



**Labor Provisions in Trade Agreements (LABPTA):
Introducing a New Dataset[†]**

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Abstract:

Global labor policy through trade has begun to receive growing attention with the inclusion of labor provisions in preferential trade agreements (PTAs). Until recently there has been a shortage of available data that would adequately capture the variation that exists with respect to the scope and stringency of labor provisions, preventing scholars and practitioners from addressing key questions about the design and effects of the trade-labor linkage. This paper introduces a new dataset covering 487 PTAs from 1990 to 2015 coded against 140 distinct items pertaining to six main categories, presenting -- to our knowledge -- the most rigorous and fine-grained mapping of labor provisions. It also offers the first systematic description of the key trends in the design and occurrence of those commitments. Our study shows that labor provisions have not only expanded in terms of their content and participating countries but that labor provisions have, although to a varying degree, also become more stringent over time. The provisions that have across all PTAs demonstrated a steady increase are the ones related to the institutional framework set up for the monitoring and implementation of labor commitments, becoming more specialized and more inclusive of third party involvement over time.

Policy Implications:

- Academics and policy makers require a better understanding of the variation in the design of labor provisions in PTAs.
- At present, there is no comprehensive dataset on the design of labor provisions, rendering the analysis of trends over time and of the causes and effects of labor provisions in trade agreements difficult for policy makers and scholars alike
- Trade negotiators have few resources for the analysis of new or best practices. This article provides a first step.
- Coding and measurement of labor provisions is of interest in spheres beyond the regulation of labor policy, particularly regarding other disciplines included in PTAs such as the environment, human rights, social security, migration, democracy and corruption.

1. Introduction

The pendulum is swinging back, but not where the master expected it – and for good reason. Since the time Polanyi wrote his masterpiece *The Great Transformation* (2001 [1944]), capitalism has gone global again. While domestic labor market liberalization has proceeded unabated worldwide in recent decades, international labor regulation has made significant progress often beyond the headlines. The trade-labor linkage is a case in point. Many of the preferential trade agreements (PTAs) signed over the past twenty years include labor provisions (LPs).¹ These LPs link the benefits of better market access to, for example, the (effective) enforcement of internationally recognized labor rights. But there is much variation across time and space with respect to the scope and stringency of these LPs. Some PTAs include far-reaching and highly enforceable LPs, while others only make scant references to labor standards or even fully omit the topic.

The objectives of this article are twofold: one is to introduce a new dataset on the design of Labor Provisions in Trade Agreements (LABPTA), and the other is to document the evolution of the content and stringency of these LPs over time. The central idea is, hence, to provide a detailed and up-to-date picture for the better assessment of the trade-labor nexus on a global scale. To the best of our knowledge, LABPTA is the most fine-grained and comprehensive mapping of the content of LPs in PTAs. It allows for extended research on the design and effects of varying LPs in PTAs.

While researchers have recently started to focus their attention on explaining the causes and consequences of variation in the design of PTAs, LPs have until most recently either been neglected or not been the focus of systematic investigation (e.g., Dür and Elsig, 2015). Existing studies have tended to focus on a single case, be it a particular PTA or a single global player (e.g., Giumelli and van Roozendaal, 2016; Nyland and O'Rourke, 2005), or on a small-N comparative analysis of the United States (US) and the European Union (EU) (e.g., Hafner-Burton, 2009, Kerremans and Gistelinck, 2009), all too often using and reproducing the narrow statement that American trade agreements are enforceable with respect to labor standards whereas European agreements are not (e.g., Postnikov and Bastiaens, 2014), which does not do justice to the broadening scope of enforceability in US PTAs and the greater enforceability, yet with variable geometry, of recent EU PTAs. The International Labour Organization's (2009; 2013; 2016) pioneering work in this domain, while providing detailed insights into the design and effectiveness of LPs in PTAs, on a methodological basis remains limited in two important ways: on the one hand it fails to introduce a comprehensive template for the mapping of LPs in PTAs, while on the other hand

it fails to carry out a systematic coding of the content of LPs in the available largest possible number of PTAs based on an integrated and encompassing conceptual and analytical approach.

Recent mapping exercises have tended to focus on LPs as part of a broader objective to map nontrade issues (NTIs) in PTAs. Researchers engaged in such ambitious endeavors almost invariably face a trade-off between breadth and depth of issues covered that tends to come at the expense of a higher level of granularity in the coding of a single issue. Milewicz's (2014; Milewicz *et al.*, 2016) dataset on NTIs codes labor rights alongside human rights, environment, corruption, security and democracy for 522 PTAs signed over the period 1951-2009. Milewicz's mapping of LPs, however, carries important limitations not only because it adopts a broad definition of labor rights that includes social security rights dealing with sickness, invalidity, old-age, industrial accident and unemployment, but also because the coding of the different nontrade issues, in spite of the distinction between provisions in the preamble and the main text of the agreement, remains crude.

