

A TRADE UNION GUIDE

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Trade Unions and Bilaterals: Do's and Don'ts

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Introduction

Why this Guide?



The number of bilateral and regional trade agreements has increased enormously over the last two decades and by 2010 is expected to number some four hundred. These agreements have a substantial and increasing impact on national economies, employment, gender and development. At the same time the involvement of trade unions through monitoring, consultation and engagement in these bilateral trade agreements is often lacking¹.

This trade union guide to bilaterals has been produced in an effort to start to fill an information gap, such that trade unions can be provided with the capacities to get more involved in their governments' negotiation and implementation of bilateral and regional trade agreements. It is divided into four sections – firstly a short introduction to bilaterals around the globe; secondly an examination of their major components, including attention to their possible labour rights and consultation provisions; thirdly a consideration of how bilaterals can be negotiated, and fit into the multilateral trading structure of the World Trade Organisation (WTO); and fourthly, a list of “Do’s and Don’ts” for trade unions engaged in influencing their governments’ processes on bilateral negotiations. This guide has benefited from input by members of the Global Unions Task Force on Trade, Investment and Labour Standards (TILS) during and after the March 2007 TILS meeting where a draft version was presented.

What are bilaterals?



Bilateral and regional trade agreements between two or more countries are agreements that aim to liberalise trade flows amongst the participating countries. They may also be referred to as Free Trade Agreements (FTAs) or Preferential Trade Agreements (PTAs) as they are agreements that give preferential access to the signing countries. Examples are the EU-Mexico agreement (concluded in 2000), the US-Singapore agreement (2003) and the Canada-Chile agreement (1997), as well as agreements covering regional blocks such as Mercosur (1994), Southern African Customs Union (SACU) (1969) and the ASEAN Free Trade Area (2003).

The term “bilaterals” is increasingly used to refer not only to bilateral trade agreements but to regional trade agreements as well, and is used that way in this guide.

Preferential trade agreements such as the Generalised System of Preferences (GSP) and the African Growth and Opportunity Act (AGOA) of the US, which are unilateral schemes, are not dealt with in this guide. Neither are the multilateral negotiations in the WTO or the world’s 2,000 Bilateral Investment Treaties (BITs) addressed in great detail in this report.

The main characteristic of these bilateral trade agreements is that they go further on trade liberalisation than the multilateral WTO agreements, and so are called “WTO plus” agreements. As well as lower tariffs on trade between member countries, they may often cover areas that are not (so far, at least) included in the WTO, such as competition policy, government procurement and investment provisions. They often go further than existing WTO agreements in areas such as investment and intellectual property. Such issues require very careful approach, especially when they are undertaken by countries at different levels of development.

On the other hand, bilateral and regional trade agreements can also include provisions that go further than the WTO with regard to labour standards. Although very few agreements have actually done so, so far, there are some good examples as well, and these are described in this report.

Bilaterals can provide institutions for regular consultations of the social partners, in a way that the WTO does not. Again there are only a few that do so, but clearly trade unions need to pressure for such institutions to be included when agreements are negotiated.²

Bilaterals among trading partners at different levels of development should be distinguished from regional integration processes between countries with similar levels of development that can benefit from a common approach to economic and social development, reinforcing regional interlinkages and building regional markets.

US-driven bilaterals are focused essentially on market access for US companies. It is the US Congress that decides on the choice of countries and that must approve the final agreements. The recently adopted Global Europe strategy by the EU has a similar focus on market access and is based on similar negotiating mandates, including WTO plus issues.

What can be regulated by bilaterals and what conclusions can be drawn from the results?



The chapter below provides more details on the major issues covered and indicates what the experiences are of negotiating these items in bilaterals. This includes trade in goods, trade in services, intellectual property, investment, competition policies, and government procurement. Beyond this, some bilaterals also include provisions on labour and environment and wider sustainable development objectives.

Trade in goods

Trade liberalisation in goods generally includes tariff reductions as well as reduction of non tariff barriers (NTBs). WTO members have bound their tariffs for all or most of their goods in the WTO (although least developed countries (LDCs), especially, still have a large percentage of tariff lines unbound), which means that there is a maximum possible tariff they have set for each product. Any tariffs above that level would be in conflict with WTO obligations. Many countries actually apply tariffs that are lower than the bound (maximum) tariffs, which are called the applied rates. Under WTO rules, only when countries negotiate bilateral or regional free trade agreements with each other can they apply different tariffs to those they apply to any other member coun-

try of the WTO. Thereby, tariff reductions through bilaterals will reduce the tariffs applied between the two countries but will keep the applied rate towards all other countries as before. So only the country with which the agreement is signed will get more favourable access to a country's market, just as the latter country will get favourable access to the first.

The level of specialisation and competitiveness in any two countries affects whether such a tariff reduction will have substantial impacts on domestic markets. Especially as tariffs are already fairly low in developed countries, reductions of those low tariffs is unlikely to have much effect. On the other hand in developing countries, tariff reductions from high levels have a bigger local impact.³

At the same time, bilaterals have not usually addressed issues of subsidies in agriculture, tariff peaks, high tariffs or tariff escalation. Generally speaking, whether the outcome of tariff reductions is beneficial for a country depends on the competitiveness of its domestic producers, the choice of tariff lines that are reduced and the level of tariff reduction in both countries.⁴

The other issue in goods liberalisation concerns non tariff barriers (NTBs). These are rules such as technical standards or sanitary measures that regulate and hence restrict trade. Bilaterals also aim to cover some of these when they address trade restrictions between member countries.

Trade in services

Until the conclusion of the Uruguay Round of trade talks in 1994, trade in services was not covered at all by the WTO system. Even now, the provisions on services are so far often rather minimal, making the liberalisation of trade in services a major element in many bilaterals negotiations.

