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Labour rights in trade agreements: Five new stories

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etui.



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Abstract

Labour provisions in trade agreements have been criticised for minimal effectiveness in improving employment conditions. Five recent cases point to some benefits and to the lessons on when and how labour provisions can be effective. They make a difference in particular economic and political circumstances and when they are a support to an active trade union movement, pressing demands relevant to the country at the time. In Uzbekistan trade sanctions and international pressure were crucial in moves towards the abolition of forced and child labour, but new issues have arisen requiring independent worker representation which does not yet exist. For Vietnam the economic incentive for a trade agreement with the USA plus problems in its industrial relations system led to acceptance of scope for independent trade union activity. Withdrawal of the USA, however, led to a watering down of reforms. A long history of struggle for trade union rights in South Korea was helped by a negative judgement on the government's practices under the free trade agreement with the EU, after which the Korea parliament ratified ILO conventions on free association and collective bargaining. Georgia's quest for international recognition stimulated an extremely liberal employment code associated with gross violations of workers' rights. This was gradually reversed after its Association Agreement with the EU required acceptance of much of EU employment law within a strict timescale. Implementation required political changes within Georgia and the active efforts of Georgian and European trade unions. Mexico is tied to the US economy and US labour was in an exceptionally strong position when President Trump was rushing to win approval for a replacement of the NAFTA agreement. This was approved in the USA after Mexico, under a new government sympathetic to labour, implemented new laws, opening the way for genuine collective bargaining. These included a rapid response mechanism against violations which quickly brought results.

1. Labour provisions in trade agreements

1.1 Introduction

Labour provisions have become the norm in free trade agreements (FTAs) signed by the EU and the USA and are also common in those between many other countries. They arose partly as a means to prevent ‘unfair’ competition by undercutting competitors in an unseemly race to the bottom over labour conditions and partly as a possible means to spread internationally recognised employment standards. However, both researchers and practitioners have been almost universally disappointed, typically concluding that they have brought either no, or extremely little, benefit to workers. They could thus appear as a smokescreen while globalisation and the liberalisation of international relations has brought huge benefits to various business interests.

This paper looks at some of the most recent evidence on the possible effectiveness of labour provisions, pursuing a number of specific cases which justify a little optimism. Developments in Uzbekistan, Vietnam, South Korea (henceforth Korea), Georgia and Mexico suggest that trade negotiations can make a difference to workers’ rights. However, changes need to be set in the specific contexts of those countries. Negotiations and agreements make a difference when they strengthen labour’s position in partner countries. Agreements are therefore most effective when their content matches the themes raised by those labour movements. The more encouraging outcomes also stem from the involvement of the ILO which gives both coherence and a wider legitimacy to concrete demands and proposals. Labour provisions in trade agreements alone may indeed achieve little, but they can be part of a process providing urgency and coherence to the efforts of a number of actors. Even then, as argued more extensively elsewhere, they are not enough to ensure that globalisation brings benefits to all. They remain only one part of trade agreements other parts of which can have negative as well as positive consequences.¹

1.2 The history of labour provisions

Although it has been assumed across practically all schools of economic thinking that trade and international economic integration can bring benefits, it is clear that this is not automatic and also that any benefits can be very unevenly shared. Some

1. Much of the argument in this first section is set out at more length in Myant (2017).

countries have grown and developed very rapidly, driven by higher exports of manufactured goods, but they are not the ones that have been the most enthusiastic at following advice from international agencies on liberalising imports and capital flows, selling off state assets and eliminating internal regulations that affect foreign companies. In some countries trade liberalisation has been accompanied by stagnation or even decline. Within countries too, trade liberalisation has brought both gainers and losers (Jansen et al. 2011). In world terms, the ‘great middle class squeeze’, caused by automation and globalisation, has made manufacturing workers in advanced countries appear as losers (Milanovic 2016: 214). Workers in new manufacturing industries in lower-income countries may, in relative terms, often be gainers but they also often endure low pay in unsafe and unregulated conditions, denied the protections of laws and collective bargaining rights which are more common in higher income countries. They could certainly aspire to gain much more.

Claims of unfair competition, through the denial of accepted workers’ rights, were an issue long before the recent debates, as summarised by Smith et al. (2020). However, the recent history of labour provisions within FTAs followed the WTO Ministerial Conference in Singapore in December 1996 which famously agreed that it had no direct responsibility for labour issues. That was to be the job of the ILO, the UN’s tripartite body that sets standards for good employment practice, embodied in (by 2021) 190 conventions and 206 recommendations. It seeks to persuade governments to ratify these, making them legally binding, and incorporate them into laws. It has considerable powers to monitor their application and, while it has no significant powers of enforcement, ratification could be interpreted as giving legal force to the principles of a convention within a country’s court system. A key step in enhancing the ILO’s role was its 1998 Declaration on Fundamental Principles and Rights at Work which included the specification of eight Fundamental Conventions.² These were to play a role in international trade negotiations which increasingly focused after 1996 on bilateral and multilateral agreements.

The shift of focus away from global to bilateral agreements reflected disappointment on the part of powerful business interests with the results of the Singapore conference. They were less concerned with trade in goods, for which tariff barriers were already very low, albeit with agriculture and some specific manufacturing sectors still exceptions, but trade in services was often restricted by countries’ regulatory systems (a barrier felt by banking and finance). Access to government contracts was often difficult for foreign companies while copyright and patent rules (the latter a particular concern for pharmaceutical companies wanting to prevent the production of cheaper, generic versions of their drugs for as long as possible) did not give all the protection that companies wanted. Companies also sought

2. These were: 1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); 2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98); 3. Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol); 4. Abolition of Forced Labour Convention, 1957 (No. 105); 5. Minimum Age Convention, 1973 (No. 138); 6. Worst Forms of Child Labour Convention, 1999 (No. 182); 7. Equal Remuneration Convention, 1951 (No. 100); 8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

absolute protection for their investment activities, culminating in the massive use of the Investor-State Dispute Settlement (ISDS) system which ultimately gave them a privileged position in relation to domestic companies as well as powers to prevent changes in government policies unfavourable to themselves. These and similar issues have been taken up by governments in western Europe and north America and have become the driving force behind the proliferation of bilateral and multilateral trade and investment agreements the most important of which, in terms of the development of labour provisions, are those involving the USA and the EU.

These agreements could offer lower-income countries easier access to markets for goods in those areas still subject to significant protection, notably textiles and garments and motor vehicles, in exchange for the benefits to businesses referred to above. The gains for most of the population in higher-income countries could be negligible or even negative: the only gainers in the USA appear to be 'large firms and wealthy households' (Gallagher and Polaski 2020). The gain for lower-income countries is the prospect of an export-oriented development model, probably in exchange also for losses in rural areas from higher food imports.

As a result of pressure from trade unions and their allies in higher-income countries, provisions to protect employment rights have been included as part of such agreements. Although the wording makes these obligations binding on both sides, it is clear that the pressure for change is on lower-income countries. By 2019 there were 293 FTAs in force and 85 of them included labour provisions. Of those, 45 included one of the G7 countries as a partner, covering 30 per cent of the world's workers. However, there were still 55 countries with no agreements including labour provisions, India prominent among them (ILO 2019: 15-19). Even where labour provisions do exist, many are too brief and vague to be likely to have much impact.

1.3 The content of labour provisions

In both of the EU and the USA, political structures make it possible for labour to have an input. The labour provisions in their agreements have evolved over time, showing some significant differences, but also important common features. They have come to include a number of important commitments: to enforce existing employment laws and not to weaken laws so as to gain a competitive advantage; to apply the standards specified in the ILO Fundamental Conventions; and to include forms of civil society involvement via procedures and structures for consultation and a means for pursuing disputes. These latter have until now always required government, or European Commission, initiation and have been directed at the partner government for failing to ensure that standards are upheld and not at a particular employer in respect of its actions.

One difference is that EU agreements seek, albeit do not necessarily insist on, ratification of the Fundamental Conventions while the USA avoids that requirement, itself having ratified only two (Nos. 105 and 182, on forced labour and the worst forms of child labour). Benefits of ratification include the greater prominence the

principles are given, involvement in the full process of ILO investigation of their successful application and possible implications for internal law. On the other hand, it has been argued that emphasis on these conventions alone may miss other important issues (Smith et al. 2020), including ones that figure in other ILO conventions such as job security, minimum wages, occupational safety and health, working hours or holiday entitlements. These do figure as obligations for member states within the EU and in the case of the EU-Georgia agreement, while some have also been present in agreements involving the USA and Canada.

Failure to settle any dispute by consultation can lead one side to demand adjudication by a three-member panel of experts. Powers of enforcement after a verdict is reached differ. In the EU case, no further penalties are imposed. There can still be a cost from reputational damage which may harm economic relations. With the USA and Canada, penalties can be imposed in the form of a fine which can then be spent on the means to improve labour practices (for example, by training or developing a labour inspectorate). Alternatively, favoured more by the USA as a last resort, trade sanctions can be imposed. This logically is less general as it is limited to cases that involve traded goods. As indicated below, the issue of enforcement has been hotly debated.

1.4 The impact of labour provisions

Notwithstanding these differences, a common conclusion has been that labour provisions achieve little or nothing. Statistical regression, comparing the presence of labour provisions in a country's agreements with subsequent changes, can suggest some improvements in laws but not as yet in outcomes for employment conditions (Smith et al. 2020: 44-6). One study confirms the absence of any significant statistical link between countries with labour provisions in trade agreements and a range of labour market outcomes, although it does show a link with higher rates of female employment (ILO 2016). However, there is no reason to assume any causality in this case, in either direction. Countries with high female participation, such as many EU members, are precisely the kind of countries that would welcome labour provisions in trade agreements.

Evidence of any impact becomes even weaker when individual cases are examined. Positive results, at least in terms of legislation, are most likely when labour provisions are made conditions for signing an agreement or when a new government wants to undertake reforms and is seeking international advice for its next steps.³ In general, as shown by analysis of negotiating processes (Smith et al. 2020), the picture is of negotiators not pressing labour issues and accepting partners' good faith when some promises have been extracted. After agreements have been signed, labour issues are similarly not given high priority by governments who prefer not to disrupt good commercial, or political, relations. The contrast is obvious with the strength of provisions protecting commercial interests and the vigour with which they are pressed. A conclusion typical of

3. Examples cited in Myant 2017.

thorough investigations, as reached from an assessment of one case, is that ‘the EU’s impact in promoting labour rights through its trade agreement with Peru has been non-existent’ (Orbie et al. 2017: 9).

The EU’s ‘soft’ approach – favouring diplomacy, avoiding confrontation and eschewing, until very recently, use of the dispute procedure – has been contrasted with the USA’s reserve power of sanctions. In fact, the USA has also been more willing to initiate disputes. An ILO publication listed only 52 examples of activation of dispute procedures up to 2019 (ILO 2019: 55). One was initiated by the EU and one by Canada, while the remainder were under agreements involving the USA, 42 being under the NAFTA agreement with Canada and Mexico. There have been marginal benefits from some of these disputes (Myant 2017: 47), but nothing to solve the enormous problems of workers’ rights in Mexico, as covered below, or, for that matter, in the USA.

The first case of arbitration by a panel of experts was the culmination of a dispute between the USA and Guatemala. This began in 2008 after the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) and Guatemalan trade unions complained over the denial of rights of free association and the Guatemalan government’s failure to enforce labour inspections, including the absence of penalties on violators of laws. The panel’s judgement, finally reached in 2017, was that Guatemala had not breached the clause in the FTA that stated ‘A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties.’⁴ The judgement was based on an examination of a number of cases concerning particular employers and concluded that there had been cases that would fit with parts of this definition. However, there were none that could be proven both to have had an effect on trade and to be demonstrably more than individual cases so as to satisfy the ‘sustained or recurring’ criterion. The case was therefore rejected and Guatemala was not required to pay a fine that could have been used to improve its employment practices.

This judgement was important in the USA in confirming the weaknesses in the phrasing of previous trade agreements. It was used in the EU in a discussion initiated by the European Commission (2017) as grounds for not changing its FTA model to one that included sanctions on the grounds that the latter appeared to be unworkable. The argument was somewhat disingenuous because the EU’s model had not brought obvious successes, because the wording of EU agreements, as was to become clear in the case of Korea, was significantly different to that in US agreements and because the US model could be, and has been, modified. However, the European Commission’s final report on the discussion (European Commission 2018) concluded with the observation that there was no consensus for change and the majority of voices were for continuing with the existing model. Dissenting voices from the European Parliament, the European Trade Union Confederation (ETUC) and others were acknowledged with a commitment to be ‘more assertive’

4. http://www.sice.oas.org/TPD/USA_CAFTA/Dispute_Settlement/final_panel_report_guatemala_Art_16_2_1_a_e.pdf (p. 201)

and that, should quiet diplomacy not bring results, ‘dispute settlement proceedings should be launched without hesitation’ (European Commission 2018: 8).

This promise reflects a gradual change. Trade policy has become a higher profile issue under continuing public scrutiny both in the EU and in the USA. Abuse of labour rights in other parts of the world are also clear to those who are looking, investigated through the ILO and given greater public profiles by a number of non-governmental organisations (NGOs) and international trade union organisations. The cases discussed below give grounds for hope that linking trade policy to workers’ rights can bring results. It remains to be seen how transformative these results will be. It also remains to be seen whether the USA and the EU, both subject to criticism for failure to respect basic workers’ rights, can be persuaded to mend their ways too.

Table 1 introduces the five cases in terms of per capita GDP, measured by purchasing power parity (PPP), and the International Trade Union Confederation (ITUC) assessment of workers’ rights developed from responses to a complex questionnaire sent to national union organisations. The former shows that, apart from Korea, all are significantly below the economic level of the world’s richer countries. Uzbekistan is the furthest behind but Mexico also appears to have a long way to catch up with the USA. The ITUC’s Global Rights Index shows that no country has a perfect record. The best cases in the world are nearly all EU member states but some EU members have been rated very badly, hit by changes imposed after the 2008 financial crisis. The ratings are fairly stable between years, but Vietnam and Mexico have both improved over the period covered below. Uzbekistan has not been included in the survey results.