Lechner's (2016) dataset of NTIs design provides a novel coding for 474 PTAs signed since 1990, covering civil and political rights, environmental protection, and economic and social rights. It is an important improvement on Milewicz's dataset in that it covers a range of labor rights coded over the three dimensions of obligation, precision and delegation inherent to the legalization approach (Abbott *et al.*, 2000). Lechner ends up coding 25 items relating to labor protection (substantive-related commitments as well as institution and cooperation-related commitments) out of a total of 72 items pertaining to the economic and social rights category. And yet, while Lechner uses a broader definition of LPs than we do, her template remains limited to the extent that the coding of extensive obligation and delegation is carried out in relation to economic and social rights in general, preventing us from knowing whether obligation and delegation applies effectively to LPs when they do for the overarching category economic and social rights.

In his recent studies, Kamata (2014; 2016) examines the impact of labor clauses in PTAs on conditions of work for a sample of 223 PTAs from 1995 to 2011. The classification of PTAs with LPs builds on two criteria: 1) provisions that demand, urge, or expect the signatory countries to harmonize their domestic labor conditions and regulations with the internationally recognized standards; and 2) provisions that stipulate items over which the signatory countries will cooperate and the procedures for dispute settlement on labor issues. While an improvement on the binary coding of LPs, his classification remains too rudimentary to adequately capture the large variation in the design of LPs in PTAs. Among

the various shortcomings is the lack of details as to whether commitments are specific to any particular standards, the conflation between soft and hard mechanisms such as cooperation and enforceability, respectively, and the failure to distinguish between different degrees of enforceability.

Finally, Hofmann *et al.* (2017) constructed a novel database with detailed assessment of the content of 279 PTAs signed between 1958 and 2015. Their mapping covers 52 policy areas with a separate category for “Labour Market Regulation.” It refers to provisions that pertain to regulation of the national labor market and affirmation of ILO commitments (a single item coded in a binary mode), and the enforcement of such provisions (coded on a 0-2 scale). In spite of their focus being more specific to labor rights, their methodological approach suffers from similar limitations as Kamata’s approach.

In short, a rigorous and fine-grained approach to mapping LPs in PTAs is over-due. Our LABPTA template and dataset provide just that.

2. Conceptualizing and measuring LPs in PTAs

Given that there is no single approach as to what constitutes a “labor” provision in trade agreements, we opted for a narrow definition which has the advantage of drawing clear distinctions between labor and (broader) social provisions on the one hand, and between labor protection provisions and (broader) labor market regulation provisions on the other. In our conceptualization, labor provisions refer to rules and regulations that aim to protect and/or promote workers’ rights and working conditions. In the context of trade agreements, a labor issue is considered to be “covered” by an agreement if the agreement contains a provision (i.e., chapter, article, paragraph or sentence) providing for some form of commitment in this field. In other words, we focus on *labor protection provisions*. Our definition thus excludes provisions dealing with social protection, such as social security (e.g., health, old age, unemployment, and family benefits) and education policy. It also excludes provisions relating to active labor market policies, such as the creation of employment opportunities, training, or “supply-side” measures aimed at better matching labor supply and demand. Finally, because our focus is on the trade and labor linkage in trade agreements, we ignore provisions regarding the free movement of workers and the treatment of migrant workers, as well as labor-related commitments in relation to investment measures (mainly found in chapters on investment).

The assessment of coverage, and the elaboration of our coding template for that matter, was done in three steps. First, we looked for the presence of LPs in agreements by

way of the traditional search for keywords.² This initial screening resulted in a classification of PTAs into three groups: PTAs with no LPs; PTAs with preambular LPs (or shallow LPs), that is, provisions found exclusively under the preamble or objectives parts of PTAs; and PTAs with comprehensive LPs, that is, LPs that go beyond the aspirational statements included in the preamble or objectives parts of PTAs. We considered LPs in the treaty texts, in side agreements on labor and Memorandums of Understanding (MoUs), without distinction of any kind between these different sources. However, the main treaty texts should establish a clear relationship to side agreements and MoUs for those to be considered. Concerning Action Plans that are agreed upon either simultaneously with³ or after the signing of the PTA concerned,⁴ those sources are also considered but careful analysis is required in establishing the unilateral or reciprocal nature of the given LPs.

