CHAPTER 19

Labor Market Regulations

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The approach presented in this chapter builds on the Labor Provisions in Trade Agreements (LABPTA) dataset (Raess and Sari 2018). LABPTA with its original methodology was developed in the context of a two-year research project titled "A Social Clause through the Back Door: Labor Provisions in Preferential Trade Agreements," funded by the Swiss Network for International Studies (call for projects 2014, project coordinator Damian Raess; see https://snis.ch/project/social-clause-through-back-door/).

19.1. INTRODUCTION

The World Bank's Deep Integration project aims to map the content of disciplines in different areas of trade regulation in order to generate a new database on deep trade agreements. This chapter covers labor market protections (or regulations, depending on one's perspective) in trade agreements, which have gained unexpected ground in international labor regulation over the past three decades.

Preferential trade agreements (PTAs) signed in recent decades have started to link the benefits of better market access to the recognition or enforcement of internationally recognized labor rights. The inclusion of labor provisions (LPs) under the international trade regime was first discussed during negotiations for the International Trade Organization (ITO), as part of the Bretton Woods negotiations, in 1945 and 1946. According to Article 7 of the Havana Charter for the International Trade Organization:

> The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory (cited in Alben 2001, p. 1431).

Efforts to enact the ITO, however, were superseded by adoption of the General Agreement on Tariffs and Trade (GATT) in 1947. The GATT did not address workers' rights except for a provision prohibiting the import of goods made with prison labor (Art. XX (e)). The debate on workers' rights reemerged with the establishment of the World Trade Organization (WTO) in 1994. In spite of intense discussions, the linkage of international trade to basic labor rights was opposed by developing countries, which argued that such provisions were protectionist and a new form of discriminatory treatment of their products. The discussion ultimately led to the adoption of the Singapore Declaration in 1996 , which named the International Labour Organization (ILO) as the competent body for setting and dealing with labor standards, thus keeping those standards out of the WTO's agenda. It was then that PTAs started to be seen as a way to protect workers' basic rights in the context of international trade, resulting in a rapid increase in the inclusion of LPs in trade agreements. Governments in the North have used LPs, particularly with their Southern partners, to address unfair working conditions in the South and enable their own workers and businesses to compete on a level playing field. On a global scale, strong trade unions have been one of main driving forces for the inclusion of more and increasingly stringent labor provisions in PTAs (Raess, Dür, and Sari 2018).

Section 19.2 introduces the methodological approach adopted to map LPs in PTAs. Section 19.3 provides a description of the main patterns and trends that emerge from the data. Section 19.4 concludes.

19.2. CONCEPTUAL AND ANALYTICAL APPROACH TO MAPPING LABOR PROVISIONS IN PTAs

19.2.1 First generation of mapping efforts

Scholars have only recently started to focus their attention on the variation in the design of PTAs to explain the causes and consequences of such variation and to consider how various provisions in PTAs relate to multilateral rules (e.g., Dür and Elsig 2015; Acharya 2016). To date, however, there has been no systematic or detailed mapping of the content of labor provisions in PTAs. All too often, the same platitudes are being offered, such as US trade agreements contain enforceable labor standards whereas the EU agreements do not (e.g., Postnikov and Bastiaens 2014), which do not do justice to the broadening scope of enforceability in US PTAs or the recent evolution of EU PTAs, and omits the design developed by other key players, such as Canada, New Zealand, or the EFTA.

Two recent projects have coded labor standards as part of a broader effort to map nontrade issues (NTIs) in PTAs; but because these projects covered several disciplines, the coding of the LPs lacked depth. First, Lechner (2016) constructs a novel dataset of NTI design for 474 PTAs signed since 1990. The coding includes provisions relating to civil and political rights, environmental protection, and economic and social rights, with the latter covering 72 items related to the right to work, rights at work, the right to education, the right to development, and the right to health. Of these 72 items, 25 are substantive, institutional, or cooperation commitments related to labor issues. Adopting the concept of legalization which distinguishes between the three dimensions of obligation, precision, and delegation (Abbott et al. 2000), one limitation is that extensive obligation and delegation are coded in relation to economic and social rights in general, so that we cannot know with certainty whether obligation and delegation applies effectively to LPs when they do for the overarching category economic and social rights.

Second, Milewicz's (2016; see also Milewicz et al. (2018) dataset on NTIs includes human rights, labor rights, environment, corruption, security, and democracy, covering 522 PTAs signed between 1951 and 2009. The broad definition of labor standards in this project includes not only labor rights and conditions but also social security rights dealing with sickness, invalidity, old age, industrial accidents, and unemployment. While the template distinguishes between references in the preamble and the main treaty text, the coding of the individual NTIs in the main text remains crude. Indeed, regarding labor issues, the template only captures the presence/absence of references to labor standards, on the one hand, and to ILO Conventions, on the other.

A few projects have focused on LPs in PTAs. The ILO has been at the forefront of the analysis of the social dimension of trade (and investment) agreements (see ILO 2009, 2013, 2016). While detailed in its insights into the design and the effectiveness of LPs

in PTAs, the ILO work has two main limitations; namely, it has failed to produce (a) a comprehensive template of LPs in PTAs and (b) a systematic coding of the content of LPs in all existing PTAs.

Kamata (2016) investigates the impact of labor provisions on working conditions, based on a sample of 223 PTAs from 1995 to 2011. The study classified PTAs with labor clauses into two categories: (a) those with provisions that demand, urge, or expect the signatory countries to harmonize their domestic labor conditions and regulations with internationally recognized standards; and (b) those that stipulate issues on which the signatory countries will cooperate, along with dispute settlement procedures for labor issues. While this classification is an improvement over the binary coding of LPs, it remains too rudimentary to adequately capture the scope of LPs in PTAs. For instance, it does not provide any details about whether the commitments are specific to any particular standards; it conflates soft and hard mechanisms such as cooperation and enforceability; and it does not distinguish among different degrees of enforceability.

Finally, under the aegis of the World Bank, Hofmann, Osnago, and Ruta (2017) constructed a database with a detailed assessment of the content of 279 PTAs signed between 1958 and 2015. The methodology covered 52 policy areas. Under the WTO-X policy areas (those not yet regulated by the WTO), the database contains a separate category for labor market regulation, referring to provisions that pertain to (a) national labor markets and affirm ILO commitments (a single item coded in a binary mode); and (b) the enforcement of these provisions (coded on a 0-2 scale). This approach, however, also lacks depth and detail.

In short, a more precisely defined and fine-grained approach to the mapping of LPs in PTAs is needed to better understand trade-labor linkages on a global scale. Combined with readily available country-level data on the protection of labor rights (e.g., Labour Rights Indicators,[1] the CIRI Human Rights Data Project,[2] and the ILO's ratification data[3]), a more comprehensive set of data on labor provisions in trade agreements would make it possible to test a variety of hypotheses regarding the consequences of such provisions.

19.2.2 Scope and structure of the coding scheme

Labor provisions vary in terms of content and stringency as well as where in the PTA they are located (preamble, text, side agreement, Memorandum of Understanding). Some PTAs include, typically in their preambles, only an aspirational goal to improve working

[1] Kucera and Sari (2019), http://labour-rights-indicators.la.psu.edu.
[2] Cingranelli, Richards, and Clay (2014), http://www.humanrightsdata.com.
[3] See http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11001:0::NO.

conditions. Others specify commitments to internationally recognized labor standards, with or without a reference to the relevant ILO instruments. Still others detail procedures for consultation, dispute settlement, cooperation activities, and/or the institutions with oversight for monitoring and implementation of labor-related commitments.

