effectiveness of provisions of labour standards in the existing RTAs

Most of the RTAs signed by LA countries in the twentieth century have no provisions for labour standards. Following a world trend (Harrison, 2019), however, the share of agreements with labour provisions is increasing in the recent period.

The MERCOSUR agreement was signed with no labour clauses, but an amendment was recently promulgated through the above-mentioned 2015 MERCOSUR Socio-Labour Declaration. This document declares the accord of the group with the principles of the ILO and several other international declarations. It is a very comprehensive text, dividing the workers' rights into 'individual', 'collective' and 'other' rights. The Declaration also creates the MERCOSUR Socio-labour Commission, a tripartite group with governments, unions and employers' representatives of all countries, tasked with monitoring the application of the declaration. It is supposed to meet twice a year, write reports and recommendations to the higher instances of the bloc.

The enforcement of this progressive declaration suffers from vague contractual language and its unusability for "commercial, economic and financial issues", thereby reducing the possibility of sanctions immensely.

The serious violations to labour rights and the freedom of association in Colombia (resulting in its inclusion in the ILO blacklist for two decades), along with the frequent murders of trade unionists (ITUC, 2020) made the US Congress reject the US-Colombia Trade Promotion Agreement (CPTA) in 2008. The Labour Action Plan of this agreement required Colombia to increase labour protections and to strengthen the procedures for investigating labour issues (Neusner, 2019). Colombia did take steps to comply with the agreement (e.g., criminalizing a variety of actions restricting labour rights and hiring more inspectors), but far behind the action plan. With insufficient enforcement mechanisms, unions argue that the laws are only adornments with no *de facto* consequences for labour rights.

In North America, many observers highlight the terrible consequences for Mexico in the last 25 years under NAFTA; there has been loss of formal jobs, increase on precarious positions and the stagnation of the average real wage for low-skill tasks. In July 2020, this agreement was superseded by USMCA, but these economic consequences are not expected to change. Nevertheless, it has incorporated the most comprehensive labour chapter in the US treaties to date.

In fact, Mexican workers have serious barriers in their rights of freedom for association and collective bargaining, due to the employers' widespread use of "protection contracts", signed with an employer-dominated union (a "phantom union").¹⁶ Trying to cope with this problem, the USMCA requires Mexico to adopt laws recognizing and protecting worker's collective bargaining rights, and allowing workers "to organize, form, or join the union of their choice". Mexico was forced to make a Labour Reform in 2019 for the agreement to enter into force. The provisions specify that the new legislation must prohibit interference by employers in union affairs, allow free and secret union elections, and ensure that collective agreements are approved by a majority of covered workers.

In the chapters which contain the provisions that regulate the rules of origin to all goods exported within North America, an entirely new form of rule was created: a certain percentage of a car traded under USMCA were to be produced in factories with average wages equal to or higher than US\$16 per hour. Though one could expect that it would elevate wages in Mexico, these rules have been protective of the production that had already been made in areas with higher wages, i.e., USA and Canada (Scherrer, 2020, 301).

The inclusion of enforceable labour provisions in the USMCA is regarded as a major difference that could lead to the improvement of labour rights in Mexico. Formally, the non-compliance of the labour provisions is at the same level of importance as any other trade-related one. More than that there is a fast-track procedure exclusively for the labour chapter, the Rapid Response Mechanism (RRM), which entails the possibility of direct economic sanctions on the enterprises that do not respect the principles of union freedom and collective bargain. Any person could file a petition claiming the denial of rights at a covered workplace. A committee has the authority to access and inspect the location and sanctions could be executed by the national governments (suspension of imports while the investigation is ongoing and, when it is concluded, the suspension or denial of the preferential treatment of goods manufactured at the covered facility). Despite all that the real impact of the agreement is still uncertain.

Summing up, RTAs increasingly include labour clauses, but their effectiveness is still very low.

¹⁶ According to the Fair Labour Association (Protection Contracts in Mexico, March 2015), up to 90 per cent collective bargaining agreements in Mexico have this problem.

3.4

Trade union action and recommendations in the field of trade and industrial policy

Trade unions in LA consider RTAs and IIAs harmful for the work and living conditions of the population. Besides the erosion of labour market protection, these agreements tend to intensify the exploitation of the natural resources, with heavy ecological impacts. Furthermore, they limit public policies, resulting in the fragilization of the welfare policies, with particular impacts on women workers.

Facing these challenges, the most important and effective action of the unions should be social dialogue as it is assumed to be the best way for unions to be aware of the discussions made at the governmental level and intervene in the decisions. When authoritarian governments are in office and the social dialogue is not promoted, the unions need to deepen the effort to engage allies in the discussions and struggles. Some concrete examples and recommendations are provided below.

The supranational platform “LA better without FTAs”,¹⁷ formed by regional and national unions and social organizations, tries to demonstrate that the RTAs have been historically detrimental to regional economies. The unions in Colombia pressurized the National Congress which resulted in the promulgation of a law obligating the government to publish an annual assessment of the RTAs and presenting it for discussions at the Congress. Some unions in LA join forces with the federations of the partner countries to make use of a “boomerang effect”¹⁸ instead of pressurizing governments that are completely averse to social dialogue. Last, but not the least, the main recommendation of the unions when it comes for the treaties is to create mechanisms for the enforcement of labour clauses, avoiding them to become mere ‘ornaments’.

As for industrial policies, many unions in the region actively take part in the design of policies to defend or strengthen the national industry. These proposals are normally restrained to a specific sector, but some of them are broader. For the second category, the biggest union central in Brazil (CUT) created the Institute for Labour, Industry and Development (TID), and aimed at gathering workers and analysts from different industrial subsectors to propose industrial policies (with a focus on technology and innovation). Very interestingly, IndustriALL Global Union office for Latin America region organizes forums with four industrial ‘macro-sectors’ (soft-ware industry; mobility; energy and mining; and manufacture), allowing the discussions and proposals to be integrated (and not only for one sector) and regionalized (and not only for one country). The perception is that the industrial policies must be developed for the whole subcontinent, which makes it more difficult to be implemented, though has the potential of being more effective.

¹⁷ <https://americalatinasintlc.org>

¹⁸ This is named by Keck and Sikkink (1998) as the “boomerang effect”, when local actors try to achieve their objectives through the connection with external actors, eventually rebounding in the national context.

4

Asia – Pacific: industrialization, trade and investment policy and workers’ rights

Praveen Jha and Meghna Goyal

As of November 2019, there have been 262 agreements on trade in goods or services (also incorporating other provisions) either in force, signed or under negotiation, involving at least one country in the Asia-Pacific region (Figure 4.1);¹⁹ 786 investment agreements²⁰ have been in force to which South, South-east and East Asian countries in the region are party;²¹ 132 of these are intra-region treaties, another 284 are with European countries or the US.

This trading framework has improved prospects for some sectors in economies such as Japan, Korea and China. They were able to use domestic industrial policy tools such as foreign capital controls, government regulations and public procurement and investment. This fuelled employment. Historically, East and South-east Asian countries like Korea, Taiwan, Thailand, Indonesia and China have used industrial policy to great effect, discussing which is outside of our scope here.

Others in the region including all South Asian countries as well as Southeast Asian countries have been unable to, or prevented from using similar policy tools, to the detriment of the working class. Unemployment remains high and wages do not match productivity growth despite rising capital shares. Informality and precarity are now common features of the world of work in the Asia-Pacific.

Figure 4.1 highlights the steep rise of expansive agreements including investment chapters and IPRs since the early 1990s. These have increasingly come to include provisions that go far beyond WTO rules on trade in goods and services.

Several important plurilateral agreements have been negotiated in the region. The Association of Southeast Asian Nations (ASEAN) concluded an RTA among its 10 member countries. ASEAN also has bilateral agreements with several other countries. In November 2020, five of ASEAN FTA partners including Australia, China, Japan, New Zealand and South Korea have recently signed the Regional Comprehensive Economic Partnership (RCEP), a ‘mega’ RTA consisting of 15 countries covering one third of world population.