Second, we manually coded LPs in PTAs against our detailed coding template, which we designed using an inductive approach that was informed by the relevant secondary literature. The coding template was fine-tuned as more agreements were added and new provisions were found. This was a result of a series of exchanges among the authors, one of which is trained as a labor lawyer, and between them and a coder, a qualified lawyer with a strong understanding of the underlying concepts. We also benefited from several rounds of consultation with an established legal expert in international trade law.

Third, to test the reliability of our coding we cross-checked our results on 13 overlapping items from the coding by Lisa Lechner on NTIs in PTAs (Lechner, 2016). The average Cohen-Kappa across the 13 dimensions of labor rights is 0.75 (range: 0.63 to 0.88), which is recognized as substantive agreement. We are confident about the (high) reliability of our coding given our rigorous conceptual approach and our relentless efforts to revise it together with the associated coding, a process that has spanned over two years and has involved in many instances checking, double-checking if not triple-checking the same agreement by multiple persons or by one person in ongoing consultations with another person, including after the above mentioned reliability check was carried out (January 2016).

Our approach goes beyond existing mapping exercises in two ways. First, for the treaty texts we draw on the DESTA dataset (Dür *et al.*, 2014), the most comprehensive of its kind in terms of the number of agreements covered. DESTA contains not only information on PTAs that are in force and have been notified to the WTO, but also many such agreements that have not been notified to the WTO. Our dataset contains information on the design of as many as 140 distinct items pertaining to LPs in 487 PTAs among 165 countries over the period 1990-2015. To our knowledge, this dataset offers the most comprehensive data

available in terms of the number of trade agreements, countries and labor protection provisions covered. Second, we focus on both on the scope (or breadth) of protective LPs covered by an agreement, and the stringency of specific provisions through the assessment of their enforceability and the institutional framework set up for the monitoring and implementation of those.⁵

3. The LABPTA coding template

Our coding scheme is structured around six main categories: 1) Aspirational statements relating to LPs in preamble and objectives of the agreement (P); 2) Substantive commitments in relation to LPs (S); 3) Obligations in relation to substantive LPs (O); 4) Enforceability of the substantive LPs (E); 5) Cooperation commitments over LPs (C); and 6) Institutions overseeing the labor-related commitments (I).

Substance and Cooperation relate to *what matters* in terms of substantive labor issues are being addressed in the relevant legal provisions of an agreement (Bourgeois *et al.* 2007). In other words, it refers to the *scope* of labor protection provisions. Obligation, Enforceability and Institutions, however, relate to the *stringency* of labor-related commitments taken in these legal provisions. In a sense they qualify how far-reaching specific substantive commitments are. Whereas Obligations and Enforceability form the basis for assessing the degree of enforceability of specific labor-related commitments, Institutions capture the strength of the implementation and available softer means to promote compliance with labor commitments.

LPs in the preamble and the objectives parts of the agreements constitute aspirational statements, which is why we code them separately. 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 in that they do not establish specific rights or obligations. Preamble statements do not contain binding obligations upon the parties, rather they “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” (Bourgeois *et al.* 2007, p. 13). The objective to “improve working conditions” is by far the most frequent reference to labor standards in preambles to a PTA. To avoid double counting we do not code under P commitments to labor standards in the preamble if those same commitments are reiterated and elaborated in the main body of the agreements (where they get coded).

Under substantive commitments we list items related to international labor standards commitments and to domestic law commitments. The former consists of provisions derived from or related to internationally recognized labor commitments (e.g., fundamental rights at work, conditions of work, decent work) and provisions concerning international instruments containing such commitments (e.g., ILO Conventions, ILO 1998 Declaration on Fundamental Principles and Rights at Work).⁶ The latter comprises three types of commitments, non-derogation, effective enforcement, and access to domestic courts. Non-derogation refers to commitments not to encourage trade through the weakening of labor laws by ways of waiving or derogating from domestic labor law. Effective enforcement of domestic laws refers to commitments to effectively enforce domestic laws to the extent that failing to do so would affect trade between the parties. Access to domestic courts refers to guarantees concerning the right of workers or employers to fair, equitable and transparent domestic procedures under which such their rights can be invoked and enforced. In total we have 20 different items coded under S, 17 pertaining to international and three to domestic commitments.