Given that there is no single understanding of LPs in PTAs, the first task is to define what constitutes LPs. This study uses a narrow definition of labor provisions, thereby drawing a distinction between labor and broader social provisions. In this context, labor provisions refer to rules and regulations that aim to protect and/or promote workers' rights and working conditions, but do not cover social protection issues such as unemployment, old age, health, education, etc. With the exception of aspirational statements about employment creation, the definition also excludes provisions relating to employment and labor market policy, such as training, or "supply-side" measures aimed at better matching labor supply and demand. Finally, the definition used here does not cover the free movement of workers or the treatment of migrant workers. We consider LPs in the treaty texts, and in side agreements on labor and Memorandums of Understanding (MoUs), without distinction of any kind. Side agreements and MoUs, however, should have a clear relationship to the PTA in question – established by a concrete reference to the relevant instrument in the main treaty text – in order to be considered.[4]

In order to code the wide variety of LPs in PTAs, the coding scheme established for the purpose of this project is structured around five main categories together with the cross-cutting measure of enforceability. The five overarching categories are: (1) Aspirational labor goals/objectives; (2) Substance-related LPs; (3) Substance-related LPs in relation to investment; (4) Cooperation over LPs; and (5) Institutions overseeing labor commitments. While substance-related LPs have a detailed list of items against which the PTAs are coded, LPs in relation to investment, cooperation, and institutions are captured with a lower level of granularity.

LPs in the preamble and the objectives parts of the agreements constitute aspirational statements, which is why we code them separately. Under substantive commitments we list items related to fundamental rights at work, conditions of work, relevant international instruments, and domestic law-related commitments such as non-derogation and effective enforcement. Substance-related LPs in relation to investment include commitments to protect labor rights in the context of investment. Under Cooperation we code the presence of any commitments in relation to provisions on labor-related cooperation. Institution-related LPs are coded for attributes that can determine the effectiveness of monitoring and implementation of labor provisions.

Whereas the Substance and Cooperation categories relate to *what matters* in terms of issues addressed in the relevant legal provisions in the PTAs, the enforcement measure addresses the question what

[4] For example, in the China-Peru PTA (2009), under article 161 such relationship is established in the following manner: "The Parties shall enhance their communication and cooperation on labor, social security and environment issues through Memorandum of Understanding on Labor Cooperation between the Government of the People's Republic of China and the Government of the Republic of Peru."

is the *nature and scope of commitments* taken in these legal provisions (see Bourgeois, Dawar, and Evenett 2007, p. 11). Based on the World Bank's Deep Integration template, the enforcement measure is constructed to reflect on the enforceability provided for LPs. Being a cross-cutting issue, enforceability categories are added for each item listed under the five overarching categories.

19.2.3 The five main categories of labor provisions

19.2.3.1 Aspirational labor provisions

We code LPs found in the agreement's preambles and objectives. Although still subject of academic debate (Hulme 2016), LPs in preambles are predominantly considered to differ in terms of their legal effect from those found in other parts of the agreement, as they do not establish specific rights and obligations (and as such cannot directly be subject to dispute settlement), but hold an interpretive role.[5] The aims to "improve working conditions" and to "create employment opportunities" are by far the most frequent references to labor standards in preambles and objectives, while other references to labor rights and working conditions remain rather rare.[6] Because statements on improving working conditions and other labor rights and conditions refer to the quality of jobs, while statements on creating employment opportunities refer to the quantity of jobs, these references are coded separately. Thus, under this category we code two types of commitment under the following two headings:

1. *Aspirational labor goals/protection or promotion of labor standards.*
Coding rule: 1 if reference to the protection or promotion of labor standards is in preambles and/or objectives parts of the agreement.

2. *Aspirational labor goals/creation of employment opportunities*.
Coding rule: 1 if reference to employment creation is in preambles and/or objectives part of the agreement.

Example 1: Switzerland-China (date of entry into force, 2014), MoU, Art.1.1 (Objectives and Scope). This we code under heading 1 because the references to labor standards appear in Objectives.

Example 2: Asia Pacific Trade Agreement (2006), Preamble. This we code under heading 2 because the reference to new employment opportunities appears in the preamble.

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[5] According to Bourgeois et al. (2007, p. 13), "[T]he preamble to an FTA does not contain any binding obligations upon the parties. The statements contained in preambles are not intended to be operative provisions in the sense of creating specific rights or obligations. Rather, the preamble statements offer a context for the signatories' overall objectives by introducing the agreement, setting out the motives of the contracting parties and the objectives to be accomplished by the provisions of the statutes."

[6] For example, Albania-EFTA PTA (2009), Preamble.

19.2.3.2 Substance-related labor provisions

First, we list items related to relevant international labor standards commitments, that is, provisions derived from or related to internationally recognized labor commitments and provisions concerning international instruments containing such commitments. We code nine separate items, as follows:

3. *ILO 1998 Declaration on Fundamental Principles and Rights at Work and Its Follow-Up.*
The Declaration stipulates that all ILO members have an obligation arising from their membership in the Organization to respect, promote and to realize the principles concerning the fundamental worker rights.
Coding rule: 1 if reference to the ILO 1998 Declaration on Fundamental Principles and Rights at Work.

4. *Freedom of association and collective bargaining rights.*
Coding rule: 1 if reference to one of the following: (a) freedom of association, right to organize, right to strike, trade union right(s); (b) ILO Convention No. 87 ("Freedom of Association and Protection of the Right to Organise Convention"; (c) collective bargaining including reference to (alternative) dispute resolution mechanism; (d) ILO Convention No. 98 ("Right to Organise and Collective Bargaining Convention"); (e) ILO fundamental labor/worker's rights/Conventions.

5. *Elimination of all forms of forced or compulsory labor.*
Coding rule: 1 if reference to one of the following: (a) elimination/abolition of forced labor; (b) ILO Convention No. 29 ("Forced Labour Convention") and/or ILO Convention No. 105 ("Abolition of Forced Labour Convention"); (c) ILO fundamental labor/worker's rights/Conventions.

6. Effective abolition of child labor.
Coding rule: 1 if reference to one of the following: (a) (progressively raise) minimum age for admission to employment or work; (b) (abolition of) child labor; (c) ILO Convention No. 138 ("Minimum Age Convention"); (d) prohibition and elimination of worst forms of child labor; (e) ILO Convention No. 182 ("Worst Forms of Child Labour Convention"); (f) ILO fundamental labor/worker's rights/Conventions.

7. *Elimination of discrimination in respect of employment and occupation.*
Coding rule: 1 if reference to one of the following: (a) equal remuneration/pay for men and women for work of equal value; (b) ILO Convention No. 100 ("Equal Remuneration Convention"); (c) elimination of discrimination of any form in respect of employment and occupation/work; (d) ILO Convention No. 111 ("Discrimination (Employment and Occupation) Convention"); (e) ILO fundamental labor/worker's rights/Conventions.

8. *Working conditions and terms of employment.*
Coding rule: 1 if reference to one of the following: (a) conditions of work; (b) working time; (c) wages; (d) health and safety.