Table 1 Per capita GDP, current international US dollars, PPP, 2019; and ITUC Global Rights Index, 2019

	GDP	ITUC Global Rights Index
USA	65,279	4
EU	46,496	1-5
Korea	42,728	5
Mexico	20,448	4
Georgia	15,623	3
Vietnam	8,381	5
Uzbekistan	7,310	na

Source: <https://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD>;
<https://www.ituc-csi.org/IMG/pdf/2019-06-ituc-global-rights-index-2019-report-en-2.pdf>
 Note: The index scores are 1. Sporadic violations of rights; 2. Repeated violations of rights; 3. Regular violations of rights; 4. Systematic violations of rights; 5. No guarantee of rights.

2. Uzbekistan

2.1 Introduction

Uzbekistan is a former Soviet republic, doubly landlocked in central Asia. The great bulk of its international economic contacts have been with neighbouring central Asian states, Russia and China. An application for WTO membership in 1994 was rejected: the state's role in business, as part of a development strategy based on import substitution and export promotion, was judged incompatible with WTO rules. It was also criticised for the systematic use of forced and child labour.

Uzbekistan is an important case because persistent international pressure, including sanctions applied to some exports, appears to have been important in encouraging steps towards the elimination of these practices. Part of the motivation within Uzbekistan was the hope that international acceptance could improve economic prospects.

Important changes followed the death of President Islam Karimov in 2016 and the subsequent election of Shavkat Mirziyoyev, who hoped to reduce the country's international isolation, improve its human rights image and develop a new economic strategy. Negotiations were reopened with the WTO in 2020. This shift in orientation set the context for a possible new approach to labour rights. At that point, the central rights affecting economic relations with other parts of the world were forced and child labour, especially in the annual cotton-picking harvest. These have now been dramatically reduced, albeit not completely eliminated, and international pressure has clearly been crucial to the change.

In formal terms the Uzbek authorities had already recognised the importance of employment rights. The country joined the ILO in 1992 and had ratified seven Fundamental Conventions by 2009 with No. 87 on freedom of association following in 2016. This last act formally implied breaking the monopoly of the single trade union organisation inherited from Soviet times, the FTUU (Federation of Trade Unions of Uzbekistan), which claimed 5.5 million members out of a working population of 13.3 million. It has been judged not to be independent of the government, as indicated below, and appears to have been complicit in organising forced and child labour.

2.2 Economic development

A reduction in international isolation promised significant economic benefits. Growth after 1995, following the sharp decline associated with the breakup of the Soviet Union, was quite rapid with per capita GDP increasing at an annual rate of 4.2 per cent from 1995 to 2020, using constant 2010 prices.⁵ However, this has been associated with remarkably little technological modernisation or structural transformation such that industry and construction still accounted for 31 per cent of GDP in 2019 against 33 per cent in 1990. Agriculture's share fell from 33 per cent to 25 per cent over the same period with the remainder accounted for by services.⁶

Economic development remains semi-autarkic, with exports equivalent to 28 per cent of GDP in 2019, as was also the case in 1990. Almost all are primary products sold overwhelmingly to China, Russia and the neighbouring landlocked countries. Manufacturing exports are largely an extension of import substitution policies rather than the result of a conscious incorporation into global value chains. Thus, a motor vehicle industry started with the assembly of Daewoo cars, taken over by General Motors in 2001. There were significant sales for a few years to Russia, but the share of motor vehicles in Uzbek exports declined from 10 per cent in 2006 (Myant and Drahokoupil 2008: 614) to 1 per cent in 2019.⁷ The industry is also heavily dependent on imported parts, 68 per cent from South Korea, contributing to a heavily negative external balance for this sector. Overall, manufactured goods are of declining importance in exports after small beginnings with the EU and USA have seemingly led nowhere. Even cotton, a key activity inherited from Soviet times, declined in importance from 31.1 per cent of exports in 2000 to only 7.4 per cent in 2019, partly reflecting the labour problems referred to below. The biggest item in Uzbekistan's exports in 2019 was gold, rapidly increasing to account for 29.2 per cent, but still leaving a deficit on goods and services that reached 16.0 per cent of GDP in 2019. Personal remittances from Uzbeks working abroad are essential for maintaining external balance.⁸

A new government growth strategy from 2017 onwards sought to find ways to benefit from international integration. Doubling gold production was a first priority⁹ and that was seen as needing inward investment and expertise from established mining companies. Further inward investment was sought to develop activities linked to existing raw materials, moving more into downstream activities. Priorities were set as mining, cotton processing and the refining and transportation of oil and gas. The first results showed a big rise in inward foreign direct investment (FDI) in 2019, dominated by Russian companies such as Lukoil in the oil and natural gas industries, plus Chinese and other Asian firms. There

5. Calculated from the World Bank database, <https://data.worldbank.org/>

6. Calculated from the Uzbek national accounts database, <https://stat.uz/en/official-statistics/national-accounts>

7. All recent trade data are calculated from the Comtrade database, <https://comtrade.un.org/data>

8. World Bank estimate, using IMF balance of payments data, <https://data.worldbank.org/indicator/BX.TRF.PWKR.CD.DT>

9. <https://resourceworld.com/uzbekistan-aims-to-become-one-of-worlds-largest-gold-producers/>

have also been plans to focus industrialisation on 21 newly-established special economic zones, aimed at attracting inward investment for which various further incentives are offered (UNCTAD 2020: 69). The total stock of inward FDI in 2019 was still very low by international standards, equivalent to 16.6 per cent of GDP with that classified as greenfield investment equivalent to only 8 per cent of GDP.

The low level of international integration has set the context for Uzbekistan's response to criticisms of its labour rights record which have focused on cotton production.

2.3 Employment practices in cotton

Cotton production developed in Soviet times with the great bulk used in textile industries elsewhere in the USSR. Harvests continued to be organised in essentially the same way after the break-up of the Soviet Union. The details of employment practices were revealed with increasing clarity by human rights organisations and campaigners and in even greater detail from 2013 when the ILO was able to undertake systematic inspections with a degree of independence from the Uzbek authorities.¹⁰

All land remained nationalised with leases of up to 50 years granted to farmers who were required to fulfil production quotas set down by state authorities. All output was sold to a state buying agency for a predetermined price and then sold on, mostly for export, providing a substantial source of state revenue. The farm population did not provide enough labour for harvest periods and mechanisation was very limited, with an estimated 90 per cent of cotton picked by hand. To ensure adequate labour, quotas for numbers of workers were passed down a chain of command to factory managers, hospital administrators and others. Employees were then sent to the fields to fulfil individual quotas, facing punishment if they failed. Schools were shut down over several weeks and 11-17 year-old children mobilised, according to investigations by the ILO, UNICEF and others, often undertaking hard and hazardous work and typically supervised by teachers.¹¹ The exact numbers involved in these forms of forced labour are unclear – the Uzbek authorities never published any data on this – but the practice was clearly widespread and systematic with estimates of up to 1.5 million children involved.¹² Some forced to work may have received payment, but that was often not the case.

Slavery and child labour are not uncommon elsewhere in the world, but what made Uzbekistan – and also Turkmenistan – particularly remarkable was the scale and the clear complicity of the state at all levels, even after Uzbekistan had ratified ILO conventions against child labour and its 2009 labour code had set a minimum age of 16 for full-time and 15 for part-time employment.

10. http://www.ilo.ch/dyn/normlex/de/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2700710

11. http://www.ilo.ch/dyn/normlex/de/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2700710

12. Ibid.

Prior to that, reports from inside Uzbekistan – inevitably limited owing to state control over information – began to stimulate concern among human rights campaigners and trade unions outside the country. From 2007 the Washington-based Cotton Campaign publicised conditions, supported Uzbek civil society, made approaches to the Uzbek authorities and sought to persuade governments, companies, investors and international institutions also to put pressure on the Uzbek government.¹³ Over time, it reported that 270 brand-name retailers had committed to avoiding Uzbek and Turkmen cotton although it is unclear how successful businesses were in identifying the source of cotton used in imported garments. In 2010 the US Department of Labor added Uzbek cotton to its catalogue of goods produced with child labour, severely restricting imports. This was an issue over which the USA could impose trade sanctions.

ILO involvement was crucial because of its status as a thorough and objective authority that could be used to justify business sanctions. It received a clear and detailed complaint from multiple international trade union organisations in November 2010 but faced obstruction in its attempts to monitor the application of the ILO conventions that Uzbekistan had ratified. Allegations of widespread forced labour were dismissed by the Uzbek government as ‘an unfounded attempt by foreign actors to undermine the reputation of Uzbek cotton in the global market,’¹⁴ repeating in May 2011 ‘that various false insinuations and fabrications by certain biased foreign enterprises and organizations’ about coerced child labour were ‘aimed at undermining the high rating of Uzbekistan’s agricultural produce, especially cotton, in foreign markets.’¹⁵

International pressure included the European Parliament in December 2011 postponing consent to the inclusion of textiles in a partnership and cooperation agreement. Approval was granted in 2016 after an ILO report in 2015 concluded that child labour had been virtually eliminated, that having been set as the condition (European Parliament 2013: 20). The World Bank, following complaints from Uzbek victims of forced labour in 2013, threatened to pull its loans unless the ILO could monitor conditions and confirm the end of child and forced labour.¹⁶ Pressure was added by the UN Human Rights Committee.¹⁷ In response, the Uzbek government ended its policy of forcibly mobilising children nationwide and in 2014 it committed to work with the ILO to apply international labour standards, including the prohibition of forced labour.

This more cooperative approach towards the ILO was confirmed under President Mirziyoyev with the gradual, and sometimes inconsistent (Schweisfurth 2020), development of a programme for the permanent elimination of forced labour from the cotton harvest. This included higher pay for cotton pickers, so as to

13. <http://www.cottoncampaign.org/>

14. <https://archive.crin.org/en/library/publications/uzbekistan-childrens-rights-international-labour-organisation-reports.html>

15. http://www.ilo.ch/dyn/normlex/de/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2700710

16. <https://documents1.worldbank.org/curated/en/276581468316481146/pdf/926800INVR0P10030Box385366B00OUO090.pdf>

17. <http://www.cottoncampaign.org/blog/archives/07-2015>

attract more voluntary labour, stronger enforcement by labour inspectorates and a reorganisation of production around private companies which were not tied to the state administration structure. The numbers needed for the harvest reduced massively, from 3.4 million in 2015 to 1.75 million in 2019, overwhelmingly because of reduced output while productivity barely increased (ILO 2020: 5).

The ILO, able for the first time in 2019 to use Uzbek civil society organisations to conduct telephone surveys of several thousand cotton workers, concluded that 94 per cent had been freely recruited in 2019 and 96 per cent in 2020 compared with 86 per cent in 2015 (ILO 2021: 5). There were still cases of local officials continuing with past practices, forcibly recruiting in one case 2,890 firefighters.¹⁸ However, these appeared not to have been formally approved from above, since laws had been passed (including a decree in March 2018 aimed at completely ending forced labour) and pressed from the top, while the total number suffering coercion had declined. The ILO was able to conclude in 2019 that ‘systematic forced labour has come to an end’, repeating the same verdict in 2020 (ILO 2020; ILO 2021).

The positive noises from the ILO encouraged the US Department of Labor in March 2019 to remove Uzbek cotton from its list of goods produced with forced child labour on the grounds that it continued only as ‘isolated incidents.’¹⁹ Some business representatives argued that all was now resolved, or well on track for being resolved, so that all boycotts of garments made from Uzbek cotton by private companies should come to an end.²⁰ This may represent an over-optimistic verdict. Other investigations continued to find widespread cases of people being coerced into cotton picking with state officials clearly involved. International pressure and trade sanctions had greatly reduced the extent of forced labour, but even the numbers revealed by the ILO’s surveys confirmed that past practices had not been completely eliminated, despite the active measures taken following ILO advice (Schweisfurth 2020).

As of March 2020 production was organised into vertically-integrated ‘clusters’ intended to bring together cotton production and processing. These were essentially private companies, with only one in a district, that were forced to buy from local farmers. They could also take over land, such that former farmers were converted into wage labour, and undertake production themselves.

The structure appealed to the authorities as it could be used to attract inward foreign investment and, as sizeable private entities, new companies could attract finance from the European Bank for Reconstruction and Development (EBRD) and the International Finance Corporation (IFC). The danger was that abusive government control was being replaced by a private model with the potential for new forms of abuse, including coerced transfers of land into the hands of private companies and unstable employment for those seeking wage work, all in a context of

18. <http://www.cottoncampaign.org/a-changing-landscape-in-uzbek-cotton-production.html>

19. <https://www.rferl.org/a/u-s-lifts-uzbek-cotton-ban-child-labor-educed-/29845439.html>
<https://www.federalregister.gov/documents/2019/03/25/2019-05360/notice-of-final-determination-to-remove-uzbek-cotton-from-the-list-of-products-requiring-federal>

20. <https://foreignpolicy.com/2020/03/28/international-cotton-boycott-uzbekistan/>

ineffective employee representation through trade unions and limited monitoring by a weak civil society. Ownership structures of these cluster companies also often remain very obscure and many owners may have close links to state officials, facilitating the continuation of past practices (Schweisfurth 2020).