Under Obligations, following a strict legal interpretation of the treaty texts, we code the extent of obligations of labor-related commitments undertaken by the signatory parties. Specifically, we are interested in whether or not the substantive commitments amount to legally binding obligations. Binding obligations are indicated by the use of terms such as shall, will, agree, undertake, ensure, realize, whereas commitments expressed with words such as “should” or “strive to ensure” indicate weaker commitments. As Bourgeois *et al.* (2007, p. 26) note “[T]he use of the word *shall* is interpreted by courts to be stronger than the term *should*”. The 20 items under Substance are repeated under Obligations and coded accordingly.

Under Enforcement we focus on the model of dispute settlement mechanism (DSM) covering labor-related commitments. Building on a WTO taxonomy (Chase *et al.*, 2013), we distinguish between political/diplomatic, quasi-judicial and judicial state to state DSM. We separately code four types of remedies at the disposal of parties to enforce compliance with third-party rulings, distinguishing between retaliation measures that can be imposed unilaterally, including trade sanctions, monetary compensation, and “other appropriate measures”, and those that cannot, as when the parties are explicitly required to find a “consensual” solution to their dispute. Strong enforceability in our definition entails that the signatory parties can resort to quasi-judicial or judicial DSM over labor standards provisions that also provides for the possibility to retaliate unilaterally. Specifically, PTA members have an “automatic” right⁷ of access to (often ad hoc) third-party adjudication (quasi-judicial

DSM) or standing judicial courts (judicial DSM) in case of a dispute with the possibility to impose unilaterally trade sanctions, monetary compensation, or “other appropriate measures”. The items under substantive commitments are repeated under each category of state-to-state DSM and coded accordingly. Taking the remedies into account, we code a total of 64 items under Enforcement.

Under Cooperation we code the presence of any commitments in relation to provisions on labor-related cooperation. This includes the presence of any substantive labor-related commitments if those are agreed by the parties as issues over which they will cooperate. The number of items covered under C (21), however, is slightly larger than the items under S as we found additional issues over which parties can agree to cooperate, including (reform of) labor laws, (promote) social dialogue, (reform of) labor administration and inspection system, and gender equality.⁸

Finally, Institutions depict the attributes that can determine the role and influence the institutional arrangements may have in the effective monitoring and implementation of labor-related commitments. Such attributes include the coding of the type of bodies responsible for overseeing/implementing the commitments, their operation, the status of participants, the involvement of third parties, and the means available for the implementation of agreed commitments. We code whether the agreement foresees the establishment of a *separate* specialized committee responsible for the implementation and/or supervision of labor commitments (including contact points) or whether the body responsible for the monitoring/implementation of the entire PTA is also in charge of dealing with labor-related provisions (“regular committee”); whether the agreement stipulates *regular* meetings of the separate committee or whether the committee is convened on an *ad hoc* basis; whether the officials staffing the separate committee are *high* or *low* rank officials; whether the agreement authorizes the participation of key stakeholders, including the social partners, the ILO, NGOs, or other third party organizations; and whether the parties enlist any types of means to carry out their cooperation activities. Regarding the latter, we use a threefold distinction, differentiating between exchange of information, exchange of people (including study visits, joint research, seminars), and capacity building (including technical assistance). In total, we code 13 items under Institution.

All in all, our LABPTA coding scheme consists of 140 items pertaining to six main categories against which we have coded 487 PTAs signed between 1990 and 2015. The remaining parts of this paper will document key trends in the incidence and the design of LPs in PTAs over time.