Some ASEAN member countries (Malaysia, Singapore, Vietnam and Brunei) along with Australia, New Zealand and Japan in the region have signed another mega-RTA—the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

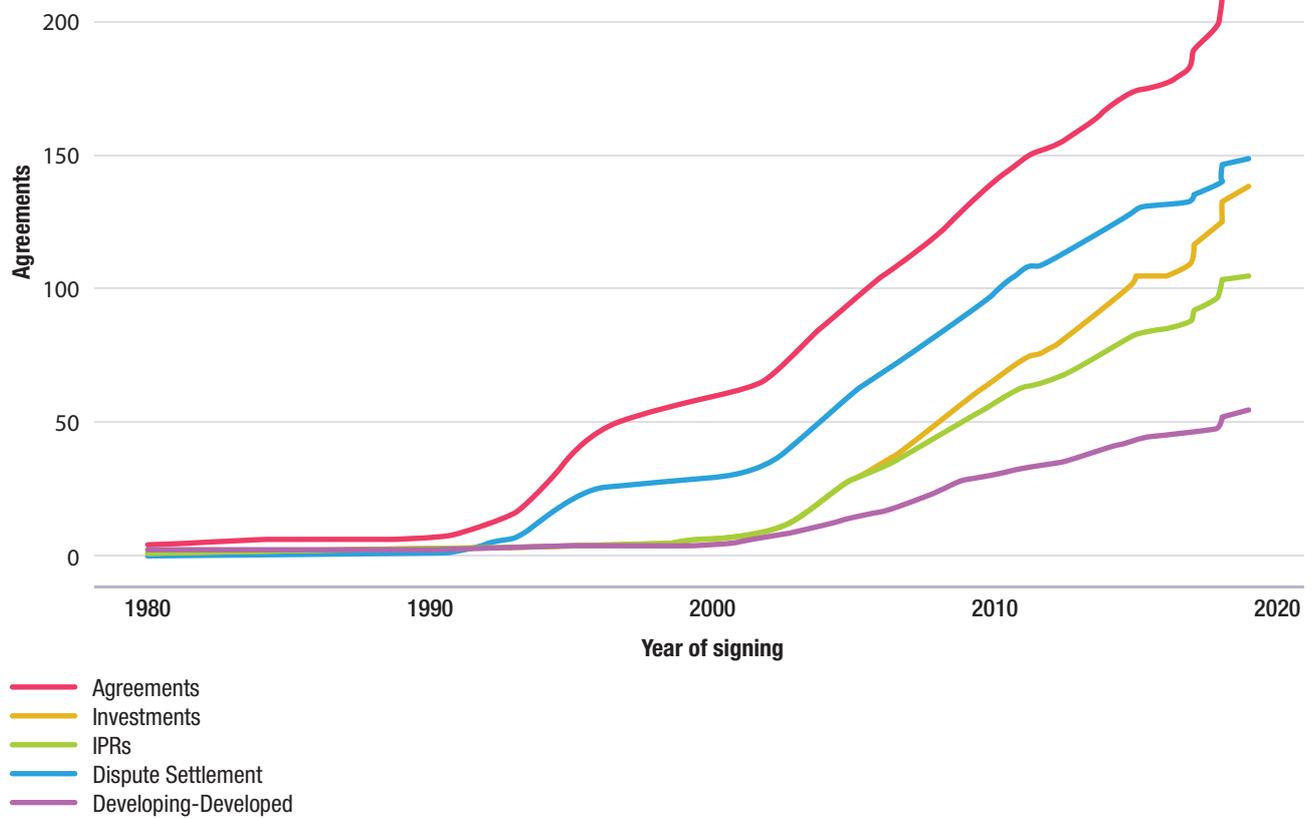
The US and EU also have particularly extensive bilateral agreements with several countries in the region. A salient agreement in this regard is the recently concluded EU-Vietnam RTA. This is the EU’s most comprehensive agreement with a developing country. Its provisions may be incorporated in EU’s agreements with other developing nations in the region like India and Indonesia. Table 4.1 gives an overview about agreements in selected countries.

¹⁹ [AFTIAD database](#) maintained by the UN ESCAP. These include RTAs and economic integration agreements, but not investment agreements.

²⁰ Either through (BITs) or treaties with investment provisions.

²¹ [UNCTAD Data](#); of 786, UNCTAD maps in detail the content of 559 agreements, used in later sections.

FIGURE 4.1:
Growth in RTAs and IIAs in the Asia Pacific



Source: UNESCAP-APTIAD Database

Note - within agreements portrayed by the red line, the dispute settlement (blue) line represents those with a dispute settlement mechanism, the investments (olive green) line represents those with investment provisions or BITs, IPRs (Treatise with Intellectual Property Rights provisions) line (green) shows those that include IPRs, and the pink line are those between a developing and developed country

TABLE 4.1:
Agreements and provisions for select countries in the region

| Country | Trade Agreements | Inclusion of a developed country | GP | IPRs | BITs | TIPs | Total Investment Agreements |
|-------------------|------------------|----------------------------------|----|------|------|------|-----------------------------|
| Australia | 22 | 22 | 12 | 12 | 16 | 22 | 38 |
| Bangladesh | 7 | - | 7 | 6 | 29 | 4 | 33 |
| Bhutan | 3 | - | 3 | 3 | 0 | 2 | 2 |
| Brunei Darussalam | 12 | 7 | 8 | 4 | 8 | 20 | 28 |
| Cambodia | 10 | 4 | 9 | 5 | 26 | 15 | 41 |
| China | 31 | 10 | 26 | 19 | 125 | 23 | 148 |
| India | 29 | 7 | 25 | 24 | 19 | 13 | 32 |
| Indonesia | 23 | 8 | 20 | 15 | 42 | 19 | 61 |
| Japan | 24 | 24 | 7 | 7 | 33 | 20 | 53 |
| Laos | 11 | 4 | 10 | 5 | 23 | 16 | 39 |
| Malaysia | 23 | 10 | 18 | 13 | 66 | 25 | 91 |
| Myanmar | 10 | 4 | 9 | 5 | 10 | 15 | 25 |
| New Zealand | 20 | 20 | 10 | 11 | 4 | 16 | 20 |
| Pakistan | 19 | | 19 | 17 | 46 | 7 | 53 |
| Philippines | 14 | 7 | 11 | 6 | 37 | 16 | 53 |
| Republic of Korea | 30 | 9 | 17 | 14 | 94 | 20 | 114 |
| Singapore | 35 | 14 | 17 | 16 | 37 | 35 | 72 |
| Sri Lanka | 9 | - | 9 | 8 | 26 | 6 | 32 |
| Thailand | 23 | 10 | 18 | 14 | 39 | 23 | 62 |
| Turkey | 42 | 3 | 26 | 25 | 109 | 20 | 129 |
| Viet Nam | 17 | 9 | 11 | 5 | 41 | 24 | 65 |

GP: public procurement, IPRs: Treatise with Intellectual Property Rights provisions, BITs: bilateral investment agreements, TIPs: treaties with investment provisions
Source: Trade agreements from UNESCAP database as of November 2019, BITs and TIPs from Investment Policy Hub, UNCTAD accessed September, 2020

4.1 Restrictions on industrial policy

4.1.1 Investment chapters, treaties and investor-state dispute settlement

Investment agreements of various kinds enhance the rights of and protections to foreign investors. Conventionally, agreements define investments broadly such that, *inter alia*, even ‘claims to money’, goodwill and intellectual property rights come within their ambit. Of the 559 investment agreements in force involving south, east and southeast Asian economies, only 11 agreements specify a closed list of covered assets as investments.²²

They are considered to incentivize foreign direct investments (FDIs) into the country, boosting production and employment in host countries. But their role in attracting FDI has been found contentious over the years (UNCTAD 2014). Crucially, significant portions of what is classified as FDI are not fresh flows (Akyuz, 2015) large parts are also directed toward mergers and acquisitions (M&As). But the restrictions they impose on the national policy space are inescapable.

50 agreements explicitly prohibit the imposition of performance requirements on foreign investments. These are disciplining measures that can aid in developing domestic industrial capacities, perform higher value-added activities, and building links between foreign and local enterprises. Most performance requirements have centred around job creation and technology and skill transfer.

CPTPP prohibits the use of performance requirements including transfers of technology, export requirements and even the use of domestic technology. This has especially serious implications for Malaysia, Brunei Darussalam and Vietnam’s ability to use foreign flows to profit from externalities, undertake upgradation and improve outcomes for labour. A leaked chapter of the RCEP prohibits even requirements to hire local workers. This prevents directing FDI in favour of local employment.

The ISDS mechanism, built into 536 investment agreements in the region, gives investors the right to bring litigation against states if an action or non-action on the part of the states can be interpreted to be a violation of the agreement. An example of how the ISDS restricts national policy space is the litigation brought against India, by White Industries Ltd. (WIL) under the Australia-India BIT. WIL used the most-favoured-nation principle, to extend India–Kuwait’s BIT provision to itself, and won the case, having claimed 10 million Australian dollars for losses. The provisions

of the investment treaty gave sweeping rights to foreign entities carrying out any economic activity or having even small stakes in production in or for Indian enterprises (Dhar 2015).

Given that only 12 countries under discussion explicitly exclude policy measures such as taxation from ISDS provisions, the cases brought against capital gains taxation on large acquisitions reflect further the inability of governments to control foreign acquisitions of domestic firms, or even to earn tax revenue from them. Unrestrained acquisitions do not create new productive capacities; and, therefore, no new employment.

Indonesia, the worst affected of the ASEAN countries by the ISDS, and India have notably already withdrawn from several BITs, and developed model BITs in order to correct for particularly egregious measures (Cornford, 2015). Indonesia’s withdrawal did not diminish FDI flows to Indonesia (Jailani, 2015). However, survival clauses extend the provisions of treaties for a decade or more after its termination, making termination a lengthy and fraught process.