Countries regulate the provision of services by foreign companies either by regulating foreign services companies' establishment in the country, by regulating the provision of services by service providers from abroad, or by regulating the entrance of service providers into the country.

A wide range of regulatory provisions is used for this. For example foreign service providing companies may only be able to establish themselves if they have a licence, or if they merge with a domestic company. Persons may only be allowed to provide services if they possess certain qualifications; or limits on the number of foreign service providers can be set.

Services liberalisation therefore means that rules and regulations will be made less stringent, so that it becomes easier for foreign service providers to provide services in another country. The main aim is to eliminate discrimination between domestic and foreign service providers. This can create the risk that regulation necessary to ensure equal and affordable access to services for ordinary people is abolished or relaxed, often with particularly negative effects on women and poor people who rely on affordable public services. It also creates the risk that domestic enterprises that are not competitive enough will be forced out of the market by foreign companies or disappear through company take-overs, and it can have negative impacts on wages and inequality.

Agreements for trade in services are normally based upon commitments. Governments commit certain services sectors or subsectors in which they allow foreign service providers to provide services in their country. This is done for example by increasing the number of service suppliers, or by reducing qualification requirements.⁵

Many of the bilaterals are based on the system of a negative list or “top down” approach. This means that all services sectors are subject to liberalisation between the countries, with the exception of those sectors explicitly included on a so-called “negative list”.

Often there is further liberalisation in terms of deregulation or abolition of rules that are considered trade restrictive.

Public services are not excluded from bilateral trade negotiations. Given the “negative list” approach in bilaterals they will therefore be included automatically, unless provisions are made in specific bilaterals for them to be exempted. It is therefore important for trade unions to ensure that these public services and other essential services are not included in bilaterals, so that governments can ensure quality and access to these services for all.

And finally a very important issue is the movement of workers, known under WTO terminology as “natural persons”, or the mode 4 commitments as they are also called. Current agreements do not provide any provisions to prevent abuses or unequal treatment of these migrant workers, many of them women. They need to be negotiated on the basis of consultations with trade unions and to include provisions that protect the interests of migrant workers.

Intellectual property

One of the agreements at the WTO provides protection for Trade Related Intellectual Property (TRIPS). Many bilaterals include intellectual property provisions, which in general are TRIPS plus, i.e. they reinforce TRIPS rules regarding the protection of intellectual property (such as patents, industrial designs, layout designs of integrated circuits, trademarks, geographical indications, copyright and related rights, and undisclosed information).

Provisions in bilaterals generally include longer patent periods that lengthen the periods before production of generic products can start. The effect of such reinforced provisions has been reduced access to medicines as a result of price increases due to the replacement of cheaper generic drugs by expensive patented drugs. Bilaterals may also include provisions on data exclusivity and on testing data, which means that such data cannot be used to test the security of generics and therefore that costly tests will have to be undertaken by the generics producers, which further increases the price of medication. For example, the US-Peru agreement includes a provision on data exclusivity, which is estimated to more than double the cost of the medicines concerned. Colombia has predicted that the agreement with the US would lead to a loss of market share for its generic industry of 71%, which will have a significant influence on prices. The Special Rapporteur of the UN on the Right to Health has expressed concerns about such bilaterals that reduce the access to cheaper generic medicines, and a commission of the World Health Organisation (WHO) has recommended avoiding such provisions in trade agreements. People with HIV/AIDS will be particularly affected by stronger intellectual property provisions, as these can increase annual costs for medication from US\$ 132 per patient with generics to US\$ 15,000 per patient if using the patent-protected drugs.⁶

Such provisions in bilaterals often include adoption and implementation of provisions from which developing countries are exempted in multilateral treaties such as TRIPS, or omit language that ensures that countries can extend their existing exceptions and limitations or can formulate new exceptions. They

often require countries to sign existing intellectual property treaties that severely restrict the rights of local players such as for example farmers and rural workers. Enforcement provisions often omit limitations, flexibilities and safeguards available to developed countries and make developing countries subject to pressure from rights holders.⁷

Whether exercised through the WTO or bilaterals, there is an absence of evidence of stronger intellectual property protection leading to more innovation or the development of new and useful medicines.

Investment

Most bilateral trade agreements contain provisions that regulate investment between the partner countries to some degree. Common investment provisions in bilaterals include substantial market opening, non-discrimination of foreign investors as compared to local firms, protection of investors, the right to establishment, investor to state dispute settlement procedures, pre-establishment provisions, and expropriation rules. Many of these protections are common in Bilateral Investment Treaties (BITs) as well.

One negative effect of such investment provisions concerns their preventive effect on policy making, in that governments refrain from laws and regulations to promote local enterprises or that provide for financial stability or for social and environmental protection, because there might be a dispute as a result.

Furthermore, although much emphasis has been put on attracting foreign investment, there is considerable doubt as to whether such strong investor protections will lead to increased foreign investment (studies from World Bank, UNCTAD and OECD for example have concluded that more market access, incentives and restricted regulation will not lead to increased investment in Africa). They will, on the other hand, lead to a continued flow of benefits to investors. Prohibiting rules that regulate investment makes it much harder for governments to keep the benefits of investment in the country.

Therefore, governments need to devise clear and transparent policies about what sort of investment they want to attract, what kind of jobs should be created, how they can ensure that benefits flow to the country and how to distribute such benefits.

At the same time it has to be noted that efforts at attracting investment have often led not to non-discrimination but in fact to more favourable treatment of foreign investors than local firms, and have thus brought about de facto discrimination against local companies. It is clear that foreign companies should not get more favourable treatment than local companies, nor be exempted from certain labour, fiscal or other legislation. The investment provisions that are negotiated in bilaterals should not restrict government regulation, prevent governments from prioritising local firms or requiring use of local inputs, or impose any obligation of “right of establishment” that requires countries to accept any foreign investment, regardless of its consequences.