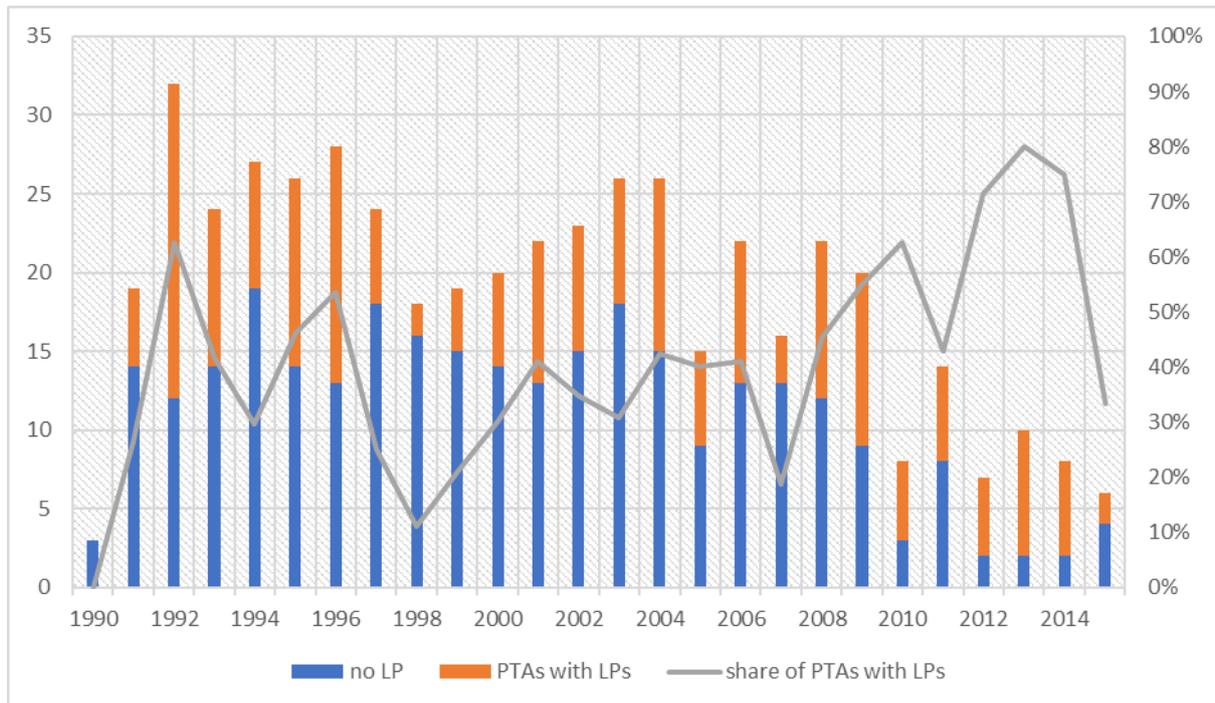
4. Trends in the content of LPs in PTAs, 1990-2015

The next section takes a first look at the data and provides a detailed description of the key trends in the occurrence and design of LPs in PTAs over the period 1990-2015. Owing to the meticulous coding scheme and the large number of issues identified, the dataset allows for a fine-grained analysis of the various LPs agreed upon in PTAs.

4.1. The rise of LPs in PTAs

As existing literature points out, the past 50 years not only witnessed a rapid proliferation in the number of PTAs, but equally important, it also led to the gradual deepening of those agreements (e.g., Dür and Elsig, 2015). The same trend can be observed when assessing LPs in PTAs. Looking at the share of PTAs with LPs in the total number of PTAs signed in a given year, the data indicates that compared to an average of 32 % in the 1990s, the share of PTAs with LPs rose to 40% during the first decade of the 2000s, reaching an average of 61% during the period of 2010-2015 (with a peak as high as 80% in 2013) (Figure 1).