4.1.2 Government procurement

Government procurement can create employment in productive sectors. This is especially significant because of jobless growth as witnessed in many countries such as India. Government procurement can increase demand for domestic players and SMEs having a larger impact on employment and wage growth. Varied and diverse conditions on government procurement can be used to benefit specific sectors, improve wages or other specific objectives. For instance, Vietnam has used restrictions on bidding on tenders by foreign firms; however, exceptions are made in cases when local bidders are unable to provide the services or goods necessary. China’s industrialization process has also depended on procurement to support private local industry.

Agreements increasingly incorporate restrictions on government procurement policies. Of the 58 RTAs signed in this region in the decade between 2009 and 2019, 23 have a chapter on government procurement; 18 of these commit to national treatment of foreign entities in this regard, making it difficult to use procurement to support domestic industries relative to large foreign capital; and 15 agreements explicitly lay down that terms including national treatment extend to all levels of the government—central, regional and local (Trivedi et al., 2019). Market access and impartiality principles in government procurement remove its potential development objectives.

22 Only one agreement explicitly lists an enterprise-based definition of investment; only two exclude portfolio investment from the scope of rights awarded by such agreements (UNCTAD website).

The recently concluded EU–Vietnam RTA commits both parties to national treatment, non-discrimination and transparency in procurement. Vietnam opens its procurement from bids by all EU member countries for key sectors. Although Vietnam can promote SMEs in procurement, its extent has been limited to a specified total sum and to a firm size. The CPTPP similarly commits Malaysia, Brunei and Vietnam to liberalize their procurement to entities from industrialized countries in the agreement.

4.1.3 Digital industrialization

Digitalization alters the length of value chains and distribution of incomes within these. Network effects, control over the data generated by digital platforms; IPRs and liberalization in digital transactions have been used to concentrate value in pre and postproduction processes and in a few large digital multinationals. Countries that fail to undertake digital industrialization themselves could be locked into lower value-added activities. Both unemployment and underemployment crises in these countries may persist as a result.

Policy space is also essential for regulating tech multinationals' activities in the national economy to ensure technology transfer (through sharing of source codes, for example) and protection of labour rights and to undertake anti-trust regulation.

Rules in the three domains of data localization, cross-border flows of data and sharing of source code are increasingly prohibited by IPRs. The CPTPP prevents requirements of sharing of source codes, localization of computing facilities and allows free cross-border flows among parties; the RCEP prohibits data localization rules.

The inability to impose transfers of technology on technology giants is a barrier to domestic industrialization. Data localization and access to source codes are important, among other aspects, to monitor anti-competitive practices that actively prevent domestic digital capacities. This is especially concerning digital platforms like Google that have been found to promote their own product or advertise against other products on their platforms. Combined with commissions charged by app developers on each paid download, this prevents innovation and competition among domestic small players. The development of local platforms may not be enough to prevent an undue disadvantage to local app developers; regulation of dominant players, with transformative national policies, while creating space for innovation is key in this regard.

Related to increasing consolidation in the market is the nature of foreign inflows into the sector. Despite Thailand's attempt at providing incentives for productive investments in the digital industrial sector through the Eastern Economic Corridor (EEC), the increase in FDIs is owed mostly to mergers and acquisitions (M&As) rather than greenfield investments (Jongwanich et al., 2020). For the ASEAN region, cross-border M&As in information and communication technology (ICT) rose from \$172 million in 2010 to \$3.6 billion in 2017, according to the ASEAN Investment Report of 2018.

Tech giants are also notorious for relying on gig workers who remain in some cases outside the scope of national labour laws. A lack of requirements pertaining to physical presence of multinationals prevents necessary regulation of large capital in this regard. Employment is also made more precarious with the increasing use of algorithmic surveillance and monitoring of workers in these spaces. Prohibitions on source code sharing and requirements for data localization are necessary to allow essential regulation in this regard.

4.1.4 Treaties with intellectual property rights provisions

IPRs imposed in the region through the WTO's TRIPS and additional agreements impact the ability of most countries to foster knowledge intensive industries and gain access to healthcare; it also furthers inequality by facilitating large transfers to multinational firms holding property rights operating largely from the North.

In the region, Japan and South Korea have pushed for stricter protection of intellectual property (especially data exclusivity) in the RCEP. India's generic drug production was at serious risk if data exclusivity, evergreening and patent term extensions were accepted as commitments; both the production and the provision of low-cost affordable medicines would be harmed.

IPRs, therefore, have made it impossible for most countries to use the same policies that some other countries in the region (Korea, Japan and China) used during their periods of industrialization—technology transfers, outright copying and “creative imitation”.

4.1.5 Trade remedies

Considering progressive elimination of tariff lines in RTAs, rules-based trade remedies are especially important for Asia-Pacific countries. In 2018, whereas less than 5 per cent non-tariff measures (NTMs) notified to the WTO were rules-based remedies, 10.3 per cent of Asian-Pacific NTMs were rules-based remedies (Asia-Pacific Trade and Investment Report 2019).

TABLE 4.2:
Implications for labour of select agreements in the region

| Provision | Agreement | Implications |
|---|---|--|
| Intellectual property | RCEP | 95 health and other organizations in the Asia-Pacific, in an open letter to RCEP member governments pointed out that Malaysia for instance which provides free generic antiretroviral medicines to their HIV positive population may not be able to sustain this program without access to Indian generic drugs. Japan and South Korea were pushing stronger IPRs (data exclusivity and evergreening) in negotiations. |
| Government procurement | EU-Vietnam FTA (EVFTA) | Vietnam's public procurement is 16 per cent of GDP. Market access for EU companies – infrastructure, railways, electricity, pharmaceuticals. Because of inability to impose local content requirements, ²³ domestic industry and employment will suffer. |
| | CPTPP | First time that Malaysia and Vietnam liberalized government procurement including sub-central governments. Prohibitions on state-owned enterprises receiving assistance from governments (constrain governments of Malaysia, Australia, Japan, Singapore and Vietnam among others, to generate employment in sectors of public importance) |
| Investment chapters | ASEAN Comprehensive Investment Agreement (ACIA) | Greenfield and M&As Flows in ASEAN Year-on-year FDI inflows stagnant; cross-border M&As in services (mainly retail) increased from \$16 billion in 2009–13 to \$43 billion in 2014–18. Retail industry, the largest employer in ASEAN (16 %). Limits of FDI for employment generation. |
| Cross border flows (e-commerce chapter) | CPTPP | Entrenches market power of existing digital giants, preventing the use of data collected on their platforms by other domestic players to undertake digital industrialization. |
| Customs duty (e-commerce chapter) | WTO, RCEP, South Korea-China FTA | Moratorium on custom duties on e-transmissions leads to revenue losses of \$1.7 billion for Thailand, close to \$500 mil. for India and China, and \$367 mil. for Pakistan; important for 1) dwindling fiscal space for industrial policy 2) protecting the infant digital industry. ²⁴ |
| Labour provisions | ACIA | Declaration on the Protection and Promotion of the Rights of Migrant Workers (DRMW) in the ASEAN region, but remains non-binding (Zhong, 2011). |

RTAs extend the WTO's controls on anti-dumping measures in two instances. First, they prescribe the use of the 'lower tax' while imposing anti-dumping duties such that the duty imposed in retaliation is relatively low. Second, parties are required to apply anti-dumping or anti-subsidy measures only if they are in line with 'common interests', i.e., the interests of consumers in the importing country; in case of manufacturing goods, this must also include evaluating the impact of imposing such measures on the importers of dumped good. Some agreements also urge both parties to find a mutually acceptable solution before implementation and apply the public interest consideration principle in the use of anti-dumping measures.

For an overview of the implications of the agreements covering 4.1.1 – 4.1.5, see table 4.2.

4.2 Labour provisions in FTAs

As of 2017, only 20 per cent of the 173 active agreements between countries had labour provisions (Engen, 2017). India, Indonesia, Pakistan, Cambodia, Laos and Myanmar have not signed any RTA with labour provisions. South Korea and New Zealand have signed the most RTAs incorporating labour provisions.

RTAs with the EU include labour provisions that relate to the core ILO standards, ratified conventions and mention progress toward non-ratified conventions. As a means of recourse these RTAs emphasize 'dialogue and the involvement of civil society'. The Korea–EU RTA sets out four procedures—cooperation, institutional mechanisms (regular discussions on progress and implementation), government consultations and expert panels – for the implementation of labour provisions

²³ As per WTO's Agreement on Trade Related Investment Measures.

²⁴ India and South Africa submitted a joint document on the subject to the WTO

in agreements. Therefore, they are unactionable provisions. After a decade of signing the agreement, Korea has yet to ratify the ILO fundamental conventions relating to forced labour and the freedom of association. The EU set up a panel of experts to examine the breaches in December 2019. Korea even uses legal provisions to curtail the actions of unions, going against ILO standards in letter and spirit. Of the ASEAN member nations, only Philippines, Cambodia and Indonesia have ratified all core ILO standards.