9. *Other international instruments.*
We consider three international instruments, namely, the ILO 2008 Declaration on Social Justice for a Fair Globalization; the ILO's Decent Work agenda; and the UN ECOSOC Ministerial Declaration on Generating Full and Productive Employment and Decent Work for All 2006.
Coding rule: 1 if reference to one of the following: (a) ILO 2008 Declaration on Social Justice for a Fair Globalization; (b) Reference to ILO's Decent Work Agenda; (c) decent work if clear from text it is understood in the way as ILO's Decent Work Agenda; (d) UN ECOSOC Ministerial Declaration on Generating Full and Productive Employment and Decent Work for All 2006.

10. *Internationally recognized labor standards.*
Given that internationally recognized labor standards can encompass a variety of standards, we consider the coding of reference to internationally recognized labor standards if no definition is provided for such reference in the agreement or if such definition is broader than the eight fundamental labor rights referred to under the 1998 ILO Declaration on the Fundamental Principles and Rights at Work and those considered under conditions of work.
Coding rule: 1 if reference to either (a) internationally recognized labor standards or (b) ILO Conventions in general.

11. *Corporate Social Responsibility.*
Coding rule: 1 if reference to one of the following: (a) good corporate governance and corporate social responsibility on labor issues; (b) internationally recognized guidelines and principles relating to good corporate governance and corporate social responsibility on labor issues.
Note: labor-related corporate social responsibility references found in investment chapters are coded under substance-related labor provisions in relation to investment (see heading 14 and example 7 below).

Example 3: Switzerland-China (2014), MoU, Art.2.1. This we code under heading 3.

Example 4: EFTA-Montenegro (2012), CH. 6 on Trade and Sustainable Development, Art. 35(1). This we code under headings 3, 4, 5, 6, and 7.

Second, we list items related to domestic laws commitments. Specifically, we code commitments related to non-derogation and to effective enforcement of domestic laws.

12. *Non-derogation.*
Coding rule: 1 if reference to commitment not to encourage trade through the weakening of labor laws by ways of waiving or derogating from domestic labor law.

13. *Effective enforcement of domestic laws.*
Coding rule: 1 if reference to commitment to effectively enforce domestic laws (to the extent as failing to do so would affect trade between the signatory countries).

Example 5: New Zealand-Republic of Korea (2015): Ch. 15 on Labour, Art. 15.2. Paragraph 3 is coded under heading 12, whereas paragraph 4 is coded under heading 13.

19.2.3.3 Investment-related labor provisions

Regarding Investment-related provisions, we code instances where the PTA requires investors to act in keeping with the protection and promotion of labor standards. Although such references have become more common provisions in PTAs, the extent of the commitments is not yet comparable to provisions agreed upon in relation to trade. The vast majority of investment-related labor provisions concern commitments related to non-derogation, that is, commitment not to encourage investment through the weakening of labor laws by ways of waiving or derogating from domestic labor law. There are only a handful of cases where investment-related labor provisions are referred to under the investment chapter of the PTA, while in the majority of cases such commitments are embedded in the labor chapter.

14. *Requirement that investors act in accordance with the protection or promotion of labor standards.*
Coding rule: 1 if reference to any substance-related labor commitment (i.e., headings 3-13) if those are formulated in relation to investment.

Example 6: Japan-Switzerland (2009), Article 101 (Health, Safety and Environmental Measures).

Example 7: Canada-Panama (2013), Chapter 9 on Investment, Article 9.17 (Corporate Social Responsibility).

19.2.3.4 Cooperation-related labor provisions

Under Cooperation we code the presence of any substantive commitments if those are agreed by the parties as issues over which they aim to cooperate. In praxis, cooperation typically takes the form of technical assistance and capacity building by means of the exchange of information, people, joint research, seminars, etc. This is heading number 15.

15. *Reference to cooperation over labor provisions.*
Coding rule: 1 if reference to one of the following: (a) cooperation over any of the substance-related LPs referred listed under headings 3-11; (b) cooperation over labor laws; (c) cooperation over industrial relations and social dialogue; (d) cooperation over labor administration and inspection; (e) cooperation over gender equality.

Example 8: US-Morocco (2006), Chapter 16 on Labor, Article 16.5.1-2 (Labor Cooperation) and Annex 16-A (Labor Cooperation Mechanism).

19.2.3.5 Institution-related labor provisions

The final category depicts three institutional features that influence the effective monitoring and implementation of labor provisions. Such items are (a) a separate specialized committee responsible for the implementation and/or supervision of labor commitments (including contact points); (b) third-party consultation/involvement (either the social partners, the ILO, NGOs, or other third-party organizations); and (c) the requirement of the realization of labor-related impact assessment. These are the final headings in our template - numbers 16, 17, and 18, respectively.

16. *Reference to a separate specialized committee or contact point for the monitoring and implementation of labor provisions.*
Coding rule: 1 if reference to a separate specialized committee or contact point established exclusively to monitor and implement labor provisions agreed upon under the PTA.

Example 9: EU-Korea (2011), Ch. 13 on Trade and Sustainable Development, Article 13.12.1-3.

17. *Reference to third-party (e.g., social partners, civil society organizations, ILO etc.) inclusion in the monitoring and implementation of labor provisions.*
Coding rule: 1 if PTA allows for the inclusion of third parties in the monitoring and implementation of LPs agreed upon under the PTA. Third-party reference typically includes (a) social partners or workers' organizations, trade unions, and employers' organizations; (b) civil society organizations; (c) ILO; (d) other bodies.
Note: Inclusion of third parties is coded also in cases where their recommendation is not binding on the signatory parties.

Example 10: EU-Korea (2011), Ch. 13 on Trade and Sustainable Development, Article 13.12.4.

18. *Reference to ex-post assessment of the impact of labor provisions.*
Coding rule: 1 if reference to one of the following: (a) a periodic or one-time review of progress after the entry into force of the agreement; b) periodic or one-time ex-post review, monitoring, or assessment of the labor impact of the agreement.

Example 11: Dominican Republic-Central America-US (2006), Chapter 16 (Labor), Article 16.4.2 (Institutional Arrangements).

Example 12: EU-Colombia and Peru (2012), Title IX (Trade and Sustainable Development), Article 279 (Review of Sustainability Impacts).

19.2.3.6 Cross-cutting category: enforceability

Under Enforcement, building on the WB's template, we focus on the model of dispute settlement (DS) mechanism covering labor-related commitments. In the coding of enforceability, we equally code the DS mechanism that applies to the entire agreement (as long as LPs are covered by it) and labor-specific DS mechanisms that are set out to deal with disputes related exclusively to LPs. Enforceability is defined along a 0 to 3 scale, where the weakest degree covers non-binding and best-endeavor commitments (0); followed by provisions that are binding but not subject to DS (1); by provisions that are binding and subject to state-to-state DS (2); and then by provisions that are binding and subject to private-state DS (3). Evidently we find private-state dispute settlement to apply only to labor provisions in relation to investment found in the investment chapter of the trade agreement, with overall only very few instances of such an enforcement mechanism.