Figure 1. Share of PTAs with LPs in total PTAs per year

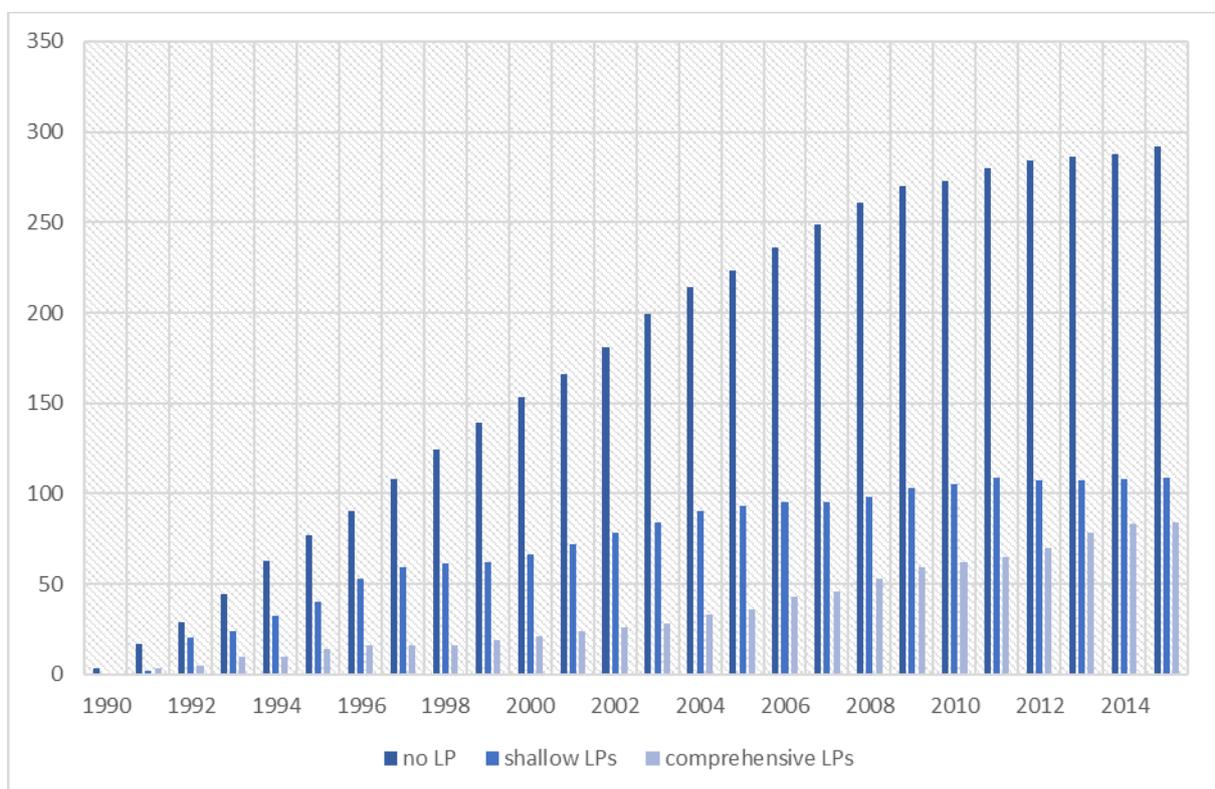


Note: PTAs with LPs include all agreements with at least one LP. The bars indicate the number of newly signed PTA with and without LPs per year.

Such an increase is rather surprising given the failure to adopt a social clause during the multilateral trade negotiations in the 1990s. Until that point the only provision directly relevant to workers' rights was an Article XX exception to trade obligations for measures relating to products of prison labor under the General Agreement on Tariffs and Trade (GATT 1994, Art. XX (e)), allowing prohibitions on imports of goods made by such labor. However, as Alben (2001, p. 1441) points out, despite apparent similarities to modern prohibitions on forced labor, this provision did not originate from modern human rights concerns, but was included to reflect on the long-standing national legislation such as that in the US and the objective to protect national industries from unfair competitions.

The past two decades did not only present an increase in the number of PTAs including LPs in some form, but there has also been a rise in the adoption of PTAs with comprehensive LPs. While the total number of PTAs without or only with shallow 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 2).

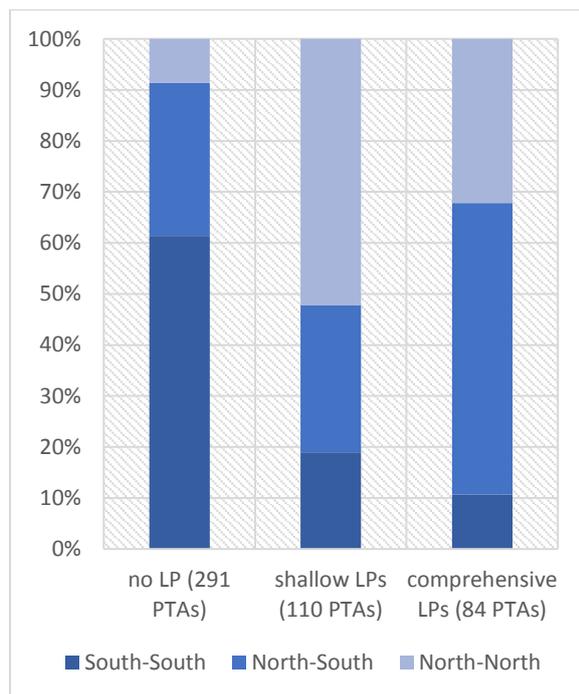
Figure 2. Cumulative number of PTAs with no LP, shallow LPs, and comprehensive LPs