2.4 Independent trade unions

The new organisational structure for cotton production, ostensibly aimed at removing pressures for forced labour, has indeed brought forward new labour issues. The potential for effective trade union representation is uncertain. The FTUU has a poor record, having at best closed its eyes over many years to the abuses of child and forced labour and it has been accused of electing government officials and employer representatives into its leadership (ILRF 2017). It applied for affiliation to the ITUC but in 2015 was given only associate status, a kind of probation period, which was reviewed in 2017 after a visit by an ITUC delegation. Meetings were rather formal and difficult with the delegation concluding that ‘the FTUU is not an independent organisation’. The leadership appeared to be ‘rather conservative’, but it was judged valuable to maintain cooperation so as to keep in contact with some more promising individuals at lower levels.²¹

A very small number of reports have been made of attempts to form independent trade unions which in the past had led to imprisonment (EPSU 2020). Formally speaking this should not continue after changes to the legal framework following the ratification of the ILO Convention on freedom of association. This was put to the test in March 2021 in Indorama Agro, the Uzbek subsidiary of a Singapore-based multinational which acquired a 49-year lease on 54,000 hectares of land, with existing cotton farmers being ‘reallocated on a voluntary basis’, while it also had contracts to buy output from farmers on a further 23,000 hectares.²² Its plans for the modernisation of production are backed by loans of \$130 million from the EBRD and the IFC to enhance economic inclusion, especially for young people and women in rural areas.²³ It has a record of activity in Uzbekistan since 2010, although this includes a complaint made in August 2016 from a group of NGOs that it was using coerced labour in a textile factor receiving IFC finance: that issue was finally resolved in 2020.²⁴

On 19 March 2021 around 280 workers (out of a reported total of about 3,200) from its cotton farm founded People’s Unity, an independent union, complaining of low wages and deteriorating working conditions. There had been previous protests when employees were laid off without payment of accrued wages and when others had been switched from permanent contracts to three-month contracts, meaning also loss of rights to sick pay, pensions and compensation for overtime.²⁵ The new

21. https://www.ituc-csi.org/IMG/pdf/17gc_e_05_-_affiliation_annex_v.ii_annex_a_secretariat_report_uzbekistan.pdf

22. https://www.indorama-agro.com/files/ENG_Project_leaflet.pdf

23. <https://bankwatch.org/blog/indorama-agro-workers-are-fighting-to-register-the-first-independent-trade-union-in-uzbekistan>

24. Office of the Compliance Advisor/Ombudsman: <https://www.cao-ombudsman.org/>

25. <https://www.rferl.org/a/uzbekistan-trade-union-agricultural-workers/31172316.html>

union received international encouragement, but complained of harassment and obstruction from the local authorities and from the FTUU, whose officials pressed strongly that its members had no alternative to joining the FTUU. Registration, required for legal status as a trade union, is difficult for all independent NGOs with the relevant authorities good at imposing arbitrary administrative barriers. The members of the new union have reportedly agreed to affiliation to the FTUU.

This Uzbek story is clearly unfinished. It shows that the threat of trade sanctions can have an impact on a country that is seeking to break out of economic semi-isolation. However, forced and child labour are only some of the abuses of labour rights; others are likely to become more apparent should Uzbekistan achieve greater integration into global value chains.

3. Vietnam

3.1 Introduction

Vietnam is an authoritarian state with the Communist Party of Vietnam holding a monopoly of political power. The only permitted trade unions are organised under the Vietnam General Confederation of Labour (VGCL) which is required to implement the party's line and policies.²⁶ The country has been criticised, among others by Amnesty International, the AFL-CIO and the ITUC, for repeatedly suppressing opposition activists, for stifling independent employee representation and for widespread abuses of labour rights.²⁷ Labour laws have provided some protection for employees, but even they are often poorly enforced with employers finding the means to ignore or circumvent them.

The negotiation of two recent trade agreements has been associated with apparently big changes in Vietnamese employment law. These are the EU-Vietnam free trade agreement (EVFTA), signed on 30 June 2019; and the Trans-Pacific Partnership (TPP) signed, after the withdrawal of the USA, on 8 March 2018 as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and ratified by Vietnam on 12 November 2018. The involvement of the USA had given strength to a requirement for changes to labour laws indicating some possible scope for independent trade union activity.

3.2 Vietnam's economic development

Vietnam has been praised in the publications of international agencies for a rapid and sustained transformation matched in recent decades only by that seen in China (World Bank Group 2016; Baum 2020). Annual growth in GDP averaged 5.6 per cent between 1988 and 2019, accompanied by poverty reduction and relatively low and stable levels of inequality. From being one of the poorest countries in the world, it has become 'the envy of developing countries around the world' (World Bank Group 2016: 1). Acceleration followed the so-called Doi Moi (renovation/innovation) reforms initiated in 1986 which aimed to create a 'socialist-oriented market economy'. Reforms included a gradual relaxation of central controls allowing a growth in private enterprise that accelerated after 2000. There was no

26. <https://web.archive.org/web/20110721171935/http://www.congdoanvn.org.vn/details.asp?l=1&c=36&c2=36&m=207>

27. https://aflcio.org/sites/default/files/2017-03/1628_TPPLaborRightsReport.pdf
<https://survey.ituc-csi.org/Vietnam.html?lang=en#tabs-3>

rush to accept World Bank advice on privatisation in full and economic growth was predicated on high levels of state investment in infrastructure, notably electricity, alongside rising state spending on health and education. A crucial element in economic transformation was an opening to inward investment from 1987 onwards, including progressively more favourable conditions for incoming firms, such as generous terms for taxation and profit repatriation and the construction of specialised industrial zones targeting investment in particular sectors.

Incoming multinationals have been attracted by Vietnam's very low wage rate. The minimum wage in 2019 was quoted to potential investors as between \$132 and \$190, around half the level in China. Publicity for one industrial zone (albeit undated) included a figure of \$59 for the average wage actually being paid.²⁸ Investors are predominantly from other Asian countries with the largest share in cumulative investment between 1988 and 2019 being taken by South Korea, at 18.2 per cent (followed by Japan – 15.7 per cent; Singapore – 14.7 per cent; China and Hong Kong – 11.6 per cent each; and Taiwan – 9.3 per cent). The USA accounts for only 2.4 per cent (GSO 2020: 279). These firms are overwhelmingly involved in manufacturing and have been the principal source of a rapid growth in exports which reached the equivalent of 100.9 per cent of GDP in 2019 (GSO 2020: 649) of which 86.0 per cent was from manufacturing industry. The main export markets are the USA (23.2 per cent), the EU and China (both 15.7 per cent) (GSO 2020: 631). By way of contrast, the biggest sources of imports, mostly materials and components, are China (29.8 per cent) and South Korea (18.5 per cent). Foreign-owned companies have the highest productivity (8.7 per cent of employment and 22.6 per cent of GDP) and are the leading force in international integration, accounting for 71 per cent of exports.

Vietnam has become an assembly base for exports into the world's high-income economies with low-wage production moving from other Asian countries in search of still lower wages. Garments and footwear together accounted in 2019 for 19.3 per cent of exports, much of it to precisely specified designs and using imported materials. The potential for further expansion of these activities is described as 'near unlimited'²⁹ in view of Vietnam's substantial continual labour reserves in unproductive agricultural activities. Electronic goods accounted for another 33.4 per cent of exports with investment by Samsung putting Vietnam in second place behind China as an exporter of mobile phones with 12.8 per cent of total world exports in 2019. Domestic value added in electronic goods as a whole has been estimated at around 30 per cent of final value (World Bank Group 2016: 42), the rest coming from the materials and components imported predominantly from China and South Korea.

There could be substantial potential for expansion of these activities, especially should trade agreements make exporting even easier. A possible constraint, however, was the country's reputation in human rights and employment practices.

28. <https://www.vietnam-briefing.com/news/vietnams-electronics-industry-guide-emerging-opportunities.html/>

29. <https://www.cosmosourcing.com/blog/how-to-find-shoe-manufacturers-in-vietnam-top-10-footwear-suppliers-and-factories-in-vietnam-list>

Conditions were particularly bad in smaller domestic-owned firms, some subcontracting from multinationals, and in 2012 the USA added garments from Vietnam to its list of products made with forced and child labour.³⁰

3.3 What Vietnam gains from FTAs

The core elements of the EVFTA and the CPTPP are essentially similar. Tariff barriers will be almost totally eliminated after adjustment periods, non-tariff barriers to trade in goods will also be reduced and access for businesses in services and government contracts will be greatly eased. Both agreements were negotiated with provision for a form of ISDS and both contained commitments on employment conditions and rights.

A number of studies have been published estimating the effects of the agreements based on the standard Computable General Equilibrium (CGE) method which uses estimates of the effects of reduced trade barriers on changes in export volumes. Although this method is based on very approximate estimates of increases in exports and imports, and may overlook some of the costs, and also benefits, of an FTA (Myant and O'Brien 2015), the results in terms of gainers and losers appear plausible.

Vietnam was shown to gain from TPP more than any other country, with GDP increasing in one estimate by 8.1 per cent after 15 years while the USA would gain by only 0.5 per cent (Petri and Plummer 2016). A subsequent World Bank study put Vietnam's gain from TPP at 6.6 per cent of GDP but only 3.5 per cent from CPTPP (World Bank Group 2018: 64). The key source of the gains taken into account by these studies was reduced tariff and non-tariff barriers for garments and footwear, estimated at equivalent to tariffs of over 20 per cent (World Bank Group 2018: 59), while other exports already faced little by way of barriers. For the USA there was very little gain in terms of exports and GDP, but some US businesses stood to gain greatly from greater certainty of copyright and patent protections, as well as from easier access for financial and other services companies.

Vietnamese industrial expansion would not take jobs from US workers should TPP be revived, but it would compete with exports from other low-wage countries, notably Bangladesh, where labour was slightly cheaper.

3.4 The industrial relations background

Under Vietnam's legal framework, trade unions are organised in the VGCL which claims to have over 10 million members out of a working population of 54.7 million and a total of 25.9 million waged workers. Union membership is not automatic and union organisations are not present in all foreign-owned enterprises. The

30. https://www.workersrights.org/wp-content/uploads/2016/02/WRC_Vietnam_Briefing_Paper.pdf

1994 Labour Code gave management the responsibility to ‘facilitate the early establishment of trade union organizations’ (Van Gramberg et al. 2013: 252) and workplace organisations are typically closely tied to management, frequently being run by the company’s HR manager and other management figures. Even when this is not the case, they cannot meet without management representatives being present. There is a legal framework for collective agreements, but these generally repeat existing legal protections. Union organisations have been criticised for being concerned mostly with social activities while the national trade union leadership has itself complained of the very weak negotiating skills of union representatives.³¹ Outside workplaces, the VGCL offers no opposition to the government, but it can take independent positions on specific policy issues and it does provide information on labour issues, including wages and strikes.

Strikes are formally legal but take place under very strict conditions. They need to be associated with the negotiation of collective agreements. Failure to resolve an issue internally then needs to go through a complex conciliation process and, in enterprises with over 300 employees, 75 per cent of all employees need to be in support for a strike to be legal. Not surprisingly in view of these constraints, there are no reports of legal strikes. However, many strikes do take place, information for which is provided in the Vietnamese media, in the reports of international agencies and in academic publications (Raj-Reichert and Plank 2019; Van Gramberg et al. 2013; Worker Rights Consortium 2013; Anner 2017; Van Tran 2019).

Reported strikes are overwhelmingly concentrated in foreign-owned companies – 80 or 90 per cent, according to different sources – with disproportionately high numbers in South Korean and Taiwanese firms, half of the former experiencing at least one strike in the 2010-2013 period (Anner 2017: 24). The number of strikes as reported by the VGCL shows several hundred every year with a peak of over 900 in 2011. They often involve several thousand workers, sometimes with coordination across workplaces, but they are typically short, lasting only a few days. The pressure on managements to meet tight delivery conditions means that concessions are usually rapid. The absence of formal means of employee representation to counter authoritarian managements means that strikes are the only, but also a very effective, way of being heard.

Organisers of these strikes face victimisation and activists attempting to promote independent trade unions have suffered imprisonment. In fact, their involvement in organising strikes has been reported only exceptionally (Buckley 2021: 89). Instead, strikes typically have no formal organisation, leaders or spokespersons. There is typically an igniting cause, but strikes also reflect continuing underlying grievances. A common complaint is pay which is below the living minimum in garments and footwear, according to trade union calculations, albeit somewhat better in electronics. Strikes are also frequently provoked by arbitrary management acts that are in conflict with employment law, including imposing arbitrary financial penalties on workers; insisting on extra overtime without notice; failing

31. <https://en.vietnamplus.vn/trade-union-executive-boards-to-receive-training-in-salary-negotiations/155917.vnp>

to pay wages that have been earned; circumventing women's right to maternity benefits; and physical brutality. In one notorious case in 2012 a supervisor in a Taiwanese-owned factory which was supplying shoes for Nike superglued an employees' hands together. The following strike led to the suspension of the supervisor but he did not face criminal charges (Worker Rights Consortium 2013: 8-9).

Once a strike has started, VGCL officials, government representatives and the police typically arrive but their role is effectively to mediate in an effort to find a speedy solution. Workers' demands almost always being met in part or in whole, including pay for the time spent on strike, on top of the media reports, clearly indicate to employees that they are an effective weapon. This is despite official discouragement and concern, in the words of one HR consultant, that 'reporters sometimes see their role as reporting strikes in the heroic light of worker success' (Van Gramberg et al. 2013: 260).

Strikes are viewed with concern by the authorities although often with a failure to understand their causes beyond blaming strikers for not using formal consultation procedures (Vu and Tran 2021: 6). Nevertheless the authorities reasonably fear that widespread worker militancy could presage an alternative trade union movement posing a direct threat to political power along the lines of Solidarność in Poland in 1980-1. At a more mundane level strikes are embarrassing to a regime that attracts inward investment sometimes with the explicit promise of good labour relations. They are also a clear demonstration of the inadequacy of formal labour representation and that could hamper the negotiation of FTAs to improve export prospects.

From 2009, the ILO Better Work Vietnam project, in cooperation with the VGCL, promoted the formation of consultative committees at factory level with equal representation of workers and managers. Their aim, as explained and discussed by Anner (2017), was to improve workplace cooperation and working conditions, but one difficulty was that employee representatives, apart from being poorly prepared and informed, were nervous of raising immediate grievances and holding management to account without the backing of a strike. A full solution would require much more radical change.