Violations of labour rights are seldom addressed through labour provisions in bilateral agreements. Simultaneously, it is important that labour provisions in trade agreements should not become a channel for blocking market access for the developing world. Developing countries in the region including India, Indonesia and Malaysia have opposed labour-provisions and trade-labour linkages in multilateral negotiations at the WTO as it may potentially become protectionist measures. The linkage of actionable labour standards and trade is embodied in other trading mechanisms as well such as the generalized system of preferences (GSP). It gives developed countries the power to use discriminatory tools disguised as retaliatory measures to pursue protectionist or other political objectives. The United States has threatened to withdraw GSP measures for many developing countries based on labour standards violations.²⁵ Developing countries in multilateral platforms have advocated for labour standards to be separately administered through the ILO.

However, in recent times many countries in the region have pursued anti-worker labour law changes with the intention to attract investments with serious implications for fundamental principles and rights at work. Progressive erosion of labour standards dealing with work working conditions, workers' rights, social dialogue, freedom of association and collective bargaining in the region calls for urgent intervention.

4.3 The role of trade unions

Partly the result of economic agreements, regions in the country have privileged exports and FDIs. They have set up barriers for government regulation, procurement and expenditure for domestic industries. India among other countries also undertook privatisation of public services. Ease of doing business has become the central focus of industrial policy in the region. Performance requirements of various kinds have been converted into incentive mechanisms for multinationals. This reduces governments' capacity to earn revenue and makes compliance a business choice. Emerging economies in Asia including Laos, India, China and

Vietnam have also been the most active in undertaking investment liberalization, although there are significant differences between their regulatory frameworks and state control. Protection and legal recourse for labour are diminishing in the region on the premise that flexibility in the labour market is necessary to increase investment, industrialisation and growth. In 2020, India and Indonesia have undertaken significant changes in labour laws that remove some essential protections to labour in the organized sector. Unorganized sector workers who form a great part of the working population in the region are almost entirely left out of this legal framework.

The lack of an industrial policy that fosters domestic industrial development has resulted in rising inequalities along 3 dimensions- between large and small capital, between labour and capital, between wages in fabrication and headquarters operations of businesses. Steep declines in income shares for labour have been experienced in most countries. As examples, India's share of labour income has fallen from 60% of GDP to 49% between 2004 and 2017 and Philippines' has worryingly fallen from low 33% to 26.6%. The share of labour income in fabrication too has fallen except for in China, where it has grown as a result of rising employment but not necessarily due to improving wages. The increase in women's employment in East Asia due to the gender wage-gap and tighter labour control has come to an end. With stagnating global demand, employment opportunities are not commensurate with the demand for work, and employment is increasingly becoming more adverse in nature. In India, for example, 70-75% of informal employment is in the manufacturing and trade sectors and over 90% of workers are categorized as informal workers. In Thailand, this ratio is 62.4%.

In 87 per cent of the Asia-Pacific countries workers are excluded from the right to join unions and in 91 per cent the right to collective bargaining is violated (ITUC Global Rights Index Report, 2020). Correspondingly, there is a lack of ratifications of the ILO core standard of the freedom of association of countries in the region. Indian trade unionists told us that they are seriously constrained by the secretive nature of trade negotiations. Tripartite discussions among stakeholders are uncommon and international economic agreements are often not even presented in Parliament as in the case of India, Philippines and Indonesia (Tansey & Cossar-Gilbert, 2017). Thus, the prospects for dialogue with national governments to establish stakeholder discussions appear bleak.

25 Recently, the US threatened Kazakhstan in this regard.

At the international level, however, there seems to be scope for establishing dialogue to revive multilateralism in the trading framework. In its [Action Programme 2019-2023, the ITUC-Asia Pacific \(ITUC-AP\)](#) charts its attempts at creating a regular forum for dialogue with international financial institutions including the IMF, World Bank and the Asian Development Bank in order to incorporate in their operations the ILO Decent Work Agenda. It also proposes to undertake extensive campaigning and training for organizing formal and informal workers. Organizing at the national level and coordination between regional trade unions has proven successful. For instance, the Thai government's repeated attempts to join the CPTPP negotiations have been prevented from succeeding due to mass protests by several unions, non-governmental organizations and civil society groups. Unions across the RCEP countries have demonstrated against the RCEP. Global union federations held various actions highlighting concerns over RCEP and creating awareness among their members.²⁶ International campaigns including the ASEAN Peoples Forum and the Asia-Europe People's forum have organized workshops to raise consciousness about issues concerning the RCEP. National campaigns in several countries including the Forum Against FTAs in India, Indonesia for Global Justice and Trade Justice Pilipinas have mobilized against RCEP negotiations. During early negotiations of the EU-Indonesia Comprehensive Economic Partnership Agreement (CEPA), The EU and the Indonesian have collaborated to share information. They demanded that ILO Core conventions are adhered to, equal rights for all workers are ensured and unions are included in monitoring and implementing the agreement.

Trade unions must, therefore, continue to coordinate and organize activities to maintain oversight over ongoing negotiations as well as to mobilise against egregious provisions in agreements.

²⁶ At the regional level BWI, EI, IndustriALL Global Union, IUF, PSI and UNI took action under the banner of [Unions for Trade Justice](#). The ITUC expressed serious concerns and [denounced RCEP](#).

Middle East Asia: introduction: industrialization, trade and investment policy and workers' rights

Ismail Karatepe

Middle East and North Africa (MENA)²⁷ region comprises mostly the Arab countries as well as Iran, Israel and Turkey, and several stateless nations such as the Kurds. The landscape of MENA is marked by incessant political turmoil. Economically, MENA is heterogeneous, spanning across oil-rich to war-torn economies. Concomitantly, the GDP per capita differs tremendously among the countries. The GDP per capita of the United Arab Emirates (UAE) is 44 times more than in Yemen.

While the region is a small player in world trade (less than 5 per cent), its rich oil and gas reserves provide for large trade surpluses, almost 270 billion USD in 2018 (World Integrated Trade Solution, 2020). Between 1990 and 2017, trade in goods and services of the MENA countries with the rest of the world has increased from 3.5 per cent to 4.8 per cent despite drastic decrease in oil prices (Saidi and Prasad, 2018) owing to increased commercial activities of the UAE, Saudi Arabia, Turkey and Israel.

The plunge in oil revenues in the last decade led policymakers to search for diversification of exports and new sources of government revenue. Yet, in countries such as Libya, Iraq or Yemen, where armed conflicts endure, there is limited leeway for diversification.

The intra-trade accounts only for 9 per cent of MENA's total trade in 2017 (Saidi and Prasad, 2018). The limited intra-trade can be ascribed to insufficient infrastructure, red tape as well as lack of logistics in the region. The United States, China and India are the three biggest export markets for the MENA countries in 2018. Saudi Arabia is the fourth largest destination for other MENA countries' exports.

5.1

Regional Trade and Investment Agreements—an Overview

Geographically, the broadest intra-MENA trade agreement, the Greater Arab Free Trade Agreement (GAFTA), has been in force since 1998. GAFTA was signed by 17 members of the Arab League²⁸ and enforced zero tariff for manufactured and agricultural products. It excludes service trade, financial flow liberalization and investments. In 2004, Egypt, Jordan, Morocco and Tunisia signed the Agadir agreement which covers also services and, furthermore, aims to facilitate trade with the EU.

The Association Agreements (AAs) between EU and some MENA countries are grounded on the Euro-Mediterranean Free Trade Agreement. The AAs aim to integrate Maghreb countries with EU free-trade area and foster political cooperation. Considering these objectives, this process is like other 'neighbourhood' agreements initiated by the EU.

The AAs with MENA are largely restricted to free trade of manufactured goods. In contrast to other agreements signed by MENA countries, some articles are devoted to labour mobility. They are designed to reduce the immigration pressure from MENA to the EU. EU and Tunisia are negotiating an RTA, allowing market opening for services and agricultural goods.

²⁷ The following countries are typically included in MENA: Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Malta, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, Turkey, United Arab Emirates, Palestine, and Yemen.

²⁸ Algeria, Bahrain, Egypt, Iraq, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

Within MENA, resource-rich countries, except Iran, have formed the Gulf Cooperation Council (GCC) in 2003. Though it covers only goods, it seeks to achieve a common market. Turkey has signed agreements with several MENA countries. These agreements are similar to the EU agreement signed with a few MENA countries (Parra et al., 2016). They cover only free trade in goods. These agreements are driven more by political considerations (i.e., Turkish Neo-Ottomanism) than by commercial ones.

The US signed RTAs with Bahrain, Oman, Morocco, Jordan and Israel. Besides, the US has signed Trade and Investment Framework Agreement with numerous MENA countries.