Competition policy

Bilaterals often cover rules on competition, addressing issues such as the excessive market power of large corporations such as in cartels (collusive agreements), restrictive business practices, and abuses of market power. The objective in bilaterals is to have similar provisions for competition policy in the part-

ner countries. For countries that have a similar level of development, such a convergence can facilitate business relations. However, some developing countries do not have competition legislation in place yet, whereas many adapt competition legislation to specific local challenges. Generally speaking, such development-oriented competition policy is intended to promote the emergence of local businesses that could contribute positively to economic development, sometimes requiring the acceptance of what might otherwise be considered anti-competitive practices.

The risk of competition policy in trade agreements is that it is drafted in the interest of multinational companies, and is developed to facilitate cross-border mergers and acquisitions, whereas developing countries would want provisions that set rules for mergers and acquisitions which take into account development concerns and other domestic priorities, including workers' interests. The inclusion of competition policy in bilateral agreements is also capable of undermining public enterprises or monopolies. It may further restrict the capacity of governments to set regulations of public interest or industrial policies. Competition provisions could further reduce the freedom of governments to set regulatory policies that for example protect the environment, restrict foreign ownership in certain sectors, or promote local content. The principle of non-discrimination would prevent countries from protecting domestic companies from the actions of large multinationals and prohibit policies that benefit domestic companies. It could clash with attempts by governments to protect certain activities from market competition and put in place public interest regulations that govern markets when there is competition. Rather than addressing the global market dominance of large global companies, the current competition policy provisions in bilaterals further the interests of such companies.

Government procurement

Government procurement is the purchase by governments of goods and services. These can involve major contracts, such as the purchase of computers for government offices, or the construction of a road or tunnel. Such purchases are often restricted by rules that allow only domestic companies to bid for such contracts or that give preference to domestic companies when bidding for contracts. They may also include social criteria, such as requiring that bidders respect a number of workers' rights, or favour particular suppliers for social purposes such as encouraging purchases from a particularly poor or disadvantaged region. Provisions on government procurement need to get more prominence as these provisions risk being damaging to social policy procurement provisions.

Often these procurement procedures are not transparent and it is unclear on which basis decisions are taken. Therefore the bilateral trade agreements aim to increase transparency in government procurement. In itself transparency might be reasonable but bilateral negotiations often aim to go much further and include market access provisions, to ensure that companies of one country can bid for contracts in another country without being discriminated against. Given the economic impact of public procurement – frequently accounting for some 10% of GNP, with commensurately sizeable employment implications - this is clearly an issue of immense importance for national development as well as employment, meaning that any consideration of negotiating on public procurement needs to be the subject of intense prior national policy debate.

Trade facilitation

The objective of trade facilitation is generally to make it easier and more efficient to trade between the partner countries, for example by reducing the time goods remain at the border before they are transferred, by reducing the costs for transfers and transport, by reducing transport time and by reducing corruption. All such measures are beneficial for a country, but can be costly to deal with. Therefore, bilaterals that aim for trade facilitation should also provide for funds to realise this, without adding to the budgetary burden of countries that have urgent needs in other areas such as health and education. Furthermore they must not undermine existing regulatory bodies responsible for ensuring the safety of cross-border movements of goods.

Labour Provisions

A number of bilateral agreements have included labour provisions, in order to reduce the negative effects on workers that can flow from trade agreements. Such provisions have been different from one agreement to another, and have been different among the main users of labour provisions. Both the EU and US have used labour provisions, but have taken different approaches. Other regional groupings have used labour provisions as well, such as Mercosur.

The US provisions have focused on the core labour standards, often also including supplementary provisions such as occupational health and safety, minimum wages and hours of work. Respect for these labour standards has been included in all its bilaterals, but the mechanism has been different from one agreement to another.

The EU has varied between an approach focusing on core labour standards, in some of its older agreements, and a “sustainable development” approach, including but going beyond core labour standards, more recently.

Other examples have included labour provisions used by New Zealand government in its bilaterals such as the P4 agreement (New Zealand, Brunei, Chile and Singapore) and the New Zealand-China agreement.⁸

The results of labour provisions are rather mixed, reflecting the non-enforceable nature that has generally characterised them. There are some positive examples but in many cases the provisions have remained unused or have not led to major changes.

Some examples of labour provisions in bilaterals include the following:

- **EU/South Africa** : the agreement contains a reference to the core labour standards but there is no explicit linkage to trade, nor are there any procedures for resolving disputes. The text mainly refers to information exchange and technical assistance to improve legislation and implementation.⁹
- **EU/Chile** : The agreement covers general human rights as well as social cooperation and recognises the core labour standards' importance for social development, but is not explicit on trade union rights and possible enforcement of the social cooperation provisions.
- **NAFTA¹⁰** : The NAFTA trade agreement includes a side agreement, the North American Agreement on Labour Cooperation (NAALC). The NAALC provisions are based on enforcement of national labour

law by the partner countries. It includes references to 11 basic labour principles. However, the enforcement mechanism is weak and most of the core labour standards, including freedom of association and the right to collective bargaining, are not subject to any form of complaints procedure. Moreover, parties could even weaken labour law further in order to escape persistent cases being brought by other NAFTA countries. Partner countries each have a National Administrative Office (NAO) that takes up complaints concerning non enforcement, which can be put forward for ministerial consultation. If such consultation does not provide solutions accepted by all parties, a committee of experts will provide a report for ministerial review with recommendations (except for cases regarding trade union rights). Ultimately fines or, in case of non-payment, trade sanctions can be imposed only for a persistent pattern of non-enforcement for cases of child labour, minimum employment standards and occupational safety and health. The results of the NAALC are rather poor, due to the political enforcement process of NAALC. No case has gone beyond ministerial consultations.¹¹