3.5 The impact of TPP

TPP³² was negotiated between 12 countries, including Vietnam and the USA, and signed on 4 February 2016. The USA withdrew in January 2017, as decided by President Trump but also following doubts, criticism and opposition across much of the US political spectrum. The resulting CPTPP followed almost the whole text of the TPP agreement, albeit excluding some specific US demands such as extended and enhanced patent protection for pharmaceutical products. The

32. <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents>

chapters on labour and dispute resolution remained unchanged but an important side agreement on labour issues between the USA and Vietnam ceased to apply.

The main text follows standard US thinking of the time, as set out above in Section 1. Potentially more powerful was the separate United States – Viet Nam Plan for the Enhancement of Trade and Labour Relations, reached also in February 2016.³³ Vietnam thereby agreed to allow for the creation of ‘a grassroots labour union’ within a workplace which was not subordinated to the VGCL, had the same rights as the official union and could link up with similar organisations in other workplaces and develop international contacts. There were to be further changes ensuring that all union officials were elected by the membership. Other issues addressed were criminal sanctions for forced labour – by then recognised by the Vietnam authorities as a problem linked to drug rehabilitation centres – and a strategy for its elimination. Discrimination law was to be amended and the labour inspectorate improved for which the USA offered to help finance ILO technical assistance. All of this was subject to a timetable while a failure to comply, following consultation and mediation, could result in the USA withholding the progressive tariff reductions scheduled in the main agreement.

This appeared to be ‘a complete labor game-changer in Vietnam’ (Trang and Bales 2017: 74), opening up discussion on fundamental labour rights in which prominent academic and government figures wrote on the need to amend existing legislation. This influenced the first drafts of a proposed new labour code in 2016, but the 2017 versions – when pressure from the USA was clearly abating – included restrictions on the new independent unions, limiting their potential impact on the existing political system. International pressure was thereafter a matter for the EU.

3.6 EVFTA

The EVFTA was presented from the EU side as ‘the most ambitious and comprehensive one that the EU has ever concluded with a middle-income country’ (Delegation of the European Union to Vietnam 2019: 6), with labour standards included in a ‘robust, comprehensive and binding chapter on trade and sustainable development’ (Delegation of the European Union to Vietnam 2019: 58). In fact, EVFTA broadly followed EU practice in terms of the framework for civil society consultation and for the referral of issues of dispute to a panel of experts with, ultimately, no provision for sanctions.

EVFTA differed from CPTPT in including ratification of the ILO Fundamental Conventions, albeit only requiring ‘continuous efforts’ in that direction (Navarsatian 2020). It also did not include a number of elements that were already appearing in the draft EU-Mercosur FTA regarding decent wages, safety and health at work, effective labour inspections and access to legal proceedings if labour standards are violated. There was also no analogy to the US-Viet Nam

33. <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labor-Relations.pdf>

Plan for the Enhancement of Trade and Labour Relations requiring action from Vietnam before trade barriers were reduced. To some extent, internal EU politics provided a partial substitute. Opposition to ISDS which, under EU rules, would require ratification by each member state meant that investment was separated out.

Doubts over the FTA, in view of Vietnam's human rights and labour standards record, were pressed by NGOs, the ETUC and others and through the European Parliament, which passed a resolution on 5 July 2016 asking for sanctions to be considered as a last resort.

The European Parliament ratified the EVFTA in February 2020 and it was then ratified by Vietnam's National Assembly on 8 June 2020.

3.7 What has been achieved?

By the time the European Parliament had approved the EVFTA, Vietnam had ratified ILO Convention No. 98 on the right to organise and collective bargaining and Convention No. 105 on the abolition of forced labour. It also promised ratification of Convention No. 87 on freedom of association and protection of the right to organise in 2023, by which time it would have accepted all the eight Fundamental Conventions. The new labour code came into effect in January 2021 including provision for 'grassroots worker representative organisations' at enterprise level (Buckley 2021: 84).

These are not the same as trade unions and the new law does not specifically allow them to grow beyond a single enterprise. They do not have the right to be involved in political or policy debates and, unlike VGCL, they do not receive state support. Their registration can be withdrawn if they are judged to have broken the law. This could be a serious limitation in view of Vietnam's strike laws, its repressive political system and the continuing harassment of activists and civil society organisations. Indeed, the absence of wider political change threatens the relevance of the system of civil society consultation proposed under the EVFTA.

The negotiation of trade agreements has encouraged changes in Vietnam's legal framework but there is still some way to go both in terms of formal laws and, above all, in changing actual practices and conditions for workers.

4. Korea

4.1 Introduction

The EU-Korea FTA, which came into effect on 1 July 2011, was the first of the so-called ‘new generation’ EU trade agreements, covering issues well beyond those included on the WTO’s agenda. Among these was a commitment to respect the ILO Fundamental Conventions, contained within a chapter on sustainable development. Korea had a bad record in this respect, joining the ILO in 1991 but only ratifying four of the eight Fundamental Conventions by 2021. It continued to resist even after signing the agreement with the EU and has been subject to repeated condemnations from the ILO for its failure to observe workers’ rights. For some time the EU appeared reluctant to pursue this through the available dispute procedure but finally pressed the issue, leading to the establishment of an expert panel which, reporting in January 2021, upheld much of the criticism.

This was important from a legal point of view (Novitz 2021) in demonstrating that the dispute procedure could be applied even when there was no demonstrable effect on trade. It was also important in showing that the EU could be persuaded to use the powers at its disposal. Finally, it was important in demonstrating that the verdict reached could have an impact within Korea as it was followed by ratification of three of the remaining four Fundamental Conventions. The significance of the judgement should not be exaggerated, however: it was only one part of a process that required a broad and persistent battle for respect for workers’ rights, undertaken by Korean trade unions with support from international agencies and international trade union organisations.

Korean governments were committed to signing FTAs from the early 2000s and this became a centrepiece of the strategy of the 2008-2013 government (Smith et al. 2020: 86), leading to the establishment of agreements with over 70 per cent of the global economy. Rapid economic growth had brought per capita GDP, measured by PPP, close to the EU average level.³⁴ Exports reached the equivalent of over 50 per cent of GDP in 2012, declining somewhat in later years, with consistently around one-quarter accounted for by electrical equipment, motor vehicles and their components. The EU had become a significant market, accounting for 9.1 per cent of Korean exports in 2011, somewhat less at the time than China (24.2 per cent) and the USA (10.2 per cent).³⁵ However, it was clearly an important base

34. Calculated from World Bank database, <https://data.worldbank.org/indicator/NY.GDP.MKTP.PP.CD>

35. All calculated from Comtrade database, <https://comtrade.un.org/data/>

for the future expansion of goods exports that would be facilitated by an FTA removing the remaining tariffs, which remained significant on motor vehicles, as well as, where possible, harmonising regulatory systems.

4.2 Korean industrial relations

Full international acceptance required overcoming a reputation as an authoritarian state which had experienced periods of military rule. Mass protests, including workers' strikes in June 1987, were followed by a scaling down of authoritarian rule.

Joining the ILO in 1991 and subsequent acceptance into the OECD in 1996 were important steps to international acknowledgment, both accompanied by commitments to ratify the ILO's Fundamental Conventions. In practice, four of the eight were ratified between 1997 and 2001, but governments resisted pressure for the ratification of Nos. 87 and 98, on freedom of association and collective bargaining; and Nos. 29 and 105 on forced labour. The ILO conventions on freedom of association and collective bargaining were seen as inconsistent with the preferred model of employment practice in Korean businesses which included enterprise unions bargaining with one employer and largely restricted to bargaining over wages. Meanwhile, forced labour for prisoners was considered by governments as essential to the penal code, for example in cases of the expression of political opinions judged favourable to North Korea or communism.³⁶

Enterprise unions, and some wider sectoral unions, were organised under the FKTU (Federation of Korean Trade Unions), formally established in August 1961, which pursued a compliant approach towards managements and government, implicitly accepting the principle of 'growth first, distribution later' (Bae et al. 1997: 148). However, its position was challenged through the 1980s, following the rise of large-scale industry, when employers were trying to reduce employees' terms and conditions of employment in the name of greater flexibility. A number of more militant enterprise and sectoral unions emerged, fighting for a voice around the principle of 'strike first, bargain later'. A strike wave reached a peak in 1987 with 1.26 million employees taking part (Bae et al. 1997: 150). In January 1990 a number of these union organisations came together to form the KTUC (Korean Trade Union Congress).

The first of the ILO's many condemnations of Korean labour law followed a complaint in March 1992 from the KTUC, backed by five international union organisations,³⁷ after its inaugural convention had been disrupted by police action and it had been declared an illegal organisation. Among the grounds cited by the government to justify its actions was that the labour law forbade certification where a union organisation covering the same membership already existed. In response, the KTUC submission, backed by 383 pages of documentation and a copy of the

36. https://www.ituc-csi.org/IMG/pdf/ituc_etuc_fidh_amicus_brief_korea.pdf (p. 6)

37. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50001:0::NO::P50001_COMPLAINT_FILE_ID:2896291

Korean labour law, argued that this law ‘instituted a monopoly union system’ at all levels.³⁸ The KTUC was further characterised in the Korean government’s submissions to the ILO as ‘an illegal organisation’ that had led strikes and ‘plotted ultimately to overthrow the national structure’.³⁹ A number of independent sectoral federations were also declared illegal on similar grounds while one aiming to represent public officials was declared illegal since organising rights for these groups of employees were limited by law. The complainants reported that 185 trade unionists had been arrested and 1,500 schoolteachers – forbidden by law from taking collective action – had been dismissed from their jobs. The ILO could not make a judgement, either in this or in later cases, on the contested details of particular events, but it could comment on the undisputed content of Korean labour law which it found incompatible with its conventions.

A further attempt was made in November 1995 to establish an umbrella organisation, this time the KCTU (Korean Confederation of Trade Unions). The Korean government was unmoved by the earlier ILO judgement in respect of the KTUC and the KCTU too was promptly declared illegal. Furthermore, the KCTU president was arrested for statements encouraging a railway workers’ strike in 1994 and its bank account was seized. This action led to renewed complaints to, and condemnations of, the Korean government from the ILO.

The government followed this with new labour law proposals on 26 December 1996 complying with the quest of big business to reduce employment protection. The KCTU responded with a strike call, this time joined by the FKTU although there had previously been no cooperation between the two organisations. Three weeks of strike action by reportedly 100,000 participants were followed by parliament approving somewhat less stringent labour laws, although still including a relaxation of restrictions on the length of the working week to allow a maximum of 56 hours. Key further changes included rescinding the requirement that a new union should not overlap with an existing organisation; accepting that a confederal organisation could play a role in collective bargaining; and accepting that unions could be involved in issues of government policy. In March 1997 the Korean president let it be known that the KCTU would be legalised, although this was only formally confirmed in 2002.

This, however, was still followed by further laws contravening trade union independence; decertification of the teachers’ union in 2013; continued rejection of applications for certification from the government employees’ union; and a massive police raid on the KCTU headquarters on 22 December 2013, allegedly in a search to arrest six leaders of the railway workers’ union.

38. https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2902360

39. https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2902360

Important ongoing issues in the country's labour law⁴⁰ include:

1. The definition of a worker as someone currently employed by a single employer. Only workers so defined are allowed to be union members. This definition deprives independent contractors (ranging in practice from lorry drivers to golf caddies), the unemployed and dismissed employees of their freedom of association and bargaining rights. This, it could be argued, both weakens trade union representation and serves to cement labour market segmentation. Indeed, employers' interest in greater numerical flexibility was being achieved in part by taking on precarious irregular workers at lower pay rates than those of regular workers (Smith et al. 2020: 97-99).
2. The requirement that an organisation allowing membership to those not defined as workers in this way could not be registered as a trade union. This was used to decertify the teachers union in December 2013 on the grounds that nine of its 60,000 members were dismissed workers.
3. The requirement that only members of a trade union could be elected as its officials. This has the effect of preventing those who had been dismissed, possibly for union activities, from continuing in union office. The provision was justified by the Korean government and employers on the grounds that only those working for an enterprise would have a direct interest in the outcome of bargaining. They raised the unlikely spectre of an outsider using a union for personal profit or political motives. Apart from the questionable nature of the argument, even on its own merits, and of the evident continued aim to keep unions as purely company-level organisations, this is in clear conflict with the right of members of an independent union to elect officials of their own choosing.

A further restriction, effective from January 2010, prevented a full-time union official from being paid by an employer and the authorities used this to make unilateral changes to binding collective agreements that included such an item. Such situations were usually the result of an agreement following successful bargaining by the union side. The overruling of such an agreement is in conflict with the right of bargaining partners to reach agreements as they wish.

4. The process of certification which goes beyond a purely formal process to include often lengthy examination of unions' proposed statutes to check conformity with the legal framework. An effect noted from the union side, as certification of the public employees union remained unconfirmed through several resubmissions after the first application

40. As shown in the ILO reports from 1996 to 2017, Case No 1865 (Republic of Korea) - Complaint date: 14-DEC-95 – and follow up reports: FOA Interim Report - Report No 304, June 1996 , FOA Report No 382, June 2017 and in the submissions and debate in the EU-Korea panel of experts meeting referred to below.

in 1997, was that this procedure could be used to prevent union activity simply by interminable delay. Using the law that no dismissed workers should be members, the authorities asked for increasing details, including at one point a 'list of all union members' and, later, a 'list of all union members who voted for or against the establishment of the trade union' (KCTU and FKTU 2012). Such detailed concern with the internal rules of a union appears incompatible with the right to independent organisation as maintained in the ILO Fundamental Conventions.

5. Strikes can face strong legal penalties including use of a vaguely-defined law on obstruction of business. This, in the government's defence before the ILO, can be used against strikes that are felt to have taken place 'unexpectedly' and 'are assessed to have possibly suppressed or confused the employers' free will to continue their business'.⁴¹ It was used against railway strikes in 2009 and 2013 justifying police raids on union headquarters, arrests of national union leaders and blanket disciplinary measures against participants. Strike activity is already restricted on railways, somewhat more than recommended in ILO guidelines, but the union believed it was following the necessary legal procedures.