Regarding the bindingness of LPs, following a strict legal analysis of the treaty texts, we carefully assess whether or not a substantive labor commitment is a legally binding commitment representing an obligation (e.g., the Parties shall ratify ILO fundamental conventions or shall *strive* to ratify ILO fundamental conventions). Binding obligations are indicated by the use of terms such as *shall, will, agree, undertake, ensure, realize.* The term *shall* is interpreted by courts to be stronger than the term *should*; and commitments expressed with words such as *strive to ensure* are weaker than those using *ensure.*

Regarding the issue of state-to-state DS, we rely partially on a WTO taxonomy (Chase et al. 2016). Under the current method, enforceability entails that the parties can resort at a minimum to quasi-judicial arbitration-based DS over labor standards provisions. In other words, PTA members have an "automatic" right[7] of access to (often ad hoc) third-party adjudication (or standing judicial courts) in case of a dispute.

Last, private-state DS refers to investor-state dispute settlement (ISDS) established under the investment chapters of the PTAs. Given that LPs are rarely featured in the investment chapter and ISDS only concerns provisions agreed upon under the investment chapter, in only one case do we find private-state DS to be applicable to the relevant labor provision (Japan-Mongolia PTA, 2015).

[7] That is, PTA members have no right to veto a referral.

In short, headings 1-18 are repeated and coded for each of the four enforceability levels (0-3) according to the following coding rules:

(0) *Non-binding and best-endeavor provisions.*
Coding rule: 1 if labor-related commitment is not legally binding on the parties (by the use of wording such as may, might, etc.), including provisions that imply a higher degree, but non-binding, commitment in complying with agreed provisions (by the use of wording such as shall strive, shall endeavor, should, etc.).
Note: Provisions coded under "0" are not subject either to the general or the labor-specific DS, as defined above (state-to-state or private-state DS).

Example 13: Korea-Australia (2014), Chapter 17 on Labour, Article 17.1.1 (General Principles) read together with Article 17.6 (Dispute Settlement).

(1) *Provisions that are binding but not subject to dispute settlement.*
Coding rule: 1 if labor-related commitment is legally binding (by the use of wording such as shall, will, agree, etc.), but only when the provision is not subject either to the general or the labor-specific DS, as defined above (state-to-state or private-state DS).

Example 14: New Zealand-Taiwan, China (2013), Chapter 16, Trade and Labour, Article 2.1-2 (Key Commitments) read with Article 5.9 (Consultations).

(2) *Provisions that are binding and subject to state-to-state dispute settlement.*
Coding rule: 1 if labor-related commitment is legally binding (by the use of wording such as shall, will, agree, etc.) and is subject to either the general or the labor-specific state-to-state DS.

Example 15: Trans-Pacific Partnership (2017), Chapter 19 on Labour, Article 19.3.1-2 (Labour Rights) read together with Article 19.15.12 (Labour Consultations).

(3) *Provisions that are binding and include private-state dispute settlement.*
Coding rule: 1 if labor-related commitment is legally binding (by the use of wording such as shall, will, agree, etc.) and is subject to the private-state DS.

Example 16: Japan-Mongolia (2016), Chapter 10 on Investment: Article 10.13, Settlement of Investment Disputes between a Party and an Investor of the Other Party, and its application to Article 10.17, Health, Safety and Environmental Measures and Labor Standards.

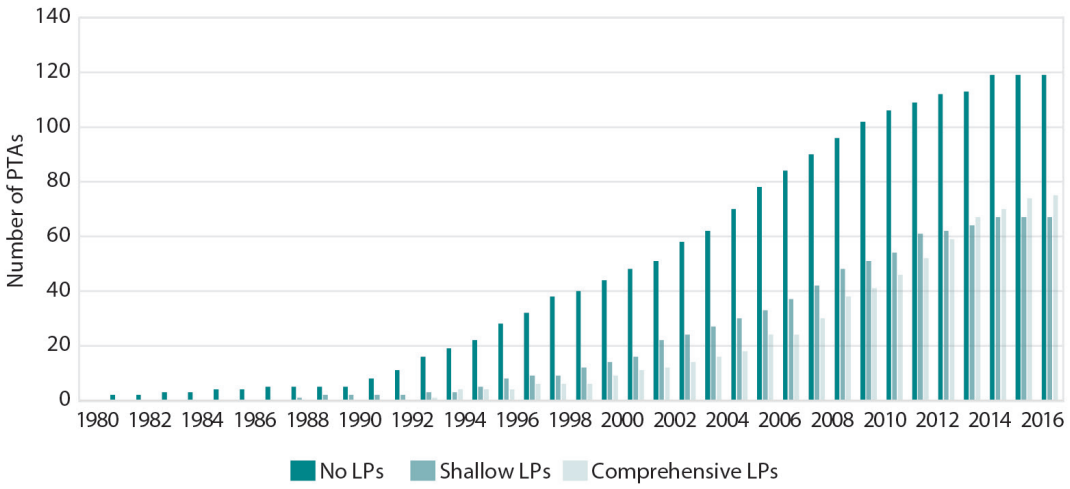
19.3. DESCRIPTIVE ANALYSIS OF LABOR PROVISIONS IN PTAs

19.3.1 The rise of LPs in PTAs

Over the past 50 years, the number of PTAs has proliferated, as have the types of issues they cover (e.g., Dür and Elsig 2015). Important issues that intersect with trade and have been included in more recent PTAs include environment and investment, addressed in other chapters of this volume, and workers' rights, which are the subject of this study.[8]

PTAs began to include provisions on workers' rights and working conditions in the late 1980s,[9] first as aspirational statements in the preamble or objectives sections ("shallow LPs"), and later through more substantive commitments found in the main text of the PTA ("comprehensive LPs"). While the total number of PTAs without LPs still surpasses the number of PTAs with comprehensive LPs, a steady increase in the pace of adoption of such PTAs can be observed in conjunction with the plateauing of shallow (and no LP) PTAs (Figure 19.1), resulting in a larger number of PTAs with comprehensive LPs compared to PTAs with shallow LPs for the first time in 2014.[10]

Figure 19.1: Cumulative number of PTAs with no LP, shallow LPs, and comprehensive LPs, 1980-2017



Source: Deep Trade Agreements Database.

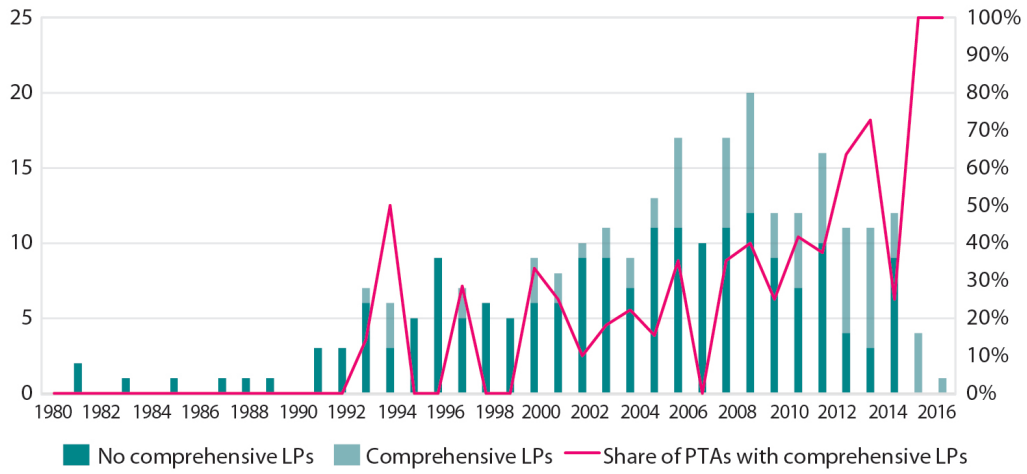
[8] Our sample includes only WTO-notified PTAs with the year of the entry into force of the agreement as the year of the agreement in the various calculations. The underlying data include 271 PTAs that entered into force during the period 1960-2017. The sample includes two interim PTAs (EU-Cameroon Interim EPA, 2009; and EU-Eastern and Southern Africa States Interim EPA, 2012), the coding of which would need to be verified once the final PTAs were adopted. The sample does not include sui generis PTAs that are a mixture of trade and political in their nature with LPs included not in direct relation to trade-related provisions but within the context of the broader political entity established by the given PTA. Such agreements are: Andean Community (CAN), 1988; East African Community (EAC), 2000; East African Community (EAC) – Accession of Burundi and Rwanda, 2007; EC Treaty, 1958; EC (9) Enlargement, 1973; EC (10) Enlargement, 1981; EC Enlargement (12), 1986; EC Enlargement (15), 1995; EC Enlargement (25), 2004; EC Enlargement (27), 2007; and EU (28) Enlargement, 2013.