5.2 Restrictions on industrial policy in free trade, bilateral and investment agreements

The trade and investment agreements limit the scope of industrial policies. For instance, almost all agreements refer to the rights and obligations delineated in articles VI and XVI of the GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures, thereby limiting the scope for subsidies. RTAs rule out tariffs and quantitative restrictions for policymakers in most of the MENA countries. Yet, the scope for industrialization policy merits more nuanced and contextualized analysis, and nothing discussed here can exhaust the varieties of restrictions on industrial policies in MENA countries.

Among MENA countries, Algeria, Iran, Iraq, Lebanon, Libya and Syria are in the process of WTO accession. The negotiations with Lebanon and Algeria are most advanced and involve several liberalization measures including privatization, fiscal consolidation and further opening up of the economy. The latter comes with overhauling tariff quota regimes, quantitative import restrictions and importing licensing procedures.

Deeper liberalization measures accompanied by traditional fiscal consolidation have several implications for industrial policies and labour. First, competitiveness is determined as a goal, and that implies cost cutting by suppressing wages. Second, without any protective measure and solid incentives, the industrialization would be at best limited to performing simple tasks in the global value chain. Third, strict budgetary policies cap the financial capacity of the state in providing basic services such as health and education, which eventually create a barrier for upgrading processes in the value chain.

5.2.1 Investor state dispute settlement (ISDS)

The North–South trade agreements in the region contain detailed ISDS clauses. Geographically broad, GAFTA is shallow in this regard, having only one paragraph on ISDS.

International Centre for Settlement of Investment Disputes (ICSID) at the World Bank hosts most of the MENA cases as the arbitration tribunal. MENA accounts for 11 per cent of all cases registered with ICSID. Egypt as a respondent state has 37 known treaty-based cases and leads the region in this regard. Firms from developed countries have initiated 24 out of 37 cases; four out of the 24 were decided in favour of the investor and eight supporting the state. Other cases are still pending or settled. Only one case has been discontinued (ICSID Case No. ARB/13/37).

Owing to the ISDS mechanism, international companies can easily resist an attempt to improve the economic condition of the workers. An example is the Veolia Group's dispute over minimum wage increase by the Egyptian government. The group sued the Egyptian government under French-Egypt BIT for compensation due to a legislated wage increase from 400 to 700 Egyptian pounds per month, i.e., USD 69 to USD 99. The investor claimed USD 202.50 million to offset the cost of wage increase. While the investor lost the case, nevertheless, it incurred high legal costs for Egypt (the exact costs have not been publicized). According to a survey conducted by the Organization for Economic Co-operation and Development (OECD), legal and attribution costs for the parties have an average of over 8 million USD and in some cases, even more than USD 30 million (Gaukrodger and Gordon, 2012).

The poor MENA countries generally lack the necessary know-how and resources to prevail against Northern corporations. Only 4 per cent of the arbitrators appointed in cases under ICSID convention and other functionaries²⁹ have been from MENA countries while 47 per cent from Western Europe (ICSID, 2020).

5.2.2 Limitations on public procurement

Except Israel, none of the MENA countries are signatories of the WTO Agreement on Government Procurement. Turkey and GCC countries (except UAE) are observers in the Government Procurement Committee. RTAs between MENA countries such as Turkey–Tunisia contain no extensive public procurement liberalization requirements. European AAs with MENA countries include rather non-binding intentions to open procurement markets (Woolcock, 2013). US agreements with Bahrain, Morocco and Oman specify in detail government procurement obligations to ensure that US firms receive national treatment by setting standards for procurement decisions including public notice of purchases.

29 Conciliators and ad hoc committee members.

Where binding agreements exist, they limit support for domestic corporations. Patronage relations between businessmen and the government officials are quite common in the region and these relations limit the industrial policies as it hinders the entry of new, perhaps more competitive and innovative firms to the procurement market. In the case of Turkey, business groups close to the party in power always profit from public bids. The binding international agreements are not a solution to such relations, policymakers can be innovative to circumvent the treaties by engineering new laws and rules. This is especially true for Turkey's AK Party. Since the AK Party came to power in 2002, the procurement law in Turkey has changed 187 times (as of July 2019). The patronage relation as such is more pronounced in the construction sector (Karatepe, 2020).

5.2.3 Limitations to rule-based trade remedies

Except for Turkey and Egypt, trade remedies under WTO rules have not been widely used by MENA countries because many of them are not yet WTO members, thus, do not have to observe its rules.

Turkey has initiated most of the *anti-dumping* measures in the region (see Table 5.1), followed by Egypt. Between 1995 and 2019, most of the initiations by MENA countries were against China. A key reason is competition: the export basket of China resembles to a large extent the one of Turkey and Egypt. China is followed by other developing countries following a low-wage strategy.

TABLE 5.1:
Anti-dumping initiations by reporting countries 2006–2019

| Country | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 1995-2009 Total |
|--------------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|-----------------|
| Bahrain | | | | | | | | | | 1* | | 4* | 3* | 2* | |
| Egypt | 9 | 2 | | 2 | 1 | 2 | 1 | 2 | 9 | 4 | 14 | | 1 | 6 | 107 |
| Jordan | 1 | | | | | | | | | | | | | | 1 |
| Kuwait | | | | | | | | | | 1* | | 4* | 3* | 2* | * |
| Morocco | | | | | | 1 | 2 | 3 | 1 | 2 | 4 | 1 | | | 14 |
| Oman | | | | | | | | | | 1* | | 4* | 3* | 2* | * |
| Qatar | | | | | | | | | | 1* | | 4* | 3* | 2* | * |
| Saudi Arabia | | | | | | | | | | 1 | | 4 | 3 | 2 | 10 |
| Turkey | 8 | 6 | 23 | 6 | 2 | 2 | 14 | 6 | 12 | 16 | 17 | 8 | 6 | 2 | 229 |
| Total World | 203 | 165 | 218 | 217 | 173 | 165 | 208 | 287 | 236 | 229 | 298 | 249 | 202 | 207 | 3057 |

Source: WTO

* initiated by the GCC, the numbers with asterisks should be only counted once.

Those countries in MENA whose domestic industry needs protection use safeguard measures more often. Between 1995 and 2019, the oil-rich countries and high-tech Israel initiated only few safeguards; countries manufacturing standard products initiated more.

TABLE 5.2:
Safeguard initiations by reporting WTO member, 01/01/1995 - 31/12/2019

| | |
|---------------------------------|------------|
| Egypt | 14 |
| Israel | 2 |
| Jordan | 19 |
| Morocco | 11 |
| GCC | 4 |
| Tunisia | 5 |
| Turkey | 25 |
| Total of all WTO members | 377 |

Source: WTO, 2020, Statistics on safeguard measures

Concerning safeguards, most of the RTAs signed with the US in the region have the characteristics specified by WTO, which include suspension of further tariff reductions and/or increases of the tariff to the Most-Favoured Nation (MFN) level in case of ‘serious injury’ caused by increased imports due to the RTA trade liberalizations.

The preferred strategy of EU agreements is the relaxation of the requirements for invocation while having strict rules on the application of safeguard measures (Kruger et al., 2009). More restrictive is the Singapore–Jordan trade agreement, which limits the safeguard measure to one year. If future RTAs limit the use of safeguards even further, employment, especially in labour intensive industries, will be at risk given the intense global competition amongst low and medium-tech industries.

In the case of the labour-abundant MENA countries, safeguard measures are generally applied against other developing countries. Turkey and Egypt, for instance, are important textile and garment-producing countries. These sectors account for more than 18 per cent of the total exports in Turkey (in 2014) and more than 10 per cent in Egypt (in 2016). Hundred thousand workers are working in thousands of manufacturers clustered around the neighbourhoods of Istanbul and Alexandria. With its backwards and forward linkages such as cotton yarn, woven cotton, the sector is central for economic growth. Safeguard measures have been applied to protect the industry against other textile-producing countries with its lower labour costs. They are generally accompanied by anti-dumping measures as reports unveil (World Trade Organization, 2016, 2018).

In contrast, Tunisia failed to protect its textile industry and suffers from import surge, owing to Turkey’s export. Trade unionists estimated that 300 enterprises closed and 40,000 workers lost jobs in the textile industry between 2011–2018 (The Arab Weekly, 2018). Considering that the textile sector hosts a high degree of women workers, the importance of safeguard becomes more important: a serious injury to the industry can hit the most vulnerable social stratum.

5.2.4 Strict intellectual property rights

The agreements signed with the EU generally refer to “prevailing international standards [for IPRs], including effective means of enforcing such rights”. Those international standards cover different topics from patent procedure to registration of trademarks. Turkey’s agreement with other countries in the region generally refer to “intellectual, industrial and commercial property rights in line with Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and other international Agreements” (Turkey–Tunisia FTA, Article 28). GAFTA just mentions about intellectual property rights without binding obligations.