In summary, Korean labour law, both as written and as practised, contains a number of elements that restrict legitimate trade union activity as expressed in the ILO conventions. These and other issues have been brought before the ILO by the KCTU, international union organisations and other Korean union organisations, with the ILO repeatedly concluding that Korean law is not consistent with its Fundamental Conventions.

The KCTU and the FKTU continue as the mainstays of Korean trade unionism. The FKTU had 1.03 million members in 2019 with 3,590 enterprise unions and 25 industrial (sectoral) affiliates. The KCTU had about 1 million members that same year, with the overwhelming majority organised in industrial unions, while another 265,000 union members were in unaffiliated enterprise organisations. In total, 12.5 per cent of employees were unionised in 2019.

Although there were originally issues of dispute linked to the KCTU's challenge to the FKTU's monopoly right to representation, the organisations subsequently found a united position in pressing for changes to employment law and in the need for respect for ILO standards, including the ratification of the remaining ILO Fundamental Conventions (KCTU and FKTU 2012). In this endeavour they have consistently won the support of, and been helped by, international union confederations. At the same time, the government's vision of economic development led to the search for better trading arrangements with the USA and the EU through the signing of FTAs. This was to provide a further avenue for international support to the Korean trade unions.

41. https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3329802

4.3 FTAs and Korea

Korea negotiated FTAs with the USA and the EU simultaneously. The US agreement came into force in March 2012⁴² and contained the elements familiar from other US FTAs of that period. It was followed by an increase in Korean goods exports to the USA, to 13.6 per cent of the total in 2019, with an 82 per cent increase in value terms for motor vehicles over the 2011 level, reaching 39.5 per cent of the total value of Korean motor vehicle exports.⁴³ This could have been helped by lower wages in Korea than in the USA, but increased Korean exports were not attributable to any breach of the labour clauses in the agreement.

The EU-Korea FTA⁴⁴ contained a substantial chapter on Trade and Sustainable Development (TSD), linking trade to wider social issues and to the commitments at international level of the signatory partners, including respect for labour rights. The implications of that are taken up below. However, the principal focus of the agreement was on strictly commercial issues.

A central aim was to reduce EU tariff barriers, at around 4.5 per cent on goods imports from Korea in 2011, in exchange for lower import tariffs from the EU, averaging at just under 8 per cent in 2011. There were also perceived gains from reducing barriers to services, trade in which was relatively under-developed, and in harmonising technical norms and other regulations that complicated trading relations. Together these were estimated to promise an increase in trade and a small increase in GDP for Korea although the increase in the EU's GDP would be even less.

No significant structural disruptions were expected and a subsequent EU assessment of early results, based on data up to 2016, suggested that expectations had been broadly confirmed with the EU doing somewhat better than expected (European Commission 2019). Updating to 2019, the EU share in Korean goods exports increased from 9.1 per cent in 2011 to 10.7 per cent in 2019 while the share of EU goods exports going to Korea increased from 2.1 per cent to 2.5 per cent – smaller percentages simply because of the much larger size of the EU economy – leaving a small trade surplus for Korea.⁴⁵ There were increases in trade across a wide range of goods, including substantial increases in motor vehicle exports on both sides. Trade in services also increased with a large and growing surplus for the EU. In view of the scale of increases in trade relative to those with other Asian countries, it was considered very likely that the FTA had had a positive impact in the commercial sphere (European Commission 2019).

The TSD chapter was never welcomed on the Korean side and this part of the agreement did not include scope for trade sanctions for transgressions of its

42. https://web.archive.org/web/20080920090221/http://ustr.gov/assets/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/asset_upload_file934_12718.pdf

43. Calculated from Comtrade database, <https://comtrade.un.org/data>

44. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22011A0514%2801%29>

45. Comtrade database, <https://comtrade.un.org/data>

provisions. The mechanism for complaint ran through a consultation mechanism involving civil society. This had been strongly resisted by the Korean side during negotiations but, as a fundamental part of the concept of ‘new generation’ agreements, could not be dropped by the EU. The outcome was a requirement for annual meetings of civil society organisations from the two parties – these included trade unions and the Korean side, after initial reluctance, later allowed the participation of the KCTU – with scope for unresolved complaints to be taken up at government level and, should that fail to find a resolution, to be put to a three-member panel of experts. No further sanction was specified should the panel uphold a complaint by one party against the other. The first stage in the consultation process, the holding of meetings, did take place and the EU assessment was quietly positive as ‘these mechanisms have been implemented as envisaged’ (European Commission 2019: 11).

Only in the area of sustainable development was the European Commission unimpressed, concluding that ‘Korea has so far made little progress to implement its TSD commitments’ (European Commission 2019: 55). During negotiation of the agreement the Korean side opposed a demand to ratify all the ILO Fundamental Conventions and negotiators from the European Commission, who had included this provision primarily under pressure from the European Parliament and trade unions, ‘did not pursue an aggressive pro-labour agenda’ (Smith et al. 2020: 89). The result was requirements towards ‘respecting, promoting and realising’ fundamental rights in line with the ILO Fundamental Conventions;⁴⁶ not to weaken or fail to implement and enforce domestic labour or environmental laws ‘in a manner affecting trade or investment’;⁴⁷ and to make ‘continued and sustained efforts towards ratifying the fundamental ILO Conventions.’⁴⁸

In practice, as indicated above, the period after the signing of the FTA saw further attacks on trade union rights. However, the situation was changed by events inside Korea and by changes in the EU approach.

4.4 Political change in Korea

A massive popular protest movement in late 2016 led to the removal of a corrupt president and the election of a replacement in May 2017 from the Democratic Party which was more sympathetic to the trade union position. The KCTU President had received a five-year prison sentence in July 2016 for his role in organising protests and, despite the change, was only released in May 2018. Furthermore, his successor was on trial even in November 2021 and facing imprisonment after union rallies earlier in the year were judged to have contravened Covid-19 rules.

Nevertheless, the new government approved revisions to the labour law and the ratification of three of the remaining ILO Fundamental Conventions in October

46. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL&from=EN>, Article 13.4.

47. Article 13.7.

48. Article 13.4.

2019. This was still a minority government and there was continuing opposition, with business representatives insisting that it was ‘too early’ for such changes.⁴⁹ The proposal fell when the parliamentary session ended, but elections on 15 April 2020 gave the Democratic Party a firm parliamentary majority. It could then reintroduce the proposal to ratify the three conventions, still excluding No. 105 on the abolition of forced labour, with a warning that the failure to do so could lead to retaliatory measures from the EU including ‘pressure through various measures’ and ‘potential trade risks.’⁵⁰ Thus, an argument of economic interest was marshalled to ensure parliamentary support. It is unclear whether the EU could inflict significant economic pain within the terms of the FTA but the steps it was taking, set out below, appear to have had a positive impact.

European trade unions had been pressing for some time through civil society consultation structures and a specific request was sent from the EU Domestic Advisory Group (civil society representatives, including ETUC) to the European Commission on 13 January 2014 to raise a dispute over Korean trade union rights in direct consultations between the EU and the Korean government.⁵¹ The then commissioner, Karel De Gucht, always primarily concerned with the commercial aspects of the FTA which were judged to be going well, preferred to avoid a formal dispute procedure. However, a change in commissioner, continuing pressure from the European Parliament and trade unions and the blatant intransigence of the Korean side led to a shift in approach. On 17 December 2018 the EU wrote to the Korean government requesting ‘consultations’ over Korean labour laws which appeared to be ‘inconsistent with Korea’s obligations’.⁵² A meeting held on 21 January 2019 could not resolve the issues and on 4 July 2019 the EU formally requested the establishment of a panel of experts which was duly constituted.

The deliberations of the panel were delayed by the Covid-19 pandemic, but it finally held a virtual hearing on 8 and 9 October 2020 and produced a final report on 25 January 2021. It heard views from both parties, the EU presenting the well-rehearsed arguments previously put by trade unions to the ILO; the Korean side also repeating its familiar positions. There were additional submissions from international trade union and Korean business organisations.⁵³

4.5 The panel and its verdict

There could be little serious doubt that Korea was in breach of its commitments to respect labour rights. Nevertheless, a number of legal issues had to be resolved before a verdict could be reached (Novitz 2021).

49. <http://www.koreaherald.com/view.php?ud=20191001000693>

50. <http://www.koreaherald.com/view.php?ud=20200707000681>

51. <https://memportal.eesc.europa.eu>

52. https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf

53. https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159077.pdf

https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf

The first objection from the Korean side was that the issues raised were outside the scope of the FTA as they were not presented as having an impact on trade. This argument was rejected. There had never been an issue of Korea failing to implement its own laws, or changing those laws, so as to gain an advantage in trade as was specifically not permitted under the terms of the FTA. The EU case was based on the failure of Korea to ‘respect, promote and realise’ the ILO’s Fundamental Conventions and the failure to ‘make continued and sustained efforts’ to ratify those which remained unratified. The first of these was already a commitment made by all ILO members but it was given legal power when incorporated into the FTA and thereby became subject to that agreement’s dispute procedure.

The points raised by the EU included the five elements in Korean law covered above in Section 4.2. Korea responded that it was proposing changes. However, a document presented on 18 November 2020, which it claimed would outline these changes, was surprisingly vague and, as pointed out by the panel, did not make clear exactly what would change, even assuming that any proposals were eventually passed by the Korean parliament.⁵⁴

The panel concluded that a number of laws were not compatible with the ILO Fundamental Conventions. However, it did not uphold the EU complaint that the certification procedure was incompatible with the FTA as the key complaint was that the procedure was preventing certification since it allowed endless delay. On this there were conflicting accounts from the two sides with insufficient detail to provide certainty.⁵⁵

On the failure to ratify the Fundamental Conventions, the panel noted that there had been efforts from the government after 2017, following a long period of zero such effort. It saw this ‘tangible, though slow’⁵⁶ progress as ‘less than optimal’⁵⁷ but concluded that, in view of the developments since 2017, the commitment to ‘continued and sustained efforts’ had not been broken.⁵⁸

This judgement helped ensure the passage through the Korean parliament on 20 April 2021 of the ratification of three Fundamental Conventions, to take effect from 20 April 2022. The issue of forced labour still remains open, as does a full revision of Korean labour law after which Korean trade unions can more effectively represent the interests of employees.

Nevertheless, the inclusion of labour clauses in the EU-Korea FTA provided important assistance at one stage of a lengthy process that had involved international agencies, international trade union organisations and long years of struggle by Korean workers and trade unions. The next two cases give support to the argument that a stronger agreement could well have achieved more substantial results much sooner.

54. https://www.ituc-csi.org/IMG/pdf/ituc_etuc_fidh_amicus_brief_korea.pdf
https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf (p. 51-52).

55. Ibid.: 69-70.

56. Ibid.: 76.

57. Ibid.: 77.

58. Ibid.: 77.

5. Georgia

5.1 Introduction

Georgia merits attention as a country that established an extremely liberal employment environment after 2006 before gradually rebuilding employment protection, culminating in 2020 in a labour code and a labour inspection system that brings it close to the requirements of its Association Agreement with the EU that also includes an FTA.

After declaring independence from the Soviet Union in April 1991, Georgia joined the ILO and, over the period 1993-2002, ratified 17 conventions, including the eight Fundamental Conventions but not including No. 81 on labour inspection. However, the government elected after the so-called 'Rose Revolution' of 2003 abolished labour inspections completely and introduced a new labour code that eliminated protections inherited from the Soviet period, including allowing dismissals without any stated cause. The road back has been slow and gradual, reflecting both explicit efforts to comply with international standards and sharp disputes within Georgia between trade unions, backed by sympathetic politicians, and employer organisations. The Association Agreement with the EU was important to this process but it was only one factor behind the changes, alongside internal political developments.

5.2 Georgia's economic development

Georgia is a middle-income country with living standards and wages well below the levels of western Europe and the USA. The country suffered a very severe depression after the break-up of the Soviet Union and was further hampered by internal conflicts and emigration. From a low point in 1994 the economy grew, with some acceleration after 2009, and recorded an average annual growth rate in per capita GDP from 2004 to 2019 of 5.6 per cent. The level then achieved was only just above the peak of the mid-1980s, as reported by the World Bank database using 2010 constant US dollars.⁵⁹

The economic strategy of the post-2003 government was to implement the rapid privatisation of state-owned businesses, open the economy to trade and investment, liberalise relations where possible and hope that the market would

59. <https://data.worldbank.org/indicator/NY.GDP.PCAP.KD?locations=GE>

bring growth. There were, as indicated below, benefits in terms of international recognition and approval, but transformation towards a competitive, modern economy integrated into the world economy was slower than growth rates might suggest. Over the period 2005-2019, with only small fluctuations in key indicators in individual years, trade in goods and services was persistently in deficit. Exports averaged 37.8 per cent of GDP while imports averaged 55.3 per cent.⁶⁰

The share of exports going to former Soviet republics actually increased over the period (from 47.0 per cent to 53.8 per cent) while China's share also grew from 0.6 per cent to 5.6 per cent. The share of the neighbouring countries of Armenia and Azerbaijan increased from 14.2 per cent to 24.8 per cent, with 19.3 per cent of all exports accounted for by the re-export of imported passenger cars overwhelmingly to those two countries. There were only small beginnings to new manufacturing industries with, for example, textiles and garments rising from 0.3 per cent of exports in 2008 to 1.8 per cent in 2014 but then increasing no further. Exports to the EU, consisting mostly of copper ore, actually fell as a share of the total, from 25.0 per cent in 2005 to 22.0 per cent in 2019. Manufacturing remained a small part of the economy (7.1 per cent of the total working population in 2019 compared with 3.5 per cent in 2005) with food, drink and tobacco accounting for much of this.