[9] Only one PTA included comprehensive LPs before 1980: the EU-Overseas Countries and Territories (OCT) agreement of 1971. While this PTA is part of the sample, it is included in the analysis below only in the figures that illustrate trends over the period 1960-2017.

[10] In our sample, the only PTA that entered into force in 2017 is the Transpacific Partnership (TPP).

In terms of the share of PTAs with comprehensive LPs in the total number of PTAs signed in a given year, the data indicate that compared to an average of 9 percent in the 1990s, the share of such PTAs rose to 24 percent during the first decade of the 2000s and reached 52 percent during the period of 2010-2017. It peaked at 100 percent in 2016-2017 (Figure 19.2).

Figure 19.2: Share of PTAs with comprehensive LPs in total PTAs per year, 1980-2017

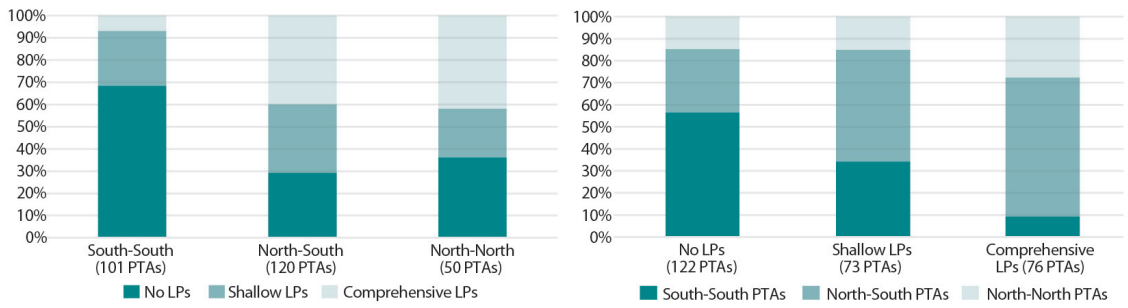


Source: Deep Trade Agreements Database.

Looking at the breakdown of PTAs by the level of development of its members[11] and by broad types of LPs (i.e., no LPs, shallow LPs, and comprehensive LPs), the data show that while agreements signed between countries from the North and the South (North-South PTAs) have the highest share of PTAs with any kind of LPs, PTAs signed between countries from the North (North-North PTAs) exhibit - although only by a fraction - the highest share of PTAs with comprehensive LPs (panel a of Figure 19.3). However, when looking at PTAs with comprehensive LPs only, most of those agreements are signed between North and South countries (panel b of Figure 19.3). While this result highlights potential protectionist motivations by Northern countries, introducing LPs into their PTAs also indicates a general concern about worker protection in the South by Northern countries. Interestingly, PTAs signed between North and South countries also have the largest share of PTAs with shallow LPs, followed by South-South and North-North PTAs (panel b of Figure 19.3). The majority of PTAs without any LPs are South-South PTAs, which also have the smallest share of agreements with comprehensive LPs.

[11] The classification of countries is based on the World Bank's 2017 Country and Lending Groups classification. High-income countries are classified as North, and middle- and low-income countries are classified as the Global South. Countries in the high-income group but not OECD member countries are Andorra; Antigua and Barbuda; the Bahamas; Bahrain; Barbados; Brunei Darussalam; Cyprus; Faroe Islands; Greenland; Hong Kong SAR, China; Kuwait; Liechtenstein; Lithuania; Macao SAR. China; Malta; Monaco; Oman; Palau; Qatar; San Marino; Saudi Arabia; Seychelles; Singapore; St. Kitts and Nevis; Taiwan, China; Trinidad and Tobago; United Arab Emirates; and Uruguay.

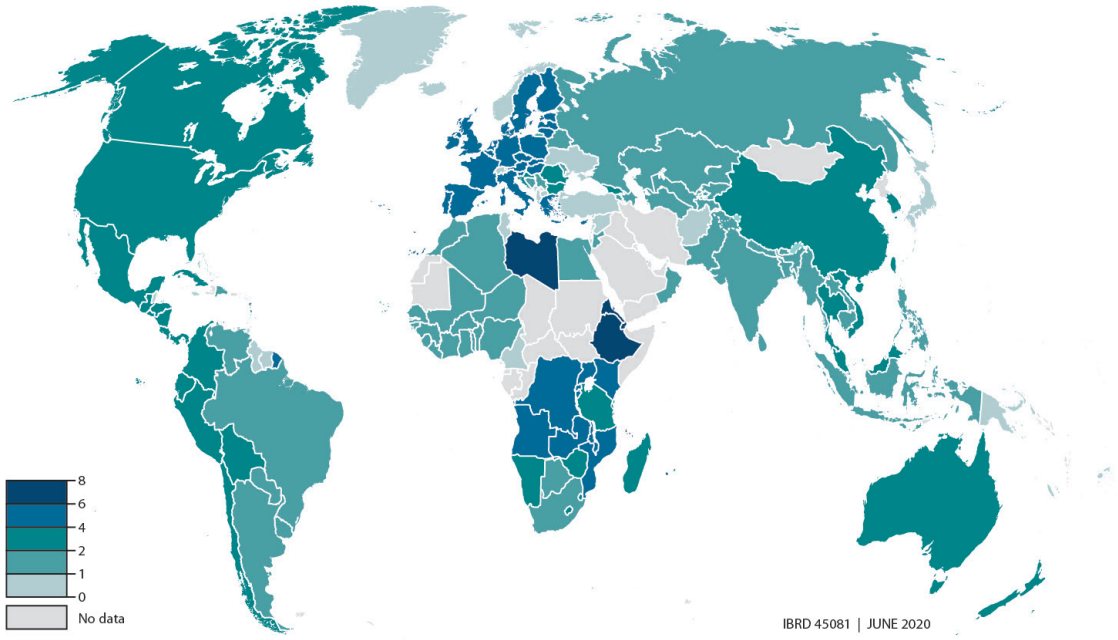
Figure 19.3: Distribution of PTAs by level of development of its members and broad types of LPs, 1960-2017



Source: Deep Trade Agreements Database.