- **US/Jordan** : A free trade agreement was signed in 2000. The agreement includes provisions on enforcement of domestic labour legislation in the body of the agreement, and provides for dispute mechanisms. The agreement also includes “strive to ensure” language with regard to the binding of core labour standards and with regard to the non-lowering of standards. The agreement includes a review process, which is based on extensive consultations that can ultimately lead to fines or the withdrawal of trade benefits. The provisions do not include the right for the public to submit complaints about labour rights violations. Therefore its effectiveness depends on the willingness of the governments to pursue enforcement.¹²
- **US/Cambodia** : In 1999 a textiles agreement was negotiated with Cambodia that allocated additional textiles quotas for access to the US market in exchange for compliance with international labour standards and Cambodian legislation. The agreement was monitored by the ILO, with the costs being shared by the US, the Government of Cambodia and the garments employers’ federation in Cambodia. All companies were part of the project which included training of workers and management at the factory level. The project managed to improve compliance with labour standards in Cambodia, although the situation is not perfect. Working conditions and wages, as well as productivity and quality of products improved. Although the results are positive, the project was costly and required strong commitment from employers, workers and government.¹³
- **CAFTA**¹⁴ : Labour obligations in CAFTA are part of the core text of the trade agreement and include provisions that commit CAFTA countries to provide workers with improved access to procedures that protect their rights. It provides a three-part cooperative approach. Firstly, the Agreement requires that all parties shall effectively enforce their own domestic labour laws in seven areas (but there is no stipulation that these must be in line with international standards). Secondly, they will work with the ILO to improve existing labour laws and enforcement. And thirdly, strategies will be built to improve workers’ rights (consultations, training programmes, financial resources and public participation). However, countries are not obliged to include procedural guarantees or sanctions to correct detected breaches, and funding to promote cooperation is lacking (the US labour cooperation budget was cut by 85% for 2005). Moreover, the ILO core Convention on Discrimination is not included in the agreement.¹⁵
- **US-Andean**¹⁶ : The US-Andean trade promotion agreement includes similar provisions to CAFTA in terms of requiring countries to comply with domestic labour legislation. Given the situation in Colom-

bia alone, such provisions are clearly insufficient.¹⁷ Recently a number of changes have been made to the agreements between the US and Panama and the US and Peru, as a consequence of the change in Congress, which clearly constitute improvements compared to the other US FTAs already negotiated. At the same time the FTA with Colombia has been put to a halt due to the trade union rights violations in that country. It is not yet clear how this will be addressed.

- **Mercosur**¹⁸ : the member governments signed a Social and Labour Declaration in 1998. This document is far reaching and goes beyond the core ILO conventions, covering also social dialogue, employment promotion, unemployment protection, health and safety and social protection. The Declaration mandated a Commission to monitor adherence to the Declaration and to advise on measures to ensure adherence. Trade unions in the region have formed the Southern Cone Trade Union Coordinating Committee (Coordinadora) and hold regular meetings to press regional officials on social and labour issues.¹⁹
- **SADC**²⁰ : SADC is an association agreement with broader political and development objectives rather than a trade agreement, but it includes trade as a component. There is an Employment and Labour Sector as one of SADC's core activities, and a tripartite commission, the Southern Africa Labour Commission (SALC), for social and labour affairs. The Southern African Trade Union Co-ordination Council (SATUCC) is the trade union counterpart to SADC and is involved in SADC's tripartite activities, as well as bringing the trade union perspective to other SADC activities. The SALC adopted the SATUCC Social Charter of Fundamental Rights of Workers in Southern Africa in 1992.²¹
- **Canada/ Costa Rica** : Signed in 2001, this bilateral contains an agreement on Labour Co-operation that takes the same name and same format as the labour agreement in NAFTA. Thereby, the parties are obliged to embody in their labour law the principles enshrined in the ILO Declaration on Fundamental Principles and Rights at Work and to enforce these laws effectively. The preamble reaffirms the importance of social development for economic development, and there are procedures for review of a country's compliance in the event of a complaint by the other party. Fines of up to US \$10 million can be levied in the event of violation of the agreement. There are no explicit mechanisms for trade union organisations to be involved in the review procedure for complaints.
- **ASEAN**²² : The ASEAN Social Charter was designed by the ASEAN Trade Union Council (ATUC) and labour-friendly NGOs as a social counterpart to ASEAN's economic, trade and investment architecture. It calls on state parties, the international community and other related non-state actors to respect, realise and promote the rights to full implementation of ILO core labour standards; Employment Stability; Health and Safety; Wages and Salaries for a just living; Social Security; and Human Resource Development. It further proposes the setting-up of a Labour Advisory Council to ensure the monitoring, reporting and enforcement of the ASEAN Social Charter. Such a Council should constitute all relevant groups and institutions involved with labour in the ASEAN region. ASEAN is developing a Charter to include guidelines and rules and a protocol is needed that includes social and labour principles in the Charter.

The overall experience with the labour provisions in US FTAs has been rather disappointing in terms of concrete results. In particular the coverage of labour standards and labour law as well as the enforcement mechanisms have been insufficient. The latest agreements with Peru and Panama²³ have provided some

improvements in that sense. The labour provisions in these agreements now include a commitment to adopt and maintain the ILO core labour rights in domestic labour laws. They also include a commitment not to weaken labour laws “in a manner affecting trade or investment”. And they include the commitment to effectively enforce domestic labour laws (including the core labour rights and laws on minimum wages, health and safety and maximum hours).

It has become clear that language such as “strive to ensure that laws recognise and protect core labour standards” (such as in the Jordan agreement) is not sufficient. Nor is the requirement that countries only enforce their domestic labour laws very helpful (Chile, Singapore, Morocco, Australia, Bahrain, CAFTA-DR, and Oman). The inclusion of the commitment to ensure the ILO core labour standards are incorporated and implemented in domestic labour law therefore is a major improvement in the Peru and Panama agreements.