The US RTAs impose strict intellectual property rights beyond TRIPs. For example, the US–Morocco RTA’s 37-page-long chapter on intellectual rights covers even domain names or rights of performers and producers of phonograms. The US–Jordan RTA requires three extra years’ data exclusivity for original manufacturers of medicine. It not only prevents the development of a generic pharmaceutical industry but also raises the prices for medicines (Barqawi, 2019).

5.3 The region’s industrial policies

The prominent persons of independence in MENA countries such as Mustafa Kemal in Turkey or Gamal Abdel Nasser in Egypt were largely influenced by the Lillian ideas for catching up with the industrial West. Their economic measures included the establishment of huge state enterprises, subsidies for private businesses, and strict import substitution policies with quotas, import tariffs or import bans. It was accompanied by a minimal social contract that covered mainly those who worked formally. The 1970s economic crises eventually undermined these developmentalist ideas. Supported by Western powers and international institutions, policymakers in both countries adopted an export-oriented strategy, along with gradual liberalization. Abandoning the Keynesian sort of budget deficit policies in the region, strict IMF-led classic austerity-based policies in the post-1980 further restricted the policy options in both countries. The budget consolidation, along with privatization, has shrunk the room for any policy intervention. Anti-inflation measures and export promotion have decreased

aggregate domestic demand over time. In the case of Turkey, to attract financial capital, the interest rate was raised above the world average. The resulting short-term capital inflows stifled net exports, as they led to currency appreciation and to an illusionary growth stemming from augmented consumption, owing to the relatively cheap imported goods. The risk of capital outflows because of a deteriorating trade balance has been addressed by further interest rates hikes. The high interest rates slowed investments and, therefore, reduced competitiveness based on new technology. To compensate for this loss of competitiveness, pressure on labour was increased. Such a policy setting has been paving the way for a crisis-prone economy.

The money flowing in was spent on real estate development on public land or national prestige enhancing extravagant infrastructure projects such as expansion of the Suez Canal or Istanbul's new airport. Surplus labour made such projects achievable. Along with low wages, the occupational health and safety measures have never been seriously enforced. The lack of inspection left hundreds of workers injured or dead.

The IMF austerity programmes in MENA countries did not only limit the scope for industrialization. They also led to massive lay-offs due to privatization and commodification of education and health infrastructures. Binding and conditional budget consolidation measures hinder social upgrading in health and education.

5.4 Democratic processes in trade agreements and enforceable labour rights

5.4.1 Democratic process in trade negotiations

The region is ruled by various political colours in different shades: from Islamists to nationalists. However, common is the lack of democratic mechanism during policymaking processes. Owing to the authoritarian government in some countries (e.g., Turkey), coup d'états (e.g., Egypt) and constitutional monarchies (e.g., UAE) most of the trade negotiations exclude the public. The power bloc (influential political figures/bureaucrats and leading class fractions) has been quite decisive in initiating or fashioning the RTAs and investment agreements. Nevertheless, some RTAs were contested by civil society. Trade unions and trade associations in Turkey criticized the Custom Union between Turkey and EU for increasing import dependency, though with little success.

5.4.2 Effectiveness of labour standards provisions in the existing free trade agreements

Trade unions occupy a precarious political existence in the MENA region, in some countries they are even banned. ITUC has listed MENA as the worst region for working people (ITUC, 2020). While some countries lack the financial or institutional capacity (e.g., enough inspectors) to protect workers' rights, the oil-rich Gulf countries use their economic capacity to control labour. The kafala (sponsorship) system generates conditions that resemble modern slavery. This system emerged in the 1950s to regulate the relationship between migrant workers and employers in most Gulf countries. It limits the mobility of the migrant workers in host countries as their entry, stay and work are linked with the permission granted by the employers (Yalçın, 2019). Without explicit written permission, a migrant worker is not even allowed to exit the country. The highly unequal power relations between employers and migrant *de facto* workers strip the basic human rights of more than 30 million migrant workers in the countries of GCC.

However, some workers' rights clauses in RTAs created *de jure* effects at the macro level. In the case of Morocco, Oman and Bahrain, the RTA with the US required labour laws to change according to international standards. The US-RTA with Jordan contains a workers' rights clause though the US pledged in a side letter that they will never resort to sanctions in case of violations. Yet, local labour actors are too weak to enforce such clauses. Especially the labour-abundant countries such as Egypt or Algeria lack the institutional and financial capacity for the enforcement of labour rights. Politically legitimate, financially endowed, institutionally backed stakeholders action supported by local pro-labor activist can lay the foundation of social dialogue and push for advancing labour rights.

5.5 Trade union action and recommendation in the field of trade and industrial policy

Decent work deficits are prevalent in MENA countries. It is more pronounced in those countries torn down due to armed conflicts. Informality has become the norm, especially the young population suffers from massive unemployment. The labour market participation of the women is low, if they can participate at all. MENA is the worst region in terms of gender gap. Secularist ideologies and the idea of development were already shelved-off: Ba'athism or Kemalism have lost their power.

The current ruling elites in MENA countries represent culturally regressive, economically liberal, political authoritarian lines. The cultural, political and economic landscape create a quagmire for labour. The wages are suppressed in the sake of increasing competitiveness; the freedom of association is violated to keep political harmony. The labour-capital accord has been managed by religious codes.

The accord established through religion as a binding force has put workers in a more defenceless position. Employers command great discretion in their treatment of workers. The supposed harmony between capital and labour, based on religious morals, has allowed employers to become part of global supply chains with low wage strategy.

Nevertheless, some opportunities for influencing international trade and industrial policies exist. Strengthening pro-labour actors in the field and supporting their attempt to organize and build network amongst themselves is urgently needed for trade unions to have any influence on RTAs and IIAs. To utilize the ever-increasing and yet non-accessible labour clauses, capacity building is to be targeted at specific labour right issues regarding RTAs. Capacity building not only involves legal expertise but also financial means.

The push for an industrial policy requires a paradigm shift that allows channelling of investments into long-term investments for higher rewards. Considering these above-mentioned barriers, such a conceptual change would ensue long-term political struggles.

6

Summary of the regional studies

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The regional studies show that RTAs and IIAs are widespread. While already WTO agreements reduce the space for industrial policy, agreements especially between the North and the South diminish the space even further. Table 6.1 gives an overview which industrial policy instruments are usually prohibited. RTAs tend to reduce actual and maximal tariffs, cover all product lines, ban export taxes, limit adequate strong domestic actions against dumping and in cases of balance of payment crises and surge in certain imports. Many RTAs oblige countries to open their service sectors and public procurement with far-reaching consequences for the delivery of public goods. In many cases, RTAs intellectual property rights are stricter than in WTO's TRIPS.

IIAs restraint countries from using instruments to control capital inflows and to make FDI conditional on domestic development. Virtually all IIAs contain the right of investors to sue the host state through Investor-State Dispute Settlements. Many RTAs and IIAs rule out the re-negotiation of individual items of the treaties.

For the South, RTAs and IIAs have two consequences. First, these agreements restrict the most easily available and traditional instruments of industrial policy even more than the WTO rules. Second, all countries in the world need and follow industrial policy. But without massive and comprehensive industrial policies the South cannot catch up. Less economically developed countries should have more and simple instruments for industrial policy. To have the same rules for all implies kicking away the ladder for the development of the less developed (Chang, 2002).

TABLE 6.1
Main instruments available and advisable for industrial policy

| | Instrument | RTAs / IIAs (typically allowed)* | WTO (allowed by WTO)** |
|---|---|-------------------------------------|---|
| General | Institution building/organizing cooperation to support and create clusters | ✓ | ✓ |
| | Investment in education and research as part of horizontal industrial policy | | |
| | International and national development banks /national innovation funds/also allowed to support certain sectors, regions, types of companies (for example small and medium companies) | | |
| | State-owned enterprises | | |
| | Sectoral bargaining/minimum wages to create fair competition | | |
| | Exchange-rate policy and other policies to avoid current account deficits | | |
| Subsidies | Subsidies to support research, innovation, ecological transformation, certain regions—there is a big grey area which can be exploited | ✓ | ✓ |
| | Preferential export credits (OECD rules) | | |
| Trade in goods | Tariffs | ⊘ | Allowed up to bounded tariffs & for not covered product lines |
| | Export taxes | | ✓ |
| | Safeguards (quantitative restrictions if import increases / balance of payment crises) | | |
| | Use strong anti-dumping measures | | |
| Trade in services | Local content | ⊘ | If sector is not opened |
| | Joint ventures and domestic equity share | | |
| | Local presence requirements | | |
| | Fiscal & other incentives only to domestic firms | | |
| Foreign direct investment producing goods | Joint ventures and domestic equity share | ⊘ | ✓ |
| | Employ local labour and directors | | |
| | Locate research and development facilities in the host country | | |
| | Use local service providers | | |
| | Allow to invest only in certain regions | | |
| Government procurement | Use procurement only to support domestic firms and the domestic economy | ⊘ | ✓ |
| Intellectual property rights | Limit protection of plants and animals | ⊘ | ✓ |
| | Allow use of patents for research | | |
| | Compulsory licences | | |
| | Parallel imports (import if something is cheaper in another country) | | |
| | Implement narrow patent requirements | | |

* RTAs / IIAs, instruments which typically can be used even under strict free trade and investment agreements

** Instruments which are allowed under WTO

✓ Allowed, ⊘ Use not allowed or massively reduced

Recommendations: industrial policy including labour rights and social upgrading

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Based on our general assessment of economic development and global economic governance as well as the case studies, we recommend the forceful pursuit of industrial policy and a regime of trade and investment rules in support of it.