Delving into country-level data over the 1960–2017 period, the countries with the highest number of PTAs with LPs are EU and EFTA (European Free Trade Association) members, followed predominantly by Latin American countries (such as Chile, Costa Rica, Peru, Panama, Colombia, Honduras, El Salvador, Guatemala, Mexico, and Nicaragua, in that order) together with the US, Canada, Korea, and New Zealand. Of the BRICS countries (Brazil, Russia, India, China, and South Africa), China stands out, with seven PTAs with LPs (four of which are with comprehensive LPs), compared to Brazil with no PTAs with LPs. India has only one PTA with shallow LPs, while Russia has one PTA with shallow and one with comprehensive LPs, and South Africa has two PTAs with comprehensive LPs and one with shallow LPs (Figure 19.4).

Figure 19.4: Number of PTAs with LPs by country, 1960-2017



Source: Deep Trade Agreements Database.
Note: Gray areas denote countries with no PTAs with LPs. The color scale is applied to countries that have at least one PTA with either shallow or comprehensive LPs and hence uses 1 as the lowest score on the scale.

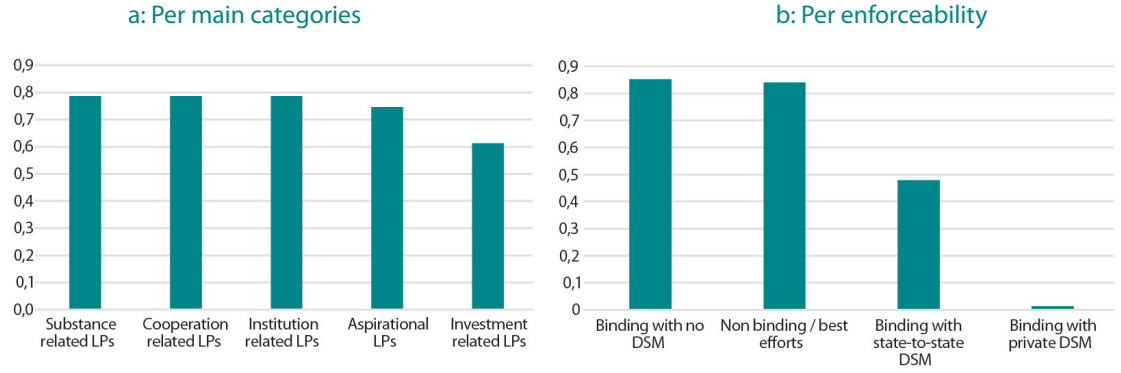
The picture is somewhat different when looking at the countries with the highest number of PTAs with shallow or comprehensive LPs (figures not shown). For shallow LPs, the leading countries are the EFTA member states, followed by Chile and the EU member states, and then other Latin American countries such as Costa Rica, Honduras, El Salvador, Guatemala, Nicaragua, Mexico, and Peru, with the US and New Zealand having no such PTAs, and Canada having only one agreement with shallow LPs (Canada-EFTA 2009). By contrast, the EU member states have the highest number of PTAs with comprehensive LPs, followed by the US, Chile, Canada, and New Zealand, and only after that Peru, Korea, and the EFTA member countries with other Latin American countries (e.g., Colombia, Costa Rica).

19.3.2 Types and enforceability of LPs in PTAs

Most of the labor provisions included in comprehensive PTAs over the period of 1990-2017 are, in equal share, substance related, cooperation related, and provisions establishing the institutional framework for the monitoring and implementation of LPs. Investment-related provisions represent the fewest number of commitments (panel a of Figure 19.5). Most of the provisions are at the non-binding or best-effort level of enforceability, or binding but without the possibility of state-to-state or private-state DS. Only a small portion are subject to state-to-state DS, while only the PTA signed between Japan and Mongolia in 2016 allows for private-state DS regarding a labor commitment included in its investment chapter (panel b of Figure 19.5).

The largest change in the shares of LPs of a given type took place in relation to the adoption of investment-related LPs (panel c of Figure 19.6), which increased from 0 percent during the first part of the period (1990-1995) to 47 percent during the last part (2011-2017). The shares of PTAs with institution- and substance-related provisions - despite the latter being included less often - increased over the same period by 31 and 39 percentage points, respectively (panels b and e of Figure 19.6).

Figure 19.5: Average number of LPs per main category and enforceability in PTAs with comprehensive LPs, 1990-2017



Source: Deep Trade Agreements Database.
Note: average number of provisions per main category was calculated by generating dummy variables for each main category of LPs per PTA (where the category gets 1 if any of the items listed under the category is coded and 0 if nothing is coded under the main category) and then averaging those across all PTAs.

By contrast, the share of cooperation-related LPs, some of the most frequently included, rose only by 24 percentage points, from 13 to 37 percent, between 1990-95 and 2011-2017 (panel d of Figure 19.6). Among the PTAs with comprehensive LPs, the share of PTAs with aspirational provisions rose by 34 points, from 8 to 42 percent (panel a of Figure 19.6). For PTAs with both shallow and comprehensive LPs, the share of PTAs with aspirational provisions increased by 46 points, from 21 to 67 percent (figures not shown).

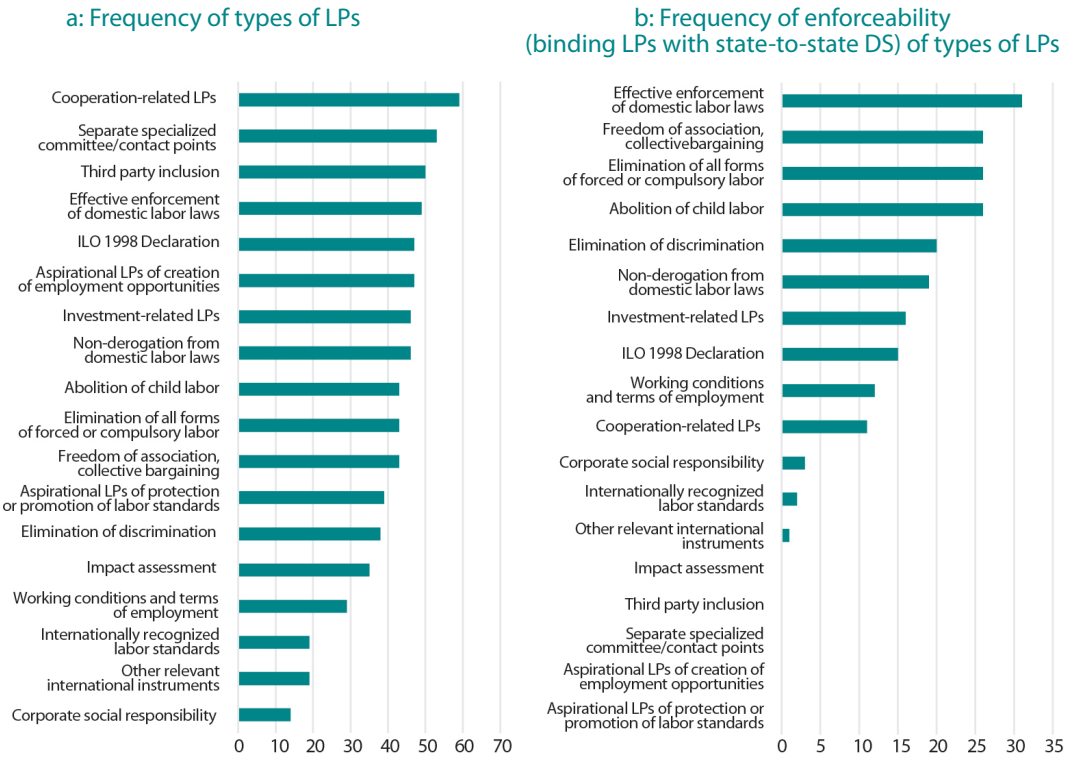
Figure 19.6: Share of LP types in total PTAs per five-year windows, 1990-2017

Source: Deep Trade Agreements Database.