Another improvement is the fact that labour provisions and disputes are no longer subject to separate procedures, but that these are now subject to the same dispute settlement, enforcement mechanisms and selection criteria as the commercial provisions in the agreement.

The earlier US FTAs contained a loophole that allowed governments to avoid complying with labour obligations on the basis of prosecutorial discretion. The new text clarifies that any decisions with respect to allocation of enforcement resources must not undermine the commitment to enforce the core labour standards.

Environmental Provisions

Some of the bilaterals also include environmental protection and trade in environmental goods. Language is often limited to “best efforts” provisions.

Consultation Mechanisms with Trade Unions

Some trade agreements provide for consultation mechanisms with trade unions. Some of the most prominent examples are indicated below.

- **EU Economic and Social Committee (EESC)** : this is a consultative body that gives representatives of the EU’s socio-occupational interest groups, and others, a formal platform to express their points of views on EU issues. Its opinions are forwarded to the larger institutions - the Council, the Commission and the European Parliament. The 344 members of the EESC are drawn from economic and social interest groups in Europe. Members are nominated by national governments and appointed by the Council of the European Union for a renewable 4-year term of office. They belong to one of three groups - employers, employees and “various interests”²⁴. The EESC has proved useful in articulating civil society concerns relating to major Commission initiatives in the field of trade and as a platform for joint meetings between EU and partner country or regions’ worker representatives (eg ACP; Mercosur). Nevertheless, its composition is too broad to provide the consultation and monitoring mechanism required to follow the negotiation and application of particular FTAs.
- **Mercosur Consultative Commission** : The Economic-Social Consultative Forum is the organ representing the economic and social sectors and consists of equal numbers of representatives from each

State Party. The Forum has a consultative function and expresses its views in the form of Recommendations to the Common Market Group, which is the executive body of Mercosur.

- **NEDLAC**²⁵ : At Nedlac, the South African government comes together with organised business, organised labour and organised community groupings on a national level to discuss and try to reach consensus on issues of social and economic policy. Nedlac's work is conducted in four chambers which discuss different aspects of social and economic policy. These are the Labour Market Chamber, the Trade and Industry Chamber, the Development Chamber and the Public Finance and Monetary Policy Chamber. Nedlac also engages in research and information sharing which can help its constituencies (government, business, labour and community) in developing economic policy. In terms of Section 77 of the Labour Relations Act, Nedlac has a dispute resolution function between trade unions and government and/or business on issues of socio-economic policy. The Trade and Industry Chamber considers matters pertaining to the economic and social dimensions of trade, as well as industrial, mining, agricultural and services policies, and the associated institutions of delivery. It includes the negotiations on SACU and WTO.²⁶
- **CARICOM**²⁷ : In the treaty establishing Caricom, article 73 regarding industrial relations promotes various trade union concerns, including tripartite consultations. It also promotes collective bargaining. There are no formal consultative mechanisms but the Caribbean Congress of Labour (CCL), which represents trade unions in the region as a counterpart to Caricom, has held regular top level meetings with Caricom officials and regional leaders.²⁸
- **EU-Mercosur Social Observatory** : This mechanism does not yet exist but has been proposed by the ETUC and the "Coordinadora" for the EU-Mercosur agreement. However as the negotiations between the EU and Mercosur have been in limbo for some years, discussions of this proposed mechanism have not advanced further.

Which countries can negotiate bilaterals?



In principle every country can negotiate a bilateral trade agreement. In recent years, the more developed emerging economies and industrialised countries or regional blocks, with larger domestic markets, have tended to be more active in seeking to conclude bilateral agreements. The poorer countries have been less engaged in bilateral agreements, except to the extent they have been required to take part in negotiation of economic partnership agreements (EPAs).

Bilateral trade agreements and the WTO

The WTO includes provisions for Free Trade Areas (FTAs) and Customs Unions which set rules for the negotiations of bilaterals. These provisions require that such FTAs or Customs Unions have to liberalise trade in goods beyond WTO liberalisation. Art. XXIV of the General Agreement on Trade in Tariffs (GATT) on Regional Trade Agreements requires that duties (tariffs) and other restrictive regulations of commerce must be eliminated with respect to substantially all trade between the partner countries. The duties and charges taken into consideration have to be applied rates and the elimination has to take place in a reasonable length of time, which has been set at a maximum of 10 years. Furthermore, such bilateral agreements have to be notified to the WTO. In addition, GATT Add Art. XXIV includes the requirement for examination by the WTO Council for Trade in Goods of all notifications of such agreements, and for regular reporting by customs unions and free trade areas to the Council. However in reality very few free trade agreements are in full conformity with Article XXIV of the GATT, making many WTO members reluctant to challenge others' trade agreements.

As noted previously, many issues that are not dealt with in the WTO are taken up in bilateral agreements, although the WTO Agreements do not oblige governments to take up these issues in bi-

lateral agreements. Examples are investment, competition, government procurement and far-reaching intellectual property and services commitments. With regard to services – and only if the governments decide to include services in the bilateral – the agreement has to cover substantially all sectors (GATS Article V). On the positive side, labour and environmental provisions are sometimes present as well. What many governments oppose in the WTO they have accepted in bilateral agreements, providing another reason why it is so important to monitor what is liberalised under bilaterals and to get things right.

Furthermore, it has been argued that the increasing number of bilaterals that feature WTO plus liberalisation commitments are likely to set the pattern for multilateral agreements at the WTO in the future. All the provisions on investment, for example, that are found in bilateral agreements might become the basis for a possible multilateral agreement on investment in the WTO. If most major WTO member countries have a number of bilateral agreements with similar commitments, it will become likely that such commitments could be applied on a multilateral basis.

This could also be true for articles concerning labour issues, and therefore it is important that labour provisions in bilaterals be strong and effective.

FTAs are also subject to a dispute settlement mechanism as in the WTO, but a variety of methods of arbitration exist in different agreements.