Before we present specific policy recommendations, we want to address a few caveats. First, our general recommendations need to be adjusted to the specifics of each country. For example, the size of the country matters. India can follow a comprehensive strategy supporting many key sectors of the economy whereas smaller countries like Nepal can only concentrate on a few sectors. Small countries must pursue regional cooperation to reach a sufficient scale for their industries. Furthermore, the different development stages of countries require consideration. The least developed countries should be granted the biggest space for industrial policy, i.e., higher tariffs, lower IPR protection and the right of one-sided interventions in trade and capital flows. One of the shortcomings of WTO is that with small exceptions it treats all countries the same despite their differences.

Second, industrial policies are in danger of corruption and mismanagement. Greater involvement by independent trade unions and civil society can keep a check on government expenditures. In addition, two general principles of previously successful industrial policy should be observed: (1) strong, not weak companies should receive support and (2) companies should cooperate (e.g., patent pools, vocational training, etc.) and compete among each other. In case of natural monopolies, public oversight is necessary.

Third, the political and economic elites in many countries profit from the current neoliberal economic governance. It allows them to transfer their monetary wealth abroad and to obtain rents by monopolizing foreign trade or certain domestic industries. Therefore, the pursuit of sustainable industrial policies will face not just international but also domestic resistance. The response must be a long-term strategy that unites popular forces behind an inclusive development strategy and finds allies among technocratic elites and progressive entrepreneurs.

In our opinion, industrial policy should have the following five pillars.

7.1

Development of industrial policy in the framework of social dialogue

For selecting promising sectors and projects, industrial policy should be developed in a framework of social dialogue and involve all stakeholders. Besides business associations, experts and governments, trade unions should have a prominent role in the formulation of industrial policy to ensure its social sustainability and to minimize the risk of corruption (Rodrik, 2004).

7.2

Cluster policy and linkages

The support or creation of economic clusters is a key area of industrial policy. Clusters require cooperation among firms, and between firms and research institutes including universities. Besides subsidies and infrastructural measures supplied by horizontal industrial policies, development banks and government innovation funds should provide inexpensive and long-term finance (Dünhaupt and Herr, 2020b).

The above-mentioned industrial policies are usually not restricted by WTO, RTAs and IIAs. Governments should stretch the limits on subsidies, tax incentives and public procurement.

Given that the host country can enforce joint ventures and the employment of domestic personnel on FDI, FDI can contribute to economic upgrading. Portfolio investment and private foreign credit, however, do not contribute to new technologies, qualifications or export channels. Capital controls and development of a financial system which provides sufficient and cheap finance in domestic currency is an important element for successful development. While WTO agreements allow the regulation of capital inflows, many IIAs do not; and, therefore, should be renegotiated or terminated.

Foreign companies producing in a host country will usually abstain from transferring key competences as this would be harmful for their headquarters. This means FDI is not enough for catching up (Amsden, 2017). Therefore, the creation of national champions should be promoted. State-owned companies or companies with state participation can play a role here. Furthermore, the delivery of public goods or services in the field of waste-management, public transport, water supply, health services, electricity, etc. should stay in public hands.

Linking economic and social upgrading

Social upgrading is not just the result of economic upgrading, it is also a precondition. Accessible quality public education including vocational training as well as comprehensive social protection are important ingredients of industrial policy. As the chief beneficiary of such measures, the working population requires a strong voice for being able to push for their realization. A prerequisite for such a voice are enforced workers' rights. Sectoral collective bargaining supports industrial upgrading by impeding companies to compete via low wages and working conditions instead with good technologies and management. Where collective bargaining is difficult, it should be substituted by minimum wage policies. Public procurement can strengthen collective bargaining by excluding firms violating labour laws.

While countries should not be allowed to shirk their responsibility for decent work, intense global competition stands clearly in the way. Therefore, an international floor of workers' rights and standards as formulated by the ILO conventions must be enforced below which companies cannot go. Workers' rights clauses in trade agreements are not very effective in their current form. Ethically, they are doubly blemished as they have been imposed through RTAs and serve as fig leaves for the many chapters in RTAs which are detrimental to developing countries. The right place for workers' rights clauses is the multilateral WTO. Furthermore, they must be transparent, rules based and accessible for workers whose rights have been denied. While core workers' rights should apply to all countries, standards should reflect a country's level of development.

Horizontal industrial policy

Governments' investment in general education, research and development, infrastructure, etc. is very important. Yet, it is an illusion that horizontal policies avoid far-reaching discretionary government decisions. Which streets, airports and electric grids should be built? As financial means are scarce, governments must set priorities. Access to quality education at all levels and health services underpins all efforts of economic upgrading. The important R&D efforts should be institutionally safeguarded against changes in government. National patent law should be narrow in focus to leave room for the free use of knowledge.

Macroeconomic framework of industrial policy

Because of learning effects and economies of scale, industrial policy must stimulate demand for the new sectors. Even if not all state investments are efficient, they nevertheless create income and demand for the expansion of other sectors (Lo and Wu, 2014). This implies keeping public procurement closed to foreign competitors.

Safeguards against sudden harmful increases of imports or balance of payment crises as well as antidumping measures support macroeconomic management. They keep production and employment stable in case of shocks and reduce the pressure for austerity in balance of payment crises. They are WTO conform.

As current account deficits reduce aggregate demand, output and domestic employment, capital import controls and a real exchange rate which protects domestic sectors and supports competitiveness of exports are necessary. Capital inflows result in profit and other investment income outflows which burden the current account. Successful real depreciations led historically in many countries to a substantial stimulation of domestic production and employment: (a) increase the profitability of companies in the exporting sector across the board; (b) can be substantial and quick; (c) stimulate firms' export activities and thereby learning from international best practice; and (d) the subsidy of export activities does not need any administration to decide which company should be subsidized (Rodrik, 2004). Of course, the use of the exchange rate is for many countries in the South difficult because of high foreign debt, import dependence or welfare effects. For countries with limited space to use the exchange rate, quantitative controls should be allowed to prevent high current account deficits.

A new institutional structure

Basic WTO regulations allow many industrial policy instruments. Countries should defend this space and abstain from further cuts in tariffs, liberalizing the service sector, stringent patent law and opening public procurement to foreign competition.

RTAs and investment agreements reduce the room for industrial policy substantially. Therefore, termination and renegotiation of these agreements is advisable. Investor-State Dispute Settlement regulation should be substituted by normal transparent legal proceedings. Trade negotiations should return to multilateral agreements which leave enough room for national policies for all countries and give developing countries additional instruments for industrial policy. Multilateral agreements can also help to establish worldwide labour and ecological standards.

Furthermore, the WTO needs substantial reforms. On substance, the concept of a single undertaking which does not differentiate among different levels of economic development as well as the TRIPS must be jettisoned. On procedure, the voice of developing countries needs to be institutionally fortified in order to democratize the negotiations.

Addressing the future of our planet

As climate change as well as air and water pollution threaten the very survival of humankind and even endanger the life of workers, industrial policy cannot merely aim at producing more goods with better efficiency. It must play a key role in a just transition to production and consumption leaving a smaller environmental footprint while ensuring decent work and sustainable livelihoods.

A just transition to a green economy offers the chance to create new jobs and combine industrial policy with social upgrading including enforcing ILO core labour standards and improving the work and social situation of women. It requires the use of all economic policy instruments mentioned above, including social dialogue. Since the current RTAs and IIAs are a hurdle for such policies, they must be modified or even terminated.

7.2

Acting on the challenge of the new trade and investment agreements

In order to safeguard policy space, trade unions should give priority to change trade and investment agreements which are currently negotiated by almost all countries. They should reject new RTAs and IIAs and push for multilateral agreements within the WTO. They should also pressure their governments to commit to a WTO reform which strengthens the bargaining position of developing countries.

Furthermore, trade unions should call for a termination of the most restrictive agreements, i.e., the IIAs. A few countries have already done so. The earlier, the better because IIAs continue to be in force after official withdrawal for usually 10 years. In case this is not possible, at least the most onerous stipulation should be renegotiated.

If new RTAs are not preventable, then fight against opening public services, extension of intellectual property rights protection, negative lists, ratchet clauses, etc. Rule-based workers' rights clauses with transparent and effective enforcement mechanisms should be included but not at the expense of losing economic policy space.