In terms of enforceability, while LPs have become more binding over time, exhibiting a 30 percentage point increase (from 17 percent to 47 percent) between 1990-1995 and 2011-2016, LPs that are also subject to state-to-state DS or private DS rose at a more modest rate, from 13 percent to 24 percent and from 0 percent to 1 percent, respectively. By contrast, the share of non-binding/best-effort provisions rose by 41 percentage points over the same period of time (from 8 percent to 49 percent), indicating that such provisions continue to remain the prevailing form of commitments (figures not shown).

Among PTAs with comprehensive LPs, the provisions most frequently included are those related to cooperation, closely followed by those related to the institutional framework together with the commitment to effectively enforce domestic labor laws. Least common are provisions related to corporate social responsibility, references to other relevant international instruments and to internationally recognized labor standards. References to the ILO 1998 Declaration on Fundamental Principles and Rights at Work and related labor rights (such as freedom of association and collective bargaining rights, prohibitions against child and forced labor, and the elimination of discrimination in employment and occupation) fall between the most and least frequent provisions, with relatively minor variation between them (panel a of Figure 19.7). Interestingly, the LPs that are most frequently subject to state-to-state DS are by far those concerning effective enforcement of domestic labor laws, followed by references to fundamental labor rights defined under the ILO 1998 Declaration and the commitment of non-derogation from labor laws (panel b of Figure 19.7). By contrast, investment-related LPs are less often, and corporate social responsibility rarely, subject to DS (panel b of Figure 19.7). By their nature, institution-related provisions (impact assessment, third-party inclusion, separate specialized committee/contact points) and aspirational LPs are not subject to state-to-state DS (panel b of Figure 19.7).

Figure 19.7: Frequency of types of LPs and their enforceability, 1990-2017

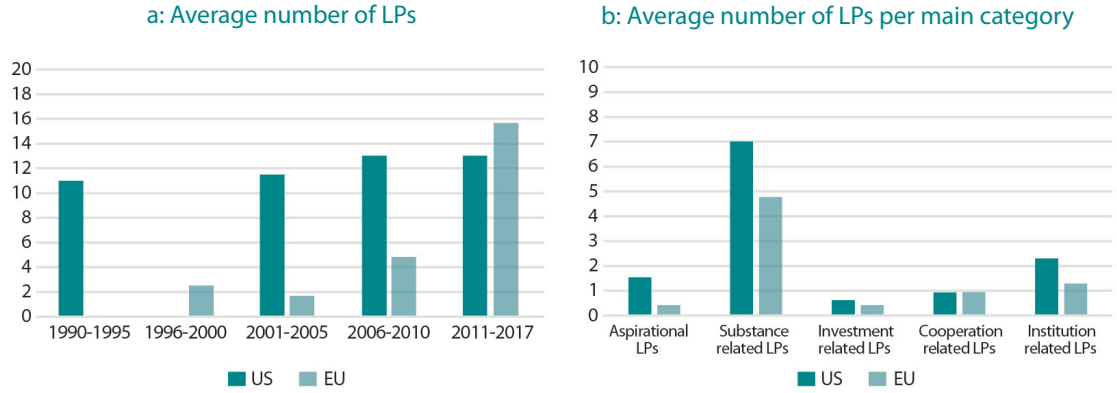


Source: Deep Trade Agreements Database.

19.3.3 LPs in PTAs by key players

The two actors that have played the most pivotal role in influencing the design of LPs in PTAs are the US and the EU. While the EU has signed more PTAs with LPs than the US since the early 1990s, the US still has the higher average number of LPs included in its PTAs. Although this trend has started to change, particularly with the introduction of the EU's latest generation of PTAs with the EU-Korea agreement in 2010 (panel a of Figure 19.8), the US continues to have, with the exception of cooperation-related LPs, more provisions under each of the main categories of LPs (panel b of Figure 19.8).

Figure 19.8: LPs in EU- and US-signed PTAs, 1990-2017



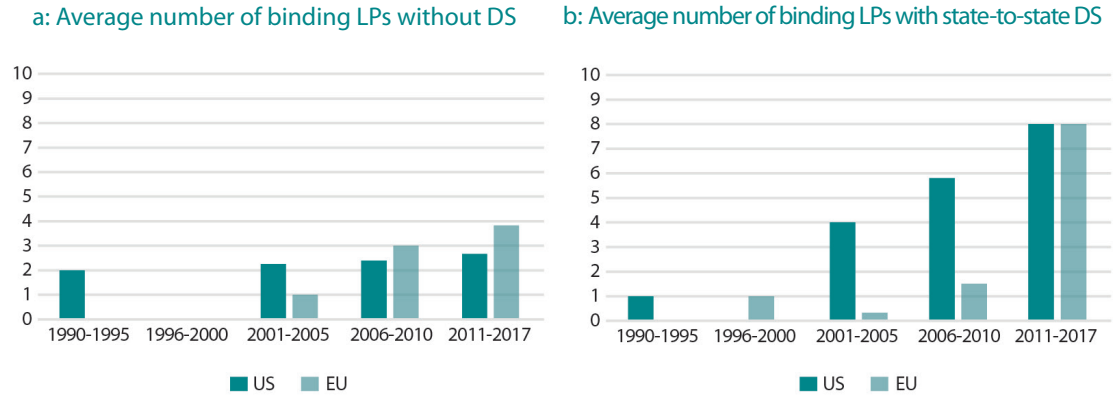
Source: Deep Trade Agreements Database.

According to previous literature, the key difference between the PTAs of the US and the EU is that the US uses a hard-law approach while the EU uses a soft-law approach (Hafner-Burton 2005). While it is true that the US includes overall more enforceable LPs in its PTAs (Figure 19.9), the difference between the two approaches is more subtle than previously indicated.[12] Since 2006, the EU has had more binding provisions without DS than the US, while state-to-state DS provisions are not at all absent from the EU-signed agreements.[13] At the same time, US agreements include about the same number of cooperation-related provisions as those signed by the EU (panel b of Figure 19.8).

[12] See, for instance, Hafner-Burton (2005); and Postnikov and Bastiaens (2014).

[13] The EU-CARIFORUM Economic Partnership Agreement (2008), for example, allows parties to bring disputes related to LPs under DS procedure and to adopt – with the exception of suspension of trade concessions – appropriate measures in case the party complained against does not comply with the ruling handed down by the arbitration panel (Art. 213 (2)).