The negotiation of bilaterals can also undermine existing regional integration processes, if one of the countries engaging in regional integration processes signs an agreement with a country outside it, as when Venezuela joined Mercosur in 2006 despite its prior commitments to regional integration in the Andean Community. In the case of EPA negotiations, the ACP countries were divided in six negotiating groups that did not correspond to memberships in regional integration processes (as in the SADC and ESA regions). This stands to lead to the undermining of regional integration instead of the promotion of regional integration the EPAs are claimed to bring.

Coordination among trade unions from the countries that are engaged in negotiations is important in order to achieve a more balanced agreement. Sometimes with bilaterals there are no trade union partners in every country. But when there are, trade unions need to share information on agreements and draft proposals, undertake joint (employment) impact studies, and provide alternative proposals. Technical assistance can be given to partner trade unions, and demands for consultations with trade unions can be made by the partner trade unions, so as to ensure each government includes trade unions in consultation processes. Furthermore meetings or seminars can be organised on the bilateral agreements with the partner unions, with an aim to come with joint positions and strategies in response to the proposed agreement.

What is important for trade unions to look at in bilaterals?



Below you find an overview of general Do's and Don'ts that can be used as a checklist to analyse a bilateral trade agreement that is under negotiation.

Regarding the Contents of the Agreement:

- Make sure you know which areas are under negotiation and what the proposals are for each of these areas (i.e. goods, services, investment etc.). Does an agreement only include the reduction of tariffs or also areas such as investment or services? Once the areas of negotiation are known it is important to know exactly what the demands are by the partner country, and the position of your own country. What are the commitments your government is proposing to make? This information on commitments can be acquired through consultations with your government. If the government is reluctant to provide such information, it is possible that trade unions from the partner country could provide that information. It is often useful to work together with other interested groups such as NGOs to acquire the necessary information.
- Once you know what is on the table, and what the different proposals are, it is important to analyse these proposals based on the possible gains and losses for the overall economy and for workers in particular. Such an analysis can then lead to the formulation of a statement or trade union position on the proposed agreement. It is advisable to use research on how pro-

posals are likely to affect employment, social and gender issues, in order to be able to demonstrate the case for the trade union position. And it is important to make alternative proposals and share these with government and with the public in general. Another possibility is to issue a statement with the trade unions in partner countries. Many examples of trade union statements on trade agreements can be found on the GURN website.²⁹

- It is particularly important to make a gender analysis of the impacts of trade proposals given that women are in many cases among those most affected by the negative effects of trade agreements. Specific proposals that address such negative effects need to be part of the trade union proposals.
- Be extremely careful with proposals for across the board tariff reductions on a line by line basis. A clear understanding is needed on what the impact will be on employment. Which tariffs are proposed to be reduced? And which should be maintained? There may be little domestic employment to be lost from lowering tariffs on products that are not produced domestically, or which serve as inputs in domestic production. However, competing products might need more careful treatment, either by applying lower tariff cuts or by increasing implementation periods. In all cases, it is essential to assess the possible impact on domestic industries in terms of production and employment.
- Be extremely careful with the “Singapore” issues (investment, competition policy, government procurement and trade facilitation). It is advisable for any country to ensure a sufficient and balanced domestic legal framework for investment rules, competition rules and government procurement before making them part of obligations in a trade agreement. Even if domestic frameworks are in place, opening up of such frameworks needs to be done carefully. Another consideration is that provisions in bilateral agreements aim for setting rules that are subject to dispute settlement and cannot be changed or withdrawn, unlike unilateral incentives. Any investment provisions should be balanced and not only provide rights to investors, but also set obligations in line with social, environmental, labour standards and development policies. Any provisions developed on investment should be in line with the principles of the OECD Guidelines for Multinational Enterprises.³⁰
- In terms of services liberalisation it is important to look at which sectors or sub-sectors will be opened up to foreign service providers, and to what extent. This will determine the possible increase of provision of services in your country and the extent to which domestic service providers remain protected. As already mentioned, quality and access to public services is important. But so-called “infrastructural services” (such as telecoms, finance, postal, energy, and distribution services) are important as they play a key role in the development of a country, and can require sometimes a certain level of “guidance” or targeting by governments. This needs to remain possible after a trade agreement has been signed.
- Avoid a negative list, top-down approach to services. A negative list approach means that all services sectors are committed automatically and opened up for foreign service providers. Sectors that governments do not want to include have to be mentioned separately when a negative list approach is used. This requires any government to be very vigilant on which sectors it wants to liberalise and which sectors or subsectors it wants to protect, and to have the capacity to anticipate the future development needs of the country into the distant future – which clearly, no government can really do.
- Special and differential treatment is important if trade negotiations take place among partners at different levels of development, or of different economic importance. Such agreements require lesser

reductions and liberalisation as well as longer implementation periods for the less developed countries involved. It is important that the lesser developed country continues to have the ability to implement policies that are aimed at industrial development, food security, access to quality public services, poverty reduction and equal distribution of incomes.