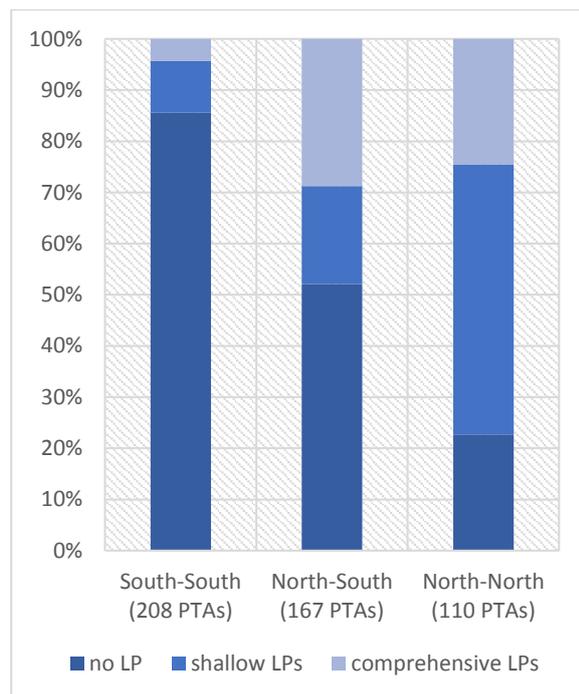
Looking at the breakdown of PTAs by the level of development of its members and by broad types of LPs,⁹ the data shows that the highest share of PTAs with any kind of LPs are signed between countries from the North (i.e., North-North PTAs) while the highest share of PTAs with comprehensive LPs are signed between countries from the North and the South (i.e., North-South PTAs), highlighting potential protectionist motivations, but also genuine concerns for worker protection, by Northern countries in the introduction of labor clauses in North-South PTAs (Figure 3.A). In contrast, the majority of PTAs without any LPs are signed among countries in the South (i.e., South-South PTAs), having also the smallest share of agreements signed with comprehensive LPs. Interestingly, PTAs signed between countries from the North have the largest share of PTAs with shallow LPs, followed by North-South and South-South PTAs (Figure 3.B).

Figure 3. Distribution of PTAs by level of development of its members and broad types of trade-labor linkages (cumulated over 1990-2015)

A. By broad types of LPs



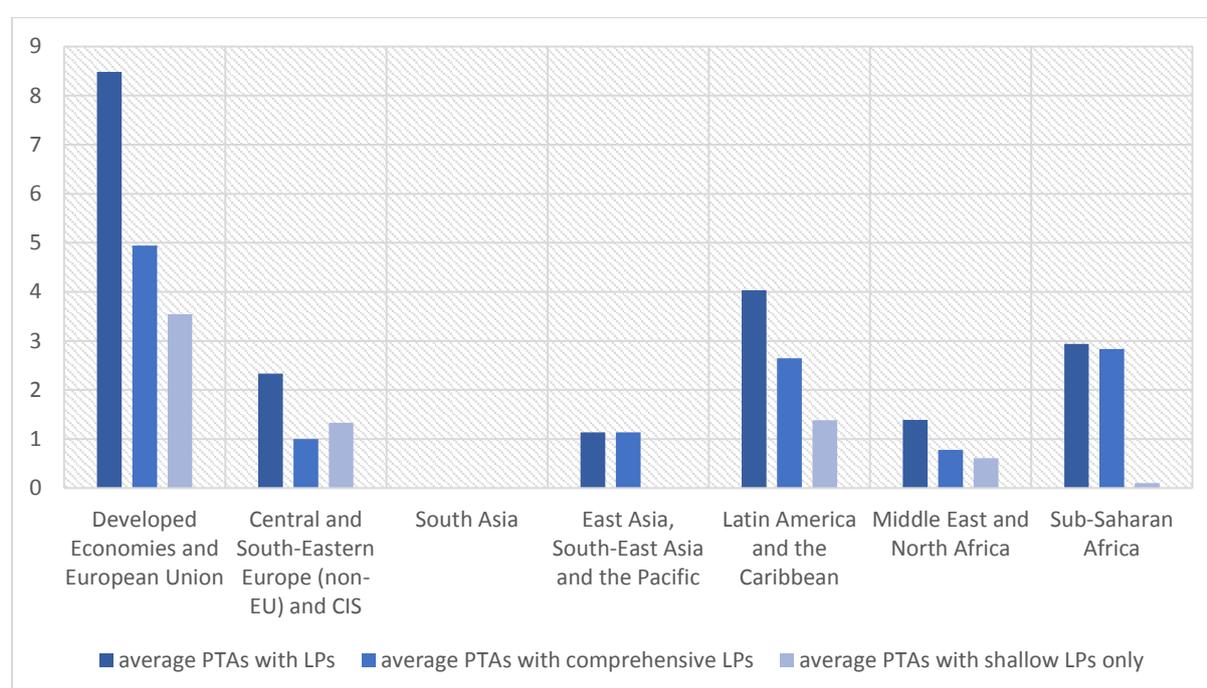
B. By level of development



Exploring the data disaggregated by regions following the classification by the International Labour Organization (2014), as one would expect, the highest average number of PTAs with LPs are signed by Developed Economies and the member states of the EU (Figure 4).¹⁰ This is followed by countries in Latin America and the Caribbean and then, surprisingly, countries in Sub-Saharan Africa. Despite the recent surge in the number of

PTAs – having tripled over the period of a single decade (Asian Development Bank, 2013) – Asia continues to fall behind other regions when looking at the average number of PTAs with LPs. Looking at PTAs with comprehensive LPs, however, the East- and South-East Asia together with the Pacific region performs better than the Middle East and North Africa or the (non-EU) Central and South-Eastern European and Commonwealth of Independent States, irrespective that such regions in total have more PTAs with LPs. This is, in part, explained by the comparatively late engagement with LPs in the region, resulting in a “jump” of the generation of PTAs in which LPs are predominantly addressed in the preamble.