Trade unions should also get involved in industrial policy debates. Given scarce resources, they should reach out to friendly academics and begin with concepts of economic upgrading for industries in their jurisdiction with a membership base. They could contribute to a vision of the development of the economy and society in general (Chang, 1994).

Since powerful corporations are lining up governments in support of the RTAs and IIAs, labour faces an uphill battle in preventing the most egregious power-grabbing aspects of these complex agreements. In this battle, fortunately, labour is not standing alone. Many organizations of civil society have become aware of the dangers of these agreements. Therefore, campaigns on the issues of RTAs and IIAs offer the opportunity to strengthen organized labour ties to civil society.

Any campaign must start with the members, since trade unions are membership-based mass organizations. Issues of economic policies are usually far removed from the shop floor and, quite naturally, seldom on the minds of the members. It is therefore essential that unions analyse the likely implications of the proposed agreements for the workplaces and daily lives of their members. Even if this analysis suggests a positive balance in terms of employment perspectives, the respective trade union should consider the agreements' impact on the broader labour movement and society.

Since the new trade agreements cover so many areas of concern to workers—not only as employees but also as citizens and consumers—it should be possible to mobilize the membership with a context-sensitive framing of the issues. There are many routes for trade unions and civil society organizations to influence trade negotiations. These differ from country to country and must be carefully but also creatively identified. In order to take advantage of these opportunities, unions must prioritize trade as an issue, build up enough trade policy knowledge and expertise, and dedicate enough resources for mobilization (Scherrer and McGuire, 2015).

Success also rests on the ability to reach out to trade unions and civil society in other countries impacted by RTAs and IIAs, and to frame the issues broadly in terms of injustice. If the campaign is seen mainly as being carried out by just one or a few countries on the grounds of narrow self-interest, it is not likely to resonate with the rest of countries involved in the trade negotiations. Joint activities might help the campaigns to avoid the stigma of national chauvinism, which the corporate lobbyists love to use in order to de-legitimize anyone who criticizes liberalizing trade and investments across borders.

Together with labour-friendly academics, trade unions should identify the articles in proposed RTAs and IIAs which limit industrial policy and call for their removal. They should insist on the termination of existing IIAs containing a broad spectrum of special privileges for foreign investors. At the same time, they should formulate their own agenda for a just green transition.

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Annex

TABLE 1:
WTO regulations and regulations in additional trade and investment agreements

NAFTA USMCA

| Regulations | Room for national policy/industrial policy instruments | WTO regulations | General characteristics of additional trade and investment agreements* | Regional characteristics of additional trade and investment agreements 1) | |
|------------------|---|--|--|--|---|
| | | | | NAFTA | USMCA |
| Trade in goods** | Tariffs | Up to the maximum of allowed tariffs (bound tariffs) for goods on the list for free trade, goods not on the list any tariff is allowed | Reduce general level of tariffs and cover all goods | Tariffs for trade inside the bloc are eliminated, but there is a small negative list. | Tariffs for trade inside the bloc are eliminated, but there is a small negative list (smaller than the NAFTA's one) |
| | Quantitative restrictions <ul style="list-style-type: none"> • Import quota • Import licensing • Voluntary export restraints | Not allowed | Not allowed | Not allowed, with a few exceptions, especially in agriculture | Not allowed, with a few exceptions (less than under NAFTA), especially in agriculture |
| | Export taxes | Allowed | Reduced or not allowed | Allowed in the situation of an exceptional shortage of a certain good, limited to one year | No party shall adopt or maintain any duty, tax, or other charge on the export of any good to the territory of another Party, unless the duty, tax, or charge is also applied to the good if destined for domestic consumption |
| | Safeguards <ul style="list-style-type: none"> • for injurious imports for certain industries • for critical food shortages, etc. • to fight balance of payment crises • protect national security | Allowed | Importance reduced, usually only used for national security, sanitary and phytosanitary measures and technical barriers | Allowed for “emergency actions” aimed at protecting domestic producers against unexpected increasing imports | It follows the WTO Safeguards Agreement |
| | Anti-dumping measures | Allowed | Application and height of measures are usually reduced <ul style="list-style-type: none"> • dumping must violate common interest • “lesser duty rule” has to be followed | The parties maintain the rights to bring antidumping and countervailing duty cases under the GATT/ WTO rules and their own unfair trade laws | The parties maintain the rights to bring antidumping and countervailing duty cases under the GATT/WTO rules and their own unfair trade laws |

* Regional Trade Agreements (RTAs), International Investment Agreements (IIAs),

** For agriculture there are specific regulations; Source: Partly based on Dünhaupt/Herr (2020: Table 4)

| Regulations | Room for national policy/industrial policy instruments | WTO regulations | General characteristics of additional trade and investment agreements* | Regional characteristics of additional trade and investment agreements 1) | |
|-------------------|--|---|--|--|--|
| | | | | NAFTA | USMCA |
| Subsidies | Subsidies <ul style="list-style-type: none"> • directly supporting exports • dependent on the use of domestic content • allowed for agricultural products • all other subsidies are in principle allowed, but actionable | Not allowed Exceptions for poor developing countries; but actionable | Use is usually reduced | Used especially in agriculture | Declared effort to reduce its use in agriculture. Restriction for Public owned enterprises. |
| | Export credits | Allowed if they comply with the OECD agreement on export credits | Allowed if they comply with the OECD agreement on export credits | Allowed if they comply with the OECD agreement on export credits | Allowed if they comply with the OECD agreement on export credits |
| | Duty-drawbacks and tax deferrals for exporting firms | Allowed | Use is usually reduced | Use is very limited | Use is very limited |
| | Countervailing measures | Same as for anti-dumping measures | Same as for anti-dumping measures | Same as for anti-dumping measures | Same as for anti-dumping measures |
| Trade in Services | Countries decide which sectors to which degree is opened Require <ul style="list-style-type: none"> • joint ventures • local equity requirements • local content • local presence requirement • fiscal and financial incentives only to domestic firms | Positive list Allowed if sector is not opened to a wider degree | Open more sectors on a positive list or even have a negative list which sectors are not opened | Negative-list. Every two years new tentative of liberalization on the negative list. National treatment and most-favoured nation treatment. Liberalization of public procurement in services. | Negative-list. National treatment and most-favoured nation treatment. Liberalization of public procurement in services. New chapter regulating Digital trade. Explicit commitments to liberalize financial services. |
| | Capital controls | Not allowed if the financial sector is opened, exception when IMF recommending capital controls | | Ban on investment controls. | Ban on investment controls. Commitments to liberalize financial services. |

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| Regulations | Room for national policy/industrial policy instruments | WTO regulations | General characteristics of additional trade and investment agreements* | Regional characteristics of additional trade and investment agreements 1) | |
|--|---|-----------------|---|--|--|
| | | | | NAFTA | USMCA |
| Foreign investment in production of goods | Local content requirements Trade balancing requirements Foreign exchange restrictions Domestic sale requirements | Not allowed | Not allowed | | Local content rule, but only for some goods sectors (steel, textile, auto). Restriction on "foreign exchange manipulation". |
| | Requirement to <ul style="list-style-type: none"> • employ local labour • put nationals on board of directors or in senior management • locate regional headquarter in the host state • locate research and development in the host state • establish operations in a particular region in the host State • use local service providers • form joint ventures • have domestic equity participation There is no right of establishment or obligation to open the capital account | Allowed | Open more sectors for FDI and other capital inflows on a positive list or even have a negative list which sectors are not opened. Eliminate requirements for FDI and other capital inflow. Establish Investor-State Dispute Settlement (ISDS) | Ban on investment controls. Establish Investor-State Dispute Settlement (ISDS). | Ban on investment controls. Establish Investor-State Dispute Settlement (ISDS) only for US-Mexico, and for some specific sectors. Minimum average wage rule for the automobile sector. |
| Intellectual property rights | Limit patent protection for plants and animals Exception for research Compulsory licenses Parallel imports Narrow patentability requirements | Allowed | Implement stricter patent protection | On par with USA rigid internal law. | On par with USA rigid internal law(with additional restrictions when compared to NAFTA, notably on pharmaceutical products and agriculture innovations). |
| Use government procurement for industrial policy | If country did not sign agreement | Allowed | Pressure to open procurement for foreign firms | - | - |
| | If country signed agreements and opened certain or all sectors for foreign tenders | Restricted | | Open procurement for foreign firms, but it does not include states and provinces | Open procurement for foreign firms, but it does not include states and provinces. Canada not included (USA-CAN ruled by WTO/GPA rules). |
| Labour provisions in trade agreements | | No | Increasingly included | Side agreement | Chapter on labour provisions. Worker Representation in Collective Bargaining; Enhanced Labor Enforceability; New Labor Value Content Rule |
| Environmental provisions in trade agreements | | No | Increasingly included | Side Agreement | Chapter on environmental provisions |

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