- A social dimension has to be part of the agreement. The section on labour in this guide showed different approaches that have been used in trade agreements. Lessons should be learned from these provisions, and drafting of labour or decent work provisions should be based on consultations with trade unions. Trade unions should also be included in the implementation of such provisions, through formal mechanisms. The agreements should incorporate respect for ILO core labour standards through enforceable provisions as a minimum, with established procedures for monitoring improvement or deterioration in respect for core labour standards and other workers' rights, and with a strong social dialogue and training component. A further element in many agreements is the use of positive incentives as well. An example of components that could be included in bilaterals is provided in the ITUC/ETUC Statement of trade union demands relating to key social elements of "sustainable development" chapters in EU negotiations on free trade agreements" produced in July 2007.³¹
- Transition periods are important. Liberalisation that is too fast and too deep can have negative effects on workers and the economy. Previous experiences of your country should be taken into account, as well as assessments of the possible impacts. Since the WTO interpretation of GATT Article XXIV on RTAs sets a maximum period for implementation of 10 years, it is essential to maximise the possibilities to have longer implementation periods and lower levels of liberalisation for developing countries.
- Non Tariff Barriers have to be looked at one by one. Some NTBs may restrict trade more than necessary, and could be relaxed. However many NTBs are legitimate measures to ensure the security and safety of products, such as regulations regarding packaging and information on dangerous substances like chemicals. Rather than relaxing such regulations, assistance should be given to producers in developing countries to meet such regulations.
- Trade agreements should include financial components to provide transfers of resources from those groups that benefit from an FTA to those that lose out. The EU's structural and regional funds are one example of using such components in a trade and economic integration agreement. At a national level there is the example of the US trade adjustment fund. Such types of funds should be applied much more generally in bilaterals as well.
- Avoid the absence of safeguards. Safeguard mechanisms can be very important when negotiating bilateral agreements, especially if tariff reductions or services commitments are far-reaching. It is important that a safeguard provision be relatively easy to use and the procedure for applying safeguards not too lengthy and complicated. Processes that are too time-consuming and complicated risk resulting in domestic production being seriously affected before any protection can be put in place.

Regarding the process of the agreement

- Do not allow your government to negotiate a bilateral agreement without trade union input. Unions need to assess the impact of tariff reductions, services liberalisation and other commitments on the domestic market, national enterprises, employment, wages, employment conditions and women workers, and take a negotiating position based on their evaluation of the impact on their members.
- Insist on trade union consultation in the negotiation of trade agreements. Whether this is an automatic feature of all trade negotiations for your country, or whether this has to be included for each agreement separately on a case-by-case basis, it is important that such consultations are not just one-off, but take place regularly during the process of negotiations. They must cover the provision of information on the progress of the negotiations, the details of government positions, changes in those positions over the course of the negotiations, and exchanges of views and joint analysis of proposals, including proposals from the trade unions. Several countries have specific consultation mechanisms and they could provide an example for other trade unions (some examples are provided in the section on consultation).
- If possible and if resources are available, it is important to sustain trade union positions with research, for example on how the proposals are likely to affect tariffs, production and employment; on how opening up of services sectors will affect access to and quality of services; on the specific impact on women workers; or on how strong intellectual property protection will affect prices and therefore have an impact on people's access to medicines. Countries' tariffs can be found for all WTO members on the WTO website³² or in a recent WTO publication on tariff profiles of countries, which is less detailed but more accessible³³. Another source of information is the GURN website, where various trade union and other studies on the impacts of trade agreements can be found³⁴.
- Employment impact assessments are an important tool to estimate the possible effects of trade agreements on employment. Although few ex ante impact assessments have been done, those that have taken place only focus on the quantity of employment. However, the impact on the quality of employment is of key importance for trade unions.

Further References and Reading



The Global Unions Research Network

The Global Union Research Network (GURN) is a platform for trade unionists and researchers dealing with the challenges of globalisation from a labour perspective. The GURN is a cooperative project between the ITUC, TUAC, the GUFs, ILO/ACTRAV and the ILS, the ILO's International Institute for Labour Studies. The GURN agenda is built around a number of priority topics, one of them being Bilateral and regional trade agreements. This page (<http://www.gurn.info/topic/trade/index.html>) contains information on bilateral and regional trade agreements, such as background papers, research papers, trade union positions on bilateral and regional trade agreements and key websites, and a database for all the different topics, including publications on trade agreements. For more info on GURN: www.gurn.info

Alternatives to FTAs

Several alternative approaches to the neoliberal trade agenda have been developed by trade unions.

In Latin America there exists Labour's Platform for the Americas, based on sustainable development and decent work. The Platform was developed by trade union representatives from the Inter-American Regional Workers' Organisation (ORIT), the Andean Labour Consultative Council (CCLA), the Caribbean Congress of Labour (CCL), the Central America and Caribbean Union Coordination (CCSCAC), the Southern Cone Union Coordination (CCSCS) and the national labour centres of Canada, the United States and Mexico. It represents the perspectives of the peoples of the Americas and civil society organisations and is the result of a democratic

process of reflection, debate and consultation bringing together regional labour perspectives, researchers and representatives of other social sectors. Its goal is to contribute to a proposal for alternative development for the Americas based on “Decent Work for Sustainable Development”.³⁶

Alternatives to Neoliberalism in Southern Africa (ANSA) is a product of key Southern African stakeholders in the regional labour movement such as the Southern Africa Trade Union Coordination Council (SATUCC), its research wing the African Labour Research Network (ALRN), the Zimbabwe Congress of Trade Unions (ZICTU) and identified progressive academics. It aims to provide building blocks for a common perspective on alternative policies and strategies in southern Africa and is based on 10 principles:

1. it is led by people
2. autocentric, based on domestic, human needs and the use of local resources
3. regional integration led from the grassroots
4. selective de-linking and negotiated re-linking
5. alternative science and technology
6. national, regional and global progressive alliances
7. redistribution of wealth to empower the non-formal sectors
8. gender rights as the basis for development
9. education for sustainable human development
10. a dynamic, participatory and radical democracy

More information can be found at www.ansa-africa.org

Further Reading :

- CIEL, The Problem of Intellectual Property in Economic Partnership Agreements with the African, Caribbean and Pacific Countries, May 2007
- ETUC/ITUC, Guide and Trade Union Dossier for Boosting the Capabilities of ACP Trade Unions in the Economic Partnership Agreements, 2007.
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- ICFTU, The spread of bilateral and regional trade agreements, 2004, http://www.gurn.info/topic/trade/icftu_0604.pdf
- Lee, Marc and Charles Morand, Competition Policy in the WTO and FTAA: A Trojan Horse for International Trade Negotiations? August 2003, CAW 567.
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- Peterson, Luke Eric, The Global Governance of Foreign Direct Investment: Madly off in all directions, FES Occasional Papers No. 19, May 2005