External balance in this period was maintained thanks to earnings on services, including transport to neighbouring countries; surpluses on personal remittances from Georgians working abroad, averaging 9.9 per cent of GDP;⁶¹ and inward foreign direct investment, averaging 9.4 per cent of GDP.⁶² Clearly, the growth strategy did not create employment for all Georgians. Those emigrating were typically young, well-educated and unemployed (OECD 2017): unemployment nevertheless remained at 17.6 per cent of the active labour force in 2019 against 12.6 per cent in 2004 despite a fall of 23 per cent in the active labour force (Geostat 2020). Inward FDI, most from the EU and USA with pipelines and transport prominent, fluctuated between the years with no clear upward trend.

Thus, despite, or maybe because of, very liberal economic policies, the opening to inward investment brought limited structural transformation and there was plenty of scope for a modernisation of the economy that could be helped by closer economic relations with the EU.

In fact, the pressure for seeking close relations with the EU and USA followed as much from political as from economic considerations. The desire for a pro-western orientation was clearly confirmed when Mikheil Saakashvili became president after the Rose Revolution, including hopes of joining NATO from 2005 onwards. A brief war with Russia in August 2008 left South Ossetia and Abkhazia, provinces with predominantly Russian populations, under Russian occupation. Elections in 2012 brought to power the Georgian Dream coalition, a broad and amorphous bloc that was less dogmatically neoliberal and less insistent on hostility towards Russia, but it did not question the logic of a western orientation.

⁶⁰. These and subsequent data are taken from Geostat 2020, and earlier years.

⁶¹. <https://data.worldbank.org/indicator/BX.TRF.PWKR.DT.GD.ZS?locations=GE>

⁶². <https://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=96740>

5.3 The labour reforms of 2006

An important element of the liberalising reforms implemented after the Rose Revolution was a new labour code, approved in 2006.⁶³ This was not the outcome of discussions with social partners: the pre-existing tripartite commission was ignored, along with trade unions, the latter condemned by President Saakashvili as ‘nothing but an unfit mafia structure’ (Borisov and Clarke 2006: 620). He also proclaimed on 27 May 2006 that Georgia had ‘the most liberal labour code in eastern Europe’ giving a ‘green light to business’ which could not be ‘approached by the labour inspectorate, which incidentally does not exist any more’ (Borisov and Clarke 2006: 612-613).

The new labour code won the country the accolade of being a ‘top reformer’, advancing from 112 to 37 place in the World Bank’s Ease of Doing Business index and becoming the ‘sixth easiest place to employ workers’ out of 175 countries (World Bank 2006: 19). ‘Georgia’s flexible labor rules, in its new labor code’ were recorded among the three boldest reforms of any in the world in 2006 (World Bank 2006: 3). The ‘employing workers’ element was suspended from the World Bank’s indicator in 2009, following complaints from the ILO and other organisations that it was in conflict with internationally recognised standards of good employment practice.⁶⁴ The new code was clearly incompatible with many ILO conventions and could therefore be a threat to trade agreements with the EU or the USA, but international praise at the time was helpful to the government and valued more highly than concerns over labour rights. In fact, the deputy minister in charge of employment matters reportedly did not know what the ILO was or which conventions Georgia had signed (Borisov and Clarke 2006: 621).

A key element in the new labour code was the right of employers to dismiss employees without stating a reason. They were required only to give one month’s pay. A raft of provisions from the old labour code, setting rights such as maximum hours, maximum overtime, breaks at work and paid holidays, were removed or weakened. Employment contracts no longer needed to be in writing. Collective bargaining was given scant coverage and weakened by allowing employers to make separate bargains with employees not represented by trade unions. Strikes were permitted with procedural restrictions, but with the proviso that they could only last for 90 days and had to be preceded by a demonstration strike: violating these rules could lead to a two-year prison sentence. At the same time, the labour inspectorate was abolished making it difficult to see how the employee protections that remained could be enforced.

The effect was to make Georgia ‘one of the worst cases in Europe’ as far as the rights of workers were concerned,⁶⁵ creating a substantial threat to the Georgian trade unions. These had developed by transformation of the Soviet-era unions, but

63. <https://www.ilo.org/dyn/natlex/docs/SERIAL/74621/76939/F1017339662/GEO74621.pdf>

64. https://www.hrw.org/report/2019/08/22/no-year-without-deaths/decade-deregulation-puts-georgian-miners-risk#_ftn14

65. <https://www.refworld.org/docid/4fd8894ec.html>

density fell to 23 per cent, exceptionally low for the former Soviet Union (Borisov and Clarke 2006: 628). The GTUC (Georgian Trade Unions Confederation) claimed in 2019 to incorporate 21 sectoral unions with a total membership of 150,000. That would represent 17 per cent of all employees and 12 per cent of the total working population.⁶⁶

The right to dismiss without giving any reason was central to attacks on trade union existence, as reported in complaints to the ILO from the GTUC, backed by the ITUC, in 2008 and 2010, with further communications in 2012.⁶⁷ Cases were reported of union representatives being met with summary dismissal, including in the Turkish-owned BTM textile factory which had 500 employees and where nine women were dismissed the day after presenting themselves to management as elected representatives of a newly-established union organisation. There was legal protection against anti-union discrimination, supported by the constitution, but the courts found that BTM's action was fully compatible with the law allowing dismissal without citing a reason. The Georgian government did not provide clear and detailed responses on the points raised and the ILO conclusion was that Georgian law did not provide adequate protection for trade union activity.

Anti-union measures were reported in the public, as well as the private, sector. A prominent example was a teachers union (ESFTUG: Educators and Scientists Free Trade Union of Georgia), established in 2005. A complaint to the ILO in 2008 by the GTUC, supported by Education International, reported that a government-sponsored rival had been created and pressure put on teachers to switch membership, including financial incentives, stopping the agreed system of automatic salary check-off for membership of the existing union and the dismissal of 11 teachers in one school. The government denied some allegations, but again did not provide much detail to the ILO. The situation was reportedly much better with the new government after 2012 and salary deductions for ESFTUG members were restored.⁶⁸

The Georgian Dream government was committed to amending the labour code and changes were implemented in 2013. Revisions followed advice from the ILO, but also faced strong opposition and lobbying from employers, represented particularly vigorously by the American Chamber of Commerce. This organisation, which has both Georgian and foreign business members, had been active in Georgia since the 1990s and was joined by newer Georgian employer organisations in claiming that the proposed changes were 'not impartial' and did not take account of the concerns of business, expressed in earlier warnings against the kind of 'extremely left-wing labour code that operates in highly developed European countries.'⁶⁹

66. History – Georgian Trade Unions Confederation. <http://gtuc.ge>

67. https://www.world-psi.org/sites/default/files/documents/research/en_ctteeexperts_report.pdf

68. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2911691
https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:3282071

69. <http://geoeconomics.ge/en/?p=2611>

The new version of the labour code was considerably longer – it was expanded from 17 to 32 pages – and included a substantial section on preventing discrimination plus the reintroduction of a number of protections in relation to working hours. It added a requirement for dismissals to be justified with a list of 14 permissible reasons, albeit including the vague ‘other objective circumstances justifying the termination of an employment agreement’. Contracts also had to be provided in writing with a copy provided to the employee, albeit only if requested. However, following lobbying from the American Chamber of Commerce, there were still ‘loopholes and gaps’ such that, the GTUC feared, many provisions could be evaded.⁷⁰ Above all, the absence of a labour inspectorate made it very difficult to ensure the implementation of many of the provisions. Even when, in 2015, a labour inspectorate was re-established, its mandate was limited to safety issues in particular sectors; it had no powers to make unannounced visits to workplaces and in any case it could only make recommendations.

The absence of an effective labour inspectorate was associated with a marked increase in the numbers of injuries and fatalities in workplaces and a rate per employee over three times the EU level (in 2014), despite relatively low employment in industry and construction (Tchanturidze 2018: 5). From a low figure of nine workplace fatalities in 2005, the number reached 168 in 2010 and 199 in 2018.⁷¹ In the mining industry, poor safety conditions, the imposition of excessive working hours (reportedly including cases of 12-hour shifts underground for 15 straight days)⁷² and repeated fatal accidents led to strikes in a number of mines. It appeared that miners were unaware of any agreed working conditions as, according to one investigation, none of those interviewed had a copy of the employment contract, having ‘signed something’ but ‘they immediately took it away’.⁷³

Amendments to the law in 2019 still required visits to be announced in advance and restricted the inspectorate’s remit to hazardous materials. Financial support from, among other countries, the USA, made possible the training of inspectors but there were still only 40 working in the department in May 2019,⁷⁴ responsible for covering an employed population of over 1.5 million.

70. <https://www.equaltimes.org/georgia-s-new-labour-code-marred?lang=en#.YhXxeejMKUm>

71. <http://webcache.googleusercontent.com/search?q=cache:Zu6xVvOU1zAJ:www.unevaluation.org/document/download/3322+&cd=3&hl=cs&ct=clnk&gl=uk> (p. 39).

72. <https://www.hrw.org/world-report/2020/country-chapters/georgia>

73. <https://www.hrw.org/report/2019/08/22/no-year-without-deaths/decade-deregulation-puts-georgian-miners-risk>

<https://www.hrw.org/world-report/2020/country-chapters/georgia>

74. <http://webcache.googleusercontent.com/search?q=cache:Zu6xVvOU1zAJ:www.unevaluation.org/document/download/3322+&cd=3&hl=cs&ct=clnk&gl=uk> (p. 27).

5.4 Georgia and the EU

Georgia signed an Association Agreement with the EU in June 2014, in force from July 2016, which contained the Deep and Comprehensive Free Trade Area (DCFTA) as an integral part. Similar agreements were signed with Moldova and the Ukraine. The aims went far beyond those of simple trade agreements, including as the first point ‘to promote political association and economic integration between the Parties based on common values and close links.’⁷⁵ The FTA as such was unexceptional. Of greater strength and significance was a precise timetable for implementing laws to ensure approximate harmonisation with 40 pieces of EU legislation in the areas of employment, social policy and equal opportunities.⁷⁶ Most were to be implemented within four years of the agreement taking effect. The following years did see changes to Georgian law to bring it closer to international standards, but often with shortcomings either in the laws or in the provisions to ensure implementation and enforcement. As an example, women’s rights to antenatal examinations were in line with EU law only in the public sector while the private sector was not covered (Kardava 2018: 7).

The DCFTA included the EU’s mechanisms for civil society representation and consultation. Meetings were held bringing together civil society groups from both sides, but the judgement of the participants was generally negative, in line with an assessment across EU agreements that such groups had ‘little political relevance’ (Martens et al. 2020: 6). However, the context of the Association Agreement, which contained further structures for civil society consultation, meant that they could complement and add to the points being made through other channels. They were also a useful supplement for the Georgian side because the Georgian government had proven to be ‘much more receptive’ to such pressure than to that of its own civil society, feeling ‘more accountable to the European side than to national organisations’ (Martens et al. 2020: 32, 49). Perhaps not surprisingly in that context, survey evidence shows higher trust in the EU in Georgia than in national institutions and strong support for joining the EU (European Parliament 2020: 22-23).

Moreover, within civil society trade unions were the best able to articulate positions, following the years of cooperation between European and Korean unions and having educated themselves over a number of years on the important issues. Labour was therefore consistently high on the agenda in consultations. Georgian business organisations often insisted that otherwise joint declarations had to be presented with the caveat that employers did not agree. However, the presence of the civil society mechanism ensured that the EU could not downplay labour issues.

The EU’s assessment of the implementation of the Association Agreement in February 2020 reported familiar positive views on the liberal business

75. [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014A0830\(02\)-20180601&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014A0830(02)-20180601&from=EN) (p. 7).

76. [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014A0830\(02\)-20180601&from=EN:%20655-660](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014A0830(02)-20180601&from=EN:%20655-660)

environment, quoting the World Bank Ease of Doing Business index. However, it also welcomed the recent changes in employment law while criticising the inadequacy of the labour inspectorate and repeating reservations over some laws and the insufficient capacity for ensuring that they were enforced. It also noted the internal context referring to ‘a new wave of protests against dangerous working conditions and poor social protection throughout 2019’ (European Commission 2020: 12).

Indeed, political and social turmoil were transforming the internal situation. Survey evidence from 2019 confirms that the Georgian public was concerned over employment issues, with 71 per cent of those in one survey complaining of inadequate salaries, 64 per cent reporting violations of labour safety norms and 57 per cent reporting violations of normal working hours.⁷⁷ There was also persistent international concern over a wide range of rights issues including media pluralism, LGBT matters and drug laws.

The potential precariousness of Georgia’s international standing was highlighted after mass protests in 2019, targeted primarily at the electoral system, that were met with excessive police violence. A demonstration following the presence of a delegation from the Russian Duma in the parliament building on 6 June 2019 led to injuries requiring medical attention to 240 people, including police and journalists as well as demonstrators. This was followed by new elections on 31 October 2020 which returned the same Georgian Dream government to power. Elections were judged by observers from the OSCE and others to have been conducted fairly, albeit with widespread allegations of pressure on voters.⁷⁸

The decisive steps towards changing the legal framework followed these events. The initiative came not from the government but from MPs in parliament, working with ILO support and advice between May 2019 and September 2020.⁷⁹ The stated aim of a package of new laws was to satisfy all international requirements arising out of the ILO Fundamental Conventions and it was passed on 29 September with no votes against. The package included updating existing laws to overcome almost all objections on working hours, overtime, night shifts, breaks and weekly rests. A labour inspectorate was re-constituted as an independent institution (not just, as previously, subordinated within a ministry) with a mandate to investigate all elements of employment law (not just certain aspects of safety) and with the power to enter any workplace without prior notice. The plan was to increase staffing to 80-90 inspectors.