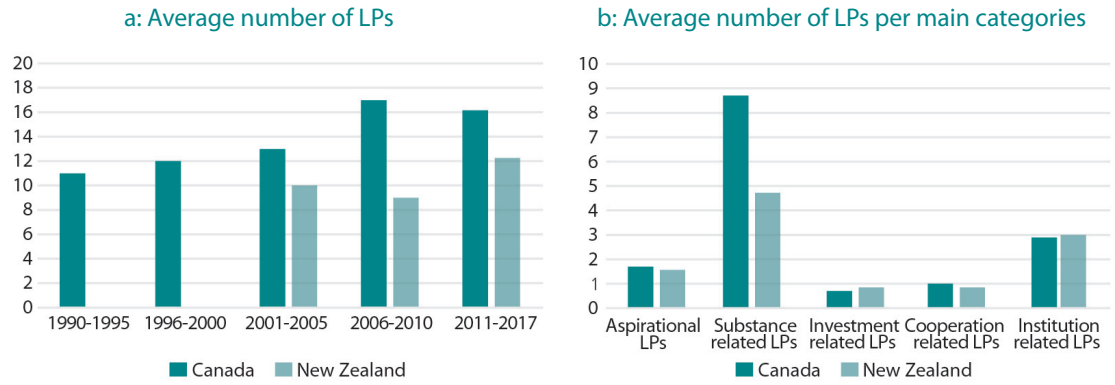
Figure 19.9: Enforceability of LPs in EU- and US-signed PTAs, 1990-2017



Source: Deep Trade Agreements Database.

In addition to the US and the EU, Canada and New Zealand (the latter only since the early 2000s) are also key drivers of LPs in PTAs. Although Canada includes more LPs in its PTAs than New Zealand (panel a of Figure 19.10), the main difference concerns the number of substance-related provisions. Regarding aspirational, investment-cooperation-, and institution-related LPs, the designs adopted by the two countries do not show significant differences, except that New Zealand has slightly more investment- and institution-related LPs (panel b of Figure 19.10).

Figure 19.10: LPs in Canada- and New Zealand–signed PTAs, 1990-2017

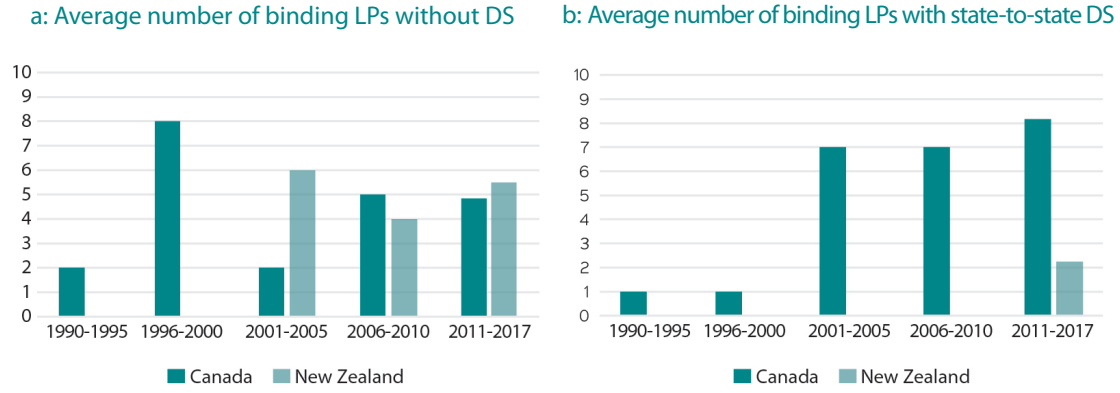


Source: Deep Trade Agreements Database.

Looking at the enforceability of provisions, a more pronounced difference can be identified: while New Zealand, like Canada, uses binding language in its commitments to labor protection and promotion (panel a of Figure 19.11), it was only with the signing of the TPP that New Zealand included the possibility of subjecting LPs to state-to-state DS (panel b of Figure 19.11).

Interestingly, comparing Canada with the EU and the US, the data indicate that Canada has, on average, a higher number of LPs than the other two key trade players, especially with respect to substance-related provisions and enforceability (Figures 19.8-19.11). Canada's progressive approach was also outlined by its proposal for a more ambitious approach to advancing labor rights in the renegotiation of NAFTA in 2018.[14]

Figure 19.11: Enforceability of LPs in EU- and US-signed PTAs, 1990-2017



Source: Deep Trade Agreements Database.

19.3.4 LPs in South-South PTAs

Throughout the past decades, and particularly since the early 2000s, countries from the South have also begun to include LPs in the PTAs signed among themselves,[15] although these commitments remain rather limited both in terms of scope and stringency. The most noticeable increase in the average number of LPs among newly signed PTAs was during 2006-2010 (from 2 LPs in the 1990-1995 period to 5 LPs during 2006-2010), with the majority of those relating to cooperation or the institutional framework.

Regarding enforceability, the South's commitments lag far behind those made by the key players from the North. Only the Economic Community of West African States (ECOWAS) agreement allows for state-to-state DS for labor provisions, particularly in relation to cooperation regarding the harmonization of labor laws.

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[14] https://www.cigionline.org/articles/what-nafta-negotiators-can-do-about-worker-anxiety.

[15] South-South PTAs with comprehensive LPs signed between 1990 and 2016 are: Economic Community of West African States (ECOWAS),1993; Common Market for Eastern and Southern Africa (COMESA), 1994; Eurasian Economic Community (EAEC), 1997; Southern African Development Community (SADC), 2000; Peru-China, 2010; Costa Rica-Colombia; 2016; and Pacific Alliance, 2016.

19.4. CONCLUSIONS

This first comprehensive mapping of the content of LPs in PTAs reveals a twofold trend.[16] On the one hand, LPs are in general becoming more binding and enforceable, mainly as a result of the design adopted by key trade players such as the US, Canada, and the EU. On the other hand, agreeing less stringent provisions (with few binding and even fewer enforceable provisions) continues, particularly by actors that have more recently started to incorporate LPs into their trade agreements (New Zealand, EFTA, and South-South trading partners). However, one key commonality between both groups, aside from the general increase in substance-related provisions, is the increased emphasis on the institutional framework responsible for the monitoring and implementation of LPs, resulting in more inclusive and specialized institutions.

With the recent NAFTA re-negotiations and the EU's renewed debate on the effective implementation and enforcement of Trade and Sustainable Development chapters,[17] the possible design of LPs in PTAs has yet again come to the center of attention. In both cases, labor unions were pushing for the broadening of the scope of issues incorporated in PTAs and for more efficient dispute settlement mechanisms.[18] Such demands have gained momentum in light of the recent ruling in the US-Guatemala case finding that no violations of the PTA could be determined, in part because of the lack of evidence for the non-compliance with LPs in a manner affecting trade. In both cases, while acknowledging some of the new provisions as improvements compared to earlier texts, trade unions expressed dissatisfaction with the overall result, particularly given the lack of convincing/sufficient progress regarding the enforcement of labor provisions.[19]

Given that labor provisions in trade agreements continue to evolve over time, it is likely that additional items to address new developments will be added to the coding template in the near future.

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[16] See also Raess and Sari 2018.

[17] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1689.

[18] https://www.etuc.org/en/document/etuc-resolution-eu-progressive-trade-and-investment-policy; https://aflcio.org/statements/written-comments-how-make-nafta-work-working-people.

[19] https://aflcio.org/pressreleases/new-nafta-deal-far-finished; https://www.etuc.org/en/document/etuc-assessment-commissions-non-paper-trade-and-sustainable-development-tsd-chapters-eu.

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