- Polaski, Sandra, Protecting Labour Rights Through Trade Agreements: An Analytical Guide, University of California Vol 10:13 2003
- Roffe, Pedro, CIEL, Intellectual Property, Bilateral Agreements and Sustainable Development: The Challenges of Implementation, http://www.ciel.org/Publications/FTA_ImplementationPub_Jan07.pdf
- SOMO, EPA negotiations do not promote the right investment policies in Africa, 2006
- SOMO, The risks and dangers of liberalisation of services in Africa under EPAs, 2006
- TUC, ACTSA, Tradecraft, EPAs - a threat to workers, <http://www.tuc.org.uk/international/tuc-12844-f0.cfm>
- UN Interagency Network on Women and Gender Equality, Task force on Gender and Trade, Trade and Gender, Opportunities and Challenges for Developing Countries, UN, New York and Geneva, 2004
- WTO, Services liberalisation in the new generation of preferential trade agreements (PTAs): How much further than GATS?, September 2006

Notes



- 1 This was confirmed by an online discussion on bilateral and regional trade agreements operated by the Global Union Research Network (GURN). For more information on the GURN, see the section on “Further Resources and Reading” at the end of this document. The GURN Online discussion concluded that “trade union participation in bilateral and regional trade agreements differs from one country to another, and the degree of involvement differs. Generally speaking, the level of trade union involvement in trade agreements has to be increased in order to cover all areas of the agreement, not just social issues”.
- 2 Information on which agreements your government has negotiated, which are currently under negotiation, and which new negotiations have been announced, can generally be found by looking at the web pages of your trade ministry or foreign ministry or the webpage of the trade ministry of any partner countries concerned.
- 3 For example, if country A applies a tariff of 35% on shoes and country B applies a tariff of 5% on textiles, reduction of 50% will lead to a tariff of 17.5% in country A and a tariff of 2.5% in country B. In practice this means that a pair of shoes of \$100 which used to cost \$135 will cost \$117.5 instead, a reduction on \$17.5, whereas in the case of country B a \$100 shirt, which used to cost \$105 will now cost \$102.5, a difference of \$2.5. So the reduction is 50% in both cases but the effect on imports will be much higher in country A than in country B.
- 4 The tariff structure of your country can be found by consulting the tariff profiles in the World Trade Report 2005: http://www.wto.org/english/res_e/booksp_e/anrep_e/wtr05-tariff_e.pdf
- 5 The internationally agreed classifications of services on a sectoral or subsectoral level can be found at: http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc
- 6 <http://www.accessmed-msf.org/prod/publications.asp?sctid=28620051846504&contenttype=PARA>
- 7 see also: The Problem of Intellectual Property in Economic Partnership Agreements with the African, Caribbean and Pacific Countries, CIEL, May 2007
- 8 See <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/labour-mou.pdf>
- 9 Thomas Greven, Social Standards in Bilateral and Regional Trade and Investment Agreements, FES, 2005
- 10 NAFTA (North American Free Trade Agreement) comprises Canada, Mexico and the US.
- 11 Thomas Greven, Social Standards in Bilateral and Regional Trade and Investment Agreements, FES, Dialogue on Globalisation, March 2005

- 12 Idem
- 13 Better Factories Cambodia
- 14 CAFTA (Central America Free Trade Agreement) comprises the US, the Dominican Republic and the Central American countries of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.
- 15 ICFTU, The spread of bilateral and regional trade agreements, 2004
- 16 The Andean Trade Promotion and Drug Eradication Act (ATPDEA) includes the US, Bolivia, Colombia, Ecuador and Peru.
- 17 Thomas Greven, Social Standards in Bilateral and Regional Trade and Investment Agreements, FES, 2005
- 18 Mercosur consists of Brazil, Argentina, Uruguay, Venezuela, and Paraguay.
- 19 ICFTU, The spread of bilateral and regional trade agreements, 2004.
- 20 The Southern African Development Community (SADC) has 14 member states, namely Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.
- 21 ICFTU, The spread of bilateral and regional trade agreements, 2004.
- 22 The Association of Southeast Asian Nations (ASEAN) is made up of Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam.
- 23 Draft AFL-CIO Analysis of Changes Agreed for Peru and Panama Trade Agreements, June 28, 2007.
- 24 For more information: http://www.eesc.europa.eu/index_en.asp
- 25 "NEDLAC" is the acronym of the National Economic Development and Labour Council of South Africa.
- 26 <http://www.nedlac.org.za/>
- 27 "CARICOM" is the Caribbean Community and Common Market.
- 28 ICFTU, The spread of bilateral and regional trade agreements, 2004
- 29 Look under the heading : "Trade union comments on trade agreements" at the URL: <http://www.gurn.info/topic/trade/index.html>
- 30 See TUAC, "A Users' Guide For Trade Unionists to the OECD Guidelines for Multinational Enterprises".
- 31 See:
 - http://www.ituc-csi.org/IMG/pdf/TLE_EN.pdf
 - http://www.ituc-csi.org/IMG/pdf/TLC_FR.pdf
 - http://www.ituc-csi.org/IMG/pdf/TLC_ES.pdf
 - http://www.ituc-csi.org/IMG/pdf/TLC_DE.pdf
- 32 Look under the goods schedules in the Marrakech Protocol or the Accession protocol at the URL: http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm
- 33 WTO, ITC, UN, World Tariff Profiles, 2006: http://www.wto.org/english/tratop_e/tariffs_e/tariff_profiles_2006_e/tariff_profiles_2006_e.pdf
- 34 <http://www.gurn.info/topic/trade/index.html>
- 35 More information on Labour's Platform for the Americas can be found at: <http://www.gpn.org/research/orit2005/index.html>

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