There was vocal opposition from the Georgian Business Association, to whom the reforms were ‘full madness’.⁸⁰ In the view of its Executive Director, the Association Agreement ‘should be implemented with exceptions related to Georgia’s economic

77. <https://oc-media.org/sweeping-labour-reforms-go-ahead-in-georgia-despite-opposition-from-business-groups/>

78. <https://www.hrw.org/world-report/2021/country-chapters/georgia>

79. https://www.ilo.org/moscow/news/WCMS_758336/lang--en/index.htm

80. <https://oc-media.org/sweeping-labour-reforms-go-ahead-in-georgia-despite-opposition-from-business-groups/>

situation.’ However, he saw the final laws as ‘more acceptable’ than the original proposals, suggesting some continuing power for business lobbying. Indeed, some MPs sponsoring the proposals expressed dismay at changes and the GTUC indicated areas of displeasure. Dimitri Tskitishvili, the initial proposer, had made some compromises but was pleased to have measures that were ‘implementable’ and could be built on in the future.

The areas of GTUC disappointment included the continuing outlawing of solidarity strikes; the lack of an absolute limit of a 48-hour week (it had been possible to increase hours with unpaid overtime); the failure to remove ‘any other objective circumstances’ as a reason for dismissal; the failure to ensure at least 125 per cent pay for overtime; and the absence of maternity and pregnancy as forms of discrimination.

There are indeed still differences with EU employment law, but the gulf is no longer comparable to that of the immediate post-2006 period. Georgia is therefore a clear example of conditions attached to a trade agreement helping to change a country’s employment law framework. However, this was not a normal trade agreement and the motivations on both sides were concerned with much more than the expansion of trade. An Association Agreement gives the prospect of considerably more political, and also economic, benefits to Georgia which could otherwise be left in a very difficult international position. Consequently there was a huge incentive to accept the EU’s terms in the Agreement and thereafter to comply with them.

6. Mexico

6.1 Introduction

The new trade agreement between the USA, Canada and Mexico came into force on 1 July 2020.⁸¹ It was billed by the US Department of Labor as having ‘the strongest and most far-reaching labor provisions of any trade agreement’.⁸² This is a justified boast in view of the powers on the US side in relation to Mexico and it is the relationship between those two countries that will be the focus in what follows.

The agreement contains novel elements that are intended to make its labour provisions enforceable and effective, overcoming the problems encountered with NAFTA, the agreement between the three countries in force since 1994, and which arose in the dispute with Guatemala. It has been accompanied by big legislative changes within Mexico which were preconditions for approval within the USA. A novel element, included at last-minute US insistence, gives a power to investigate, and insist on action against, breaches of international standards on freedom of association and/or collective bargaining in individual companies. This power was already being used shortly after the agreement came into force. It remains unclear how industrial relations within Mexico will change, but provisions within the trade agreement appear to be having a substantial impact.

6.2 The NAFTA experience

NAFTA was criticised throughout its existence. A common complaint on the US side was that removing tariffs on imports from Mexico led to outsourcing and hence the loss of manufacturing jobs. Over the period 1994 to 2019, manufacturing employment in Mexico increased by 4.2 million while decreasing by 4.4 million in the USA.⁸³ However, it is extremely difficult to separate out the effects specifically of NAFTA. Declining US manufacturing employment is in large part attributable to higher productivity. In so far as imports have played a role, they were already significant from Mexico before 1994 and have increased even more markedly from some other countries. Defenders of NAFTA also point to gains for others in

81. The new agreement is named differently in the three countries: USMCA in the USA; CUSMA in Canada; and T-MEC in Mexico. It was ratified by Mexico on 20 June 2019, by the USA on 29 January 2020 and by Canada on 13 March 2020.

82. <https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca>

83. https://www.ilo.org/shinyapps/bulkexplorer19/?lang=en&segment=indicator&id=EMP_TEMP_SEX_ECO_NB_A

the USA from exports and from cheaper imports, in turn contributing to higher employment (discussed in Myant 2017).

Nevertheless, visible gains from NAFTA for the US side are hard to find and arguments about the costs from low-wage competition have been influential in US politics. They were taken up by President Trump as one of the reasons for ending NAFTA and seeking to replace it with a new agreement that could be presented as more favourable to the USA. The urgency to fulfil this promise in the lead-up to Trump's attempt at re-election put US labour in an unusually strong position to press for greatly strengthened labour provisions.

There are even stronger arguments that NAFTA was bad for Mexico, albeit as a component rather than the totality of a growth strategy that had served the country very poorly (Puyana 2020). That strategy was strongly liberal, with a small state and taxes equivalent to only 16.5 per cent of GDP in 2019, much the lowest among OECD members for which the average was 33.8 per cent.⁸⁴ However, the average per capita GDP growth rate from 1994 to 2019 was only 0.8 per cent (measured in constant 2010 US dollars), below the rate for the obvious comparator, Brazil (1.2 per cent), itself no great success story in world terms. The gap with the USA actually widened, with Mexico's per capita GDP in nominal terms falling from 21.1 per cent of the US level in 1994 to 15.2 per cent in 2019. It also fell when measured by PPP from 32.5 per cent of the US level in 1994 to 31.3 per cent in 2019.⁸⁵

Part of the reason for Mexico's poor performance was the blow to agriculture from US imports which impoverished and displaced part of the rural population. Moreover, the rapid development of manufacturing industries led to only slow growth in wages while leaving Mexico extremely dependent on exports to the USA. Manufacturing exports grew from an equivalent of 12.3 per cent of GDP to 38.0 per cent between 1994 and 2019. Growth in export-oriented manufacturing centred at first in the so-called *maquiladora* factories in border areas undertaking simple assembly tasks using imported parts and materials. The automotive industry played a progressively more important role, developed by multinational companies from the USA and, increasingly, from European and Asian countries. Employment in the sector grew to almost 1 million in 2019 (still only 1.8 per cent of the working population) with an output of almost 4 million vehicles in 2019 (4.3 per cent of total world output). Automotive exports took off especially from 2009, reaching 26.3 per cent of all exports in 2019. The USA was the biggest market for all exports (77.9 per cent in 2019) and accounted for 83 per cent of exports of motor vehicles and their components.⁸⁶ This dependence on the US economy left Mexico with little bargaining strength when faced with threats of an end to NAFTA without a replacement.

A clearly disappointing feature of Mexico's economic development has been the widening wage gap with the USA, its main trading partner. Nominal compensation

84. <https://data.oecd.org/tax/tax-revenue.htm>

85. All calculated from the World Bank database, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD>

86. Calculated from the Comtrade database.

per employee in manufacturing fell from 20.8 per cent of the US level in 1994 to only 12.1 per cent in 2019⁸⁷ with a smaller, but still very large, gap in vehicle assembly (INEGI and AMIA 2016: 24). By way of contrast, countries from eastern Europe that joined the EU and followed similar growth strategies, with increasing exports of motor vehicles, saw their wage levels gaining ground relative to the richer EU member states, albeit still leaving a substantial gap. Thus, Romania's nominal compensation per employee was 23 per cent of Mexico's level in 1994 but 152 per cent in 2019.⁸⁸

Among the causes of Mexico's extraordinarily low wage growth has to be the country's employment practices and industrial relations system. In respect of the first of these there is a high level of informality (representing 27.5 per cent of the active population in 2019) as well as of labour subcontracting, meaning that workers in one company are formally employees of another.⁸⁹ This increased to 24 per cent of employees in auto components in 2014 and to 50 per cent in aerospace. The implication is that it could be very difficult to know who the employer really is and very hard to enforce collective agreements and employment law. There are also more general problems with the employment relations system which became the central target of the new elements in the labour chapter in the USMCA.

6.3 Mexico's industrial relations background

Mexico's dominant trade union is the CTM (*La Confederación de Trabajadores de México*; Workers' Confederation of Mexico), founded in 1936 as the main part of the labour division of the PRI (*Partido Revolucionario Institucional*; Institutional Revolutionary Party). As this was the ruling party from 1929 to 2000, the CTM was closely linked to the federal government. Its status was weakened when the PRI lost power and not fully restored when that party returned to government from 2012 to 2018.

The CTM claimed in 2012 to have 4.5 million workers affiliated,⁹⁰ equivalent to 13 per cent of the waged labour force. Other confederations and independent unions also exist but they are considerably smaller. The *Unión Nacional de Trabajadores* (UNT) affiliates 180,000 members to the ITUC. OECD estimates show a density of 12.3 per cent in 2019⁹¹ and a collective bargaining coverage of 10.4 per cent. Density is higher in the public sector and about 24 per cent in manufacturing in 2016, with much higher levels in bigger workplaces.⁹²

87. <http://en.www.inegi.org.mx/app/tabulados/default.html?nc=539>

88. Calculated from AMECO database, https://dashboard.tech.ec.europa.eu/qs_digit_dashboard_mt/public/sense/app/667e9fba-eea7-4d17-abfo-ef2of6994336/sheet/2f9f3ab7-09e9-4665-92d1-de9ead91fac7/state/analysis

89. <https://aficio.org/sites/default/files/2020-12/IMLEB%20Interim%20Report%20%26%20Separate%20Statement%20of%20Members%20Marculewicz%20%26%20Miscimarra.pdf>

90. <https://ctmoficial.org/>

91. <https://stats.oecd.org/Index.aspx?DataSetCode=TUD>

92. https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_722482.pdf (p.19).

The collective bargaining system in Mexico had come to be dominated by so-called ‘protection contracts’ which allowed ‘total employer unilateralism’ (Bensusán and Middlebrook 2020: 9). Such agreements were signed by union representatives not elected by, nor answerable to, the employees on whose behalf they were bargaining. Those employees often had no knowledge of those agreements or even of whether they existed at all. In many cases, agreements were even registered before an enterprise started operations. They often covered little beyond workers’ rights given by the law, leaving pay and conditions to considerable managerial discretion.

The prevalence of protection contracts can only be estimated, with reasonably authoritative sources suggesting ‘at least 75 per cent’ of agreements, the ‘great majority’ or ‘up to 85 per cent.’⁹³ Once signed it is very difficult to make any changes, partly because workers do not know what the agreements contain. Workers who tried to set up a new union, a difficult and dangerous enough task that could invite intimidation, including even assassinations, were told that it could not bargain as an agreement was already in place; they needed to replace the existing union which was only possible by showing majority support in a ballot administered by a part of the government’s labour administration.

The issue was investigated by the ILO from 2009 onwards, following a complaint from the International Metalworkers Federation (subsequently IndustriALL), taking up issues raised by a number of independent Mexican unions. High profile cases continued to be reported over the following years. For example, in July 2014 BMW announced the creation of a new plant, to start operations in 2019, and signed a collective agreement that same month with a union official who had reportedly concluded 26 similar agreements. In August 2014, a similar procedure was undertaken by Kia.⁹⁴ The ILO expressed concern at practices that clearly contravened its convention on collective bargaining.

The Mexican government was repeatedly slow to respond to accusations and disputed the facts of some cases. However, it was embarrassed enough by criticisms including, in February 2012, ‘a week of global mobilisation’ by unions from 35 countries pressing for respect for ILO recommendations,⁹⁵ to reform the law such that agreements had to be published online and posted at workplaces. This was, however, poorly implemented and websites often functioned very badly, leaving the information inaccessible. A further attempt at reform was made in 2017 in response to pressure from the US government while it was still involved in the negotiation of TPP, following the criticisms from the ILO, but it was followed by uncertainty and attempts at reversal from traditional labour organisations and business groups (Bensusán and Middlebrook 2020: 5).

93. <https://aficio.org/sites/default/files/2020-12/IMLEB%20Interim%20Report%20%26%20Separate%20Statement%20of%20Members%20Marculewicz%20%26%20Miscimarra.pdf>, all with plausibly authoritative sources.

94. https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3329826

95. <https://www.industrialunion.org/ilo-calls-on-mexico-for-tripartite-dialogue-on-protection-contracts>

6.4 USMCA and Mexican industrial relations

The initial drafts of the USMCA brought some improvements in labour provisions and these were substantially strengthened under political pressure from, and within, the USA. The changes from NAFTA can be summarised under four points.

1. As in other trade agreements signed by the USA from 2007 onwards, reference is made to ILO fundamental labour rights, although ratification is not required. These matters can also be subject to the dispute process which can end in trade sanctions. NAFTA did not include within this process the issues covered in ILO conventions 87 and 98. To avoid the judgement reached in the case with Guatemala, it was no longer necessary to prove that a denial of labour rights gave one side an advantage in trade. Instead, the wording was ‘in a manner affecting trade or investment between the Parties’⁹⁶ with the further explanation that this simply meant that the good or service was traded. All violations of labour rights were assumed to fit with this definition, unless the responding party demonstrated otherwise.

In one respect this is a step backwards from NAFTA as it means there is no protection for non-traded goods or services. There had been dispute proceedings under NAFTA relating to public administration and, although they could not have ended in trade sanctions, public shaming did have some impact.

2. The rules of origin section⁹⁷ brings a requirement that 75 per cent of a motor vehicle must be made in North America, up from 62.5 per cent in NAFTA. This was billed as fostering the integration of production within north America. In practice it was judged that this would create difficulties for Mexican component manufacturers which were significantly dependent on components and materials imported from outside the USMCA area. That might therefore encourage moving production, or returning outsourced production, to the USA. The same aim lies behind a new requirement that 40-45 per cent of a vehicle, depending on the type, must be made by workers earning at least \$16 per hour. They would otherwise have to pay tariffs even within the USMCA area. This is clearly well above Mexican wage levels meaning that employers would have to pay more; pay the tariffs and thus likewise raise their costs; or move the production location.

3. A completely new element is the RRLM (Rapid Response Labor Mechanism) which was agreed as an addition in December 2019, one year after the agreement had been signed.⁹⁸ It was proposed by two prominent Democrat politicians and was crucial for winning support from the AFL-CIO, which had previously expressed opposition to the agreement, and was itself crucial in persuading Democrats to allow its ratification. Negotiations with the Mexican government included a visit to Mexico by Nancy Pelosi (Speaker of the US House of Representatives) who

⁹⁶. <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23%20Labor.pdf>

⁹⁷. <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/04%20Rules%20of%20Origin.pdf>

⁹⁸. <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31%20Dispute%20Settlement.pdf>

returned with this and other changes accepted in Mexico. Other changes at this time also removed proposals pressed vigorously by pharmaceutical companies for longer patent protections and other means of maintaining their monopoly powers over new drugs. Long patent lives increase the prices for everyone, including in the USA, and US Democrats were seeking reductions in protections there, too.⁹⁹

The RRLM is essentially two bilateral agreements, between the USA and Mexico and between Canada and Mexico. Each gives much greater powers to the first named country than to Mexico and there is no corresponding US-Canada agreement. The RRLM is concerned only with the denial of rights of free association and collective bargaining and applies only to so-called ‘priority’ sectors, defined as manufacturing, services or mining. Agriculture is therefore not included, although there had been three cases brought by Mexico against the USA under NAFTA relating to migrant workers in farming.

A key novelty is that anyone could complain and that the complaint could be against an individual company rather than just against a government. Complaints from the US side go to a newly-established committee which is obliged to investigate, with the help of an increased number of US labour attachés in Mexico, whether the complaint is justified. The US government can then press the issue with its Mexican counterpart. The complaint can thereafter be accepted and remedies agreed. If the issue is not resolved by consultation, or if the Mexican side delays beyond a tight time schedule, the issue can be taken to an arbitration panel with the power to impose sanctions on the individual company, meaning a loss of the right to tariff-free trade within the USMCA area.

Mexico’s powers in relation to the USA are much more limited. A complaint can only be filed if a company has failed to comply with a ruling of the National Labor Relations Board, the US body that investigates violations of collective bargaining agreements. This body can take years to reach a verdict, meaning that the response would not be rapid. This part of the agreement also means that a US company refusing to accept trade union representation, undertaking anti-union harassment and intimidating workers – all common occurrences – would not be subject to the same penalties as a Mexican equivalent.

4. A fourth new element in the agreement is Annex 23-A, appended to the labour chapter. In this it was noted that the new, incoming government of December 2018 had confirmed that it would establish impartial oversight mechanisms that could ensure the implementation of new requirements for the election of union leaders by those they are to represent, for secret ballots on collective agreements and for making all agreements public and accessible. It was made clear that the legislation should be adopted before 1 January 2019 and that ‘entry into force of this Agreement may be delayed until such legislation becomes effective.’¹⁰⁰

⁹⁹. <https://www.epi.org/press/u-s-mexico-canada-agreement-weak-tea-at-best/>

¹⁰⁰. <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23%20Labor.pdf>

There was progress in this direction during 2018. In the July of that year Mexico elected Andrés Manuel López Obrador as president, viewed as the country's most left-wing leader of all time. He promised labour reform in his election programme as part of a shift in economic strategy to put greater emphasis on rising living standards and domestic demand. Attaching firm conditions to a trade agreement was a means to strengthen his position against political opponents and ensure that changes to the law would not be reversed by a subsequent government (Puyana 2020). Honouring a commitment to increase the minimum wage, in practice by more than 50 per cent in real terms, also provoked a rapid, and unprecedented, escalation of strike action in border cities from December 2018 with workers aiming immediately to gain equivalent increases. Numbers involved were in the tens of thousands even though some employers sometimes met demands before strike action.¹⁰¹ This was further evidence of the failings of the established system of industrial relations within Mexico.

The newly-elected senate finally approved ratification of ILO Convention No. 98 in September 2018. This had been sent to the senate on 1 December 2015, following pressure from the ILO and others, but left unapproved. The significance of ratification was that, if applied in Mexican law, much of the protection contract system should be found illegal. Ratification means accepting a convention 'as a legally binding instrument'. It is not enforceable as part of an international treaty, but it could be taken as law by Mexican courts¹⁰² and has been used in judgements to uphold the constitutionality of laws that were subsequently passed,¹⁰³ after more than 400 judicial appeals against the reforms had been attempted by the CTM (Bensusán and Middlebrook 2020: 9).

The actual approval of new laws came after warnings from Nancy Pelosi on 2 April 2019 that the US Congress would not approve the agreement until new legislation was passed in Mexico. Urgency was pressed by López Obrador, saying 'We don't want any motive to be given for reopening the negotiations of the treaty.'¹⁰⁴ All the main political parties voted in favour on 1 May 2019, with business leaders swayed by the US President's threat to end NAFTA without replacement. The way was then open for ratification in the USA.¹⁰⁵

6.5 The economic consequences of USMCA

For the first time in a trade agreement, the labour provisions are important enough to affect the economic outcome. Predictions from the US side using the standard CGE method showed very small economic impacts, including no increase in US

101. <https://www.vox.com/world/2019/3/28/18251583/mexico-matamoros-factory-worker-labor-strikes>

<https://www.theguardian.com/world/2019/feb/17/mexico-matamoros-strike-union-jobs>

102. http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-05782019000200157

103. <https://aflcio.org/sites/default/files/2020-12/IMLEB%20Interim%20Report%20%26%20Separate%20Statement%20of%20Members%20Marculewicz%20%26%20Miscimarra.pdf>

104. <https://www.reuters.com/article/us-usa-trade-usmca-mexico-idUSKCN1RG1SN>

105. <https://www.vox.com/2019/5/1/18523972/may-day-2019-mexico-labor-reform>

GDP, largely because USMCA replaced an existing agreement with a similar tariff regime. The key question was whether the labour provisions would lead to the relocation of economic activity, with one study predicting 30,000 jobs in vehicle components moving to the USA implying reduced employment in Mexico, a fear expressed by some businesses in that country (Puyana 2020). There was much guesswork in the US estimates as producers in Mexico could prefer not to move but to pay the higher tariffs when required or invest in more production in Mexico to reduce the import contents of their products. Predictions of relocation were also based on estimates that Mexican wages would increase by 17.2 per cent once all the provisions were enforced (USITC 2019). In view of the gap in wage levels with the USA, that need not induce many firms to move production.

In fact, the first reactions from firms suggested no appetite to move. A number of Japanese firms were reportedly prepared to face the higher costs from tariffs or higher wages rather than undertake costly relocations. Toyota reportedly took the view that it would not be ‘whipped around by a policy that we don’t know how long it will last.’¹⁰⁶ It is also an open question how far Mexican wages will rise, not least in view of difficulties in enforcing the new laws. In fact, AFL-CIO President Richard Trumka still expressed serious scepticism on 23 April 2019.¹⁰⁷ His fears were rational. It was reported after one year of operation of USMCA that there would need to be legitimisation votes for 80,000 collective agreements to comply with the new law. There had been 1,378. The deadline for implementation was 1 May 2023, implying the need for 120 ballots per day, all of which needed to be conducted properly and fairly.¹⁰⁸

6.6 Industrial relations consequences of USMCA

A key test of the effectiveness of the labour provisions is the use of the RRLM. This was already being used in two important cases by the end of May 2021. The first of these was initiated on 10 May by the AFL-CIO, along with an independent Mexican union and other groups, with the case falling for investigation to the US Interagency Labor Committee. The case relates to Tridonex, a subsidiary of the US company Cardone, which is alleged to have interfered in union elections. Workers were harassed and more than 600 had reportedly been dismissed over a period of time for attempting to organise with an alternative union. A lawyer representing them was arrested for ‘inciting riot, threats and coercion’,¹⁰⁹ jailed by the Tamaulipas governor, a known opponent of labour reform, and released

¹⁰⁶. <https://www.motor1.com/news/432557/auto-companies-raise-mexican-wages/>

¹⁰⁷. <https://www.industryweek.com/the-economy/trade/article/22027493/aflcio-president-opposes-usmca-in-current-form>

¹⁰⁸. <https://www.finance.senate.gov/imo/media/doc/2021.07.27%20SFC%20USMCA%20Hearing%20-%20Davis%20Testimony.pdf>

¹⁰⁹. <https://aflcio.org/sites/default/files/2020-12/IMLEB%20Interim%20Report%20%26%20Separate%20Statement%20of%20Members%20Marculewicz%20%26%20Miscimarra.pdf>

only on condition of internal exile in another state¹¹⁰ where she also faced criminal charges relating to support for worker protests.¹¹¹

The second case originated from the US Trade Representative on 12 May. The allegation related to the denial of rights at the GM plant at Guanajuato. A vote was held in April to confirm the existing collective agreement, but officials from Mexico's labour ministry found 'irregularities' – representatives of the incumbent union were allegedly caught destroying ballot papers – and the US side then lodged an official complaint. Mexico agreed that a denial of rights had taken place and instructed a new vote under a newly-agreed procedure. This included involving the government and the ILO as observers to check the proper conduct of the vote and whether workers had accurate information on the collective agreement. The CTM administered the ballot. The vote was rerun on 17-18 August with 3,214 employees voting against and 2,623 for out of the 5,876 employees.¹¹² In a vote to decide on union representation held on 3 February 2022, 78 per cent of workers chose the independent autoworkers union while only 5 per cent voted for the incumbent CTM, a result welcomed by unions and the administration in the USA as a step towards genuine employee representation and higher wages in Mexico.

There have also been some complaints by Mexico against the USA involving migrant workers in agriculture and food processing and a failure to enforce gender discrimination laws.¹¹³ It remains to be seen whether they will make any progress in view of the constraints in the trade agreement working against complaints from the Mexican side.

However, the first results of USMCA suggest greater involvement in using the agreement to back changes in employment relations than had been the case in any previous agreement.

110. <https://www.natlawreview.com/article/first-usmca-labor-complaint-promises-new-challenges-us-mexican-manufacturers>
<https://www.jurist.org/news/2021/05/afl-cio-files-labor-abuse-lawsuit-against-mexico-factories/>

111. <https://aflcio.org/sites/default/files/2020-12/IMLEB%20Interim%20Report%20%26%20Separate%20Statement%20of%20Members%20Marculewicz%20%26%20Miscimarra.pdf>

112. <https://www.reuters.com/business/autos-transportation/gm-workers-mexico-vote-scrap-union-contract-labor-ministry-2021-08-19/>
<https://apnews.com/article/business-mexico-caribbean-global-trade-0205e3c7de4c61c44011c1913fdfae36>
https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_815723/lang--en/index.htm

113. <https://www.uschamber.com/international/trade-agreements/usmca-rapid-response-mechanism-makes-its-debut>

7. Conclusion

The five cases presented above give grounds for cautious optimism, suggesting that trade negotiations and labour provisions in trade agreements may sometimes help to improve labour conditions. Doubts must remain about how permanent such changes will prove to be and how far the ratification of ILO conventions and changes in laws will bring real changes in employees' conditions. Nevertheless, a comparison of the case studies presented above points to some general conclusions on when labour provisions are most likely to make a difference.

1. The effectiveness of labour provisions depends on the conditions in a particular country at a particular time. In every case covered here, positive results came as part of changes in economic policies and with the rise of, to a greater or lesser extent, more sympathetic political leaders. Labour provisions helped development in a certain direction, but did not set that direction. Even in Uzbekistan, where the economic pressures for a change in employment practices were enormous, it required a change in government to ensure that change happened, incomplete though it still is.
2. Effectiveness depends on continual efforts by trade unions and others. Trade agreements are primarily about commercial issues and labour provisions were accepted rather as an add-on. It has therefore been, and continues to be, an uphill struggle on the part of trade unions and sympathetic politicians to give them adequate strength in agreements as negotiated and to ensure that provisions in agreements are used to the full. The ongoing trade union voice has been clear in EU agreements, through civil society consultation mechanisms that were valuable both in Korea and Georgia. Trade unions in the USA have also been more successful than their European counterparts using their influence to improve agreements before they are signed.
3. The form of an agreement matters. Actors have been learning from past disappointments and have used their influence to press for improvements in the content of agreements. An important issue is the disputes section, greatly strengthened in the USMCA where positive results are the most visible, but still unnecessarily weak in EU agreements. It took a very long time to see any positive results in Korea, in stark contrast to the signs of progress in Mexico.

4. It is also clear that the strongest pressure can be exerted before an agreement is signed, as demonstrated by the tough prior conditions imposed by the USA on Mexico and Vietnam. The latter case also shows the effect of relaxing pressure as the withdrawal of the USA from the agreement was followed by a weakening of reforms inside Vietnam.
5. A partial substitute for insistence on changes before an agreement takes effect is a strict timetable for implementation. That applied to Mexico in the USMCA. The nearest in an EU agreement covered here is the deadline in the Association Agreement with Georgia. Implementation still depended on the continuing efforts of Georgian trade unions and the ETUC and on an independent initiative in the Georgian parliament. Nevertheless, results came more rapidly than in Korea where the ratification of the ILO Fundamental Conventions was left without a deadline.
6. The best results can be expected when labour provisions relate to visible failings in a country's employment practices. The ILO Fundamental Conventions do not necessarily encompass the key issues in a country and their ratification is only a small step towards better employment relations. Somewhat exceptionally in Korea, where trade union rights were a major issue, ratification of the ILO conventions on rights to association and collective bargaining were more central to disputes than in other countries and were associated with quite specific changes in laws although it remains to be seen whether Korean employment law will undergo a full transformation. In Mexico, the laws insisted on in USMCA were clearly targeted at failings in the existing system of industrial relations. In Georgia, the broader scope of the Association Agreement meant that more issues were covered, including safety and health at work and the need for a labour inspectorate. Effective means to include more issues, such as minimum wages and protection against precarious working conditions, could bring labour provisions closer to the issues of greatest concern to employees.
7. These cases demonstrate more clearly than ever the power of trade sanctions. That is shown in the willingness of governments to change practices to end existing sanctions, as in Uzbekistan, and to accept conditions in agreements before they take effect, as in Vietnam and Mexico. The USMCA shows the value of a rapid mechanism linked to trade sanctions against particular companies. This is not a complete solution, as the use of trade sanctions alone would not protect employees in non-trading activities. Nor need it be used repeatedly, as the partner country's own legal system should be able to handle the same transgressions of employment law. However, it is a useful and effective supplement to, and check on, internal legal processes.

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