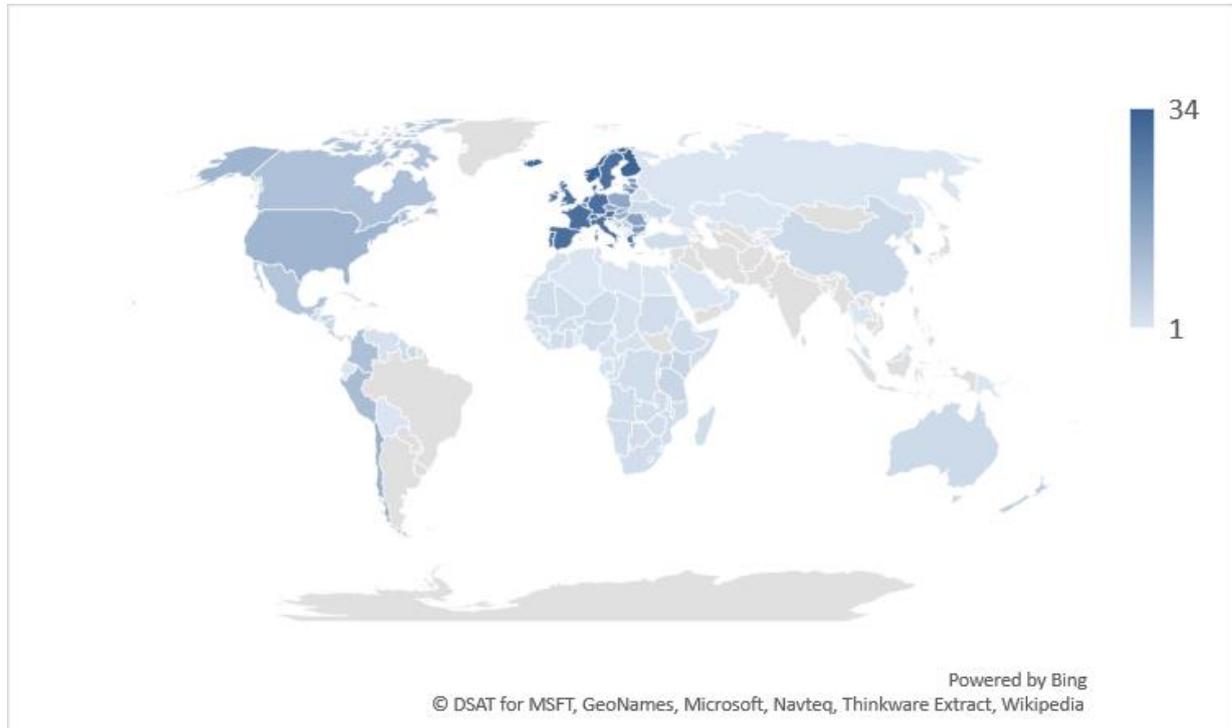
Figure 4. Average number of PTAs with LPs by region



Delving into country-level data (Figure 5), the countries with the highest number of PTAs with LPs over 1990-2015 are the EFTA member states (Iceland, Liechtenstein, Norway and Switzerland), followed by the EU-15 (i.e., countries that joined the EU pre-2004), and the Eastern European countries that joined the EU in 2004 (i.e., EU-10 countries). Among the countries with the highest number of PTAs with LPs are also the US, Canada and New Zealand, while from the South are predominantly Latin American countries, such as Chile, Peru and Colombia. Regarding the number of PTAs with comprehensive LPs (figure not shown), the picture is different: countries with the highest number of PTAs with comprehensive LPs are the EU-15 countries, followed by the US and the EU-10 countries. This list of countries is then followed by Chile, Canada, South Korea, Colombia and New

Zealand, with the EFTA member states only afterward. It is worth noting that the results are in part driven by the numerous agreements signed between EU member states and prospective candidate countries prior to their accession to the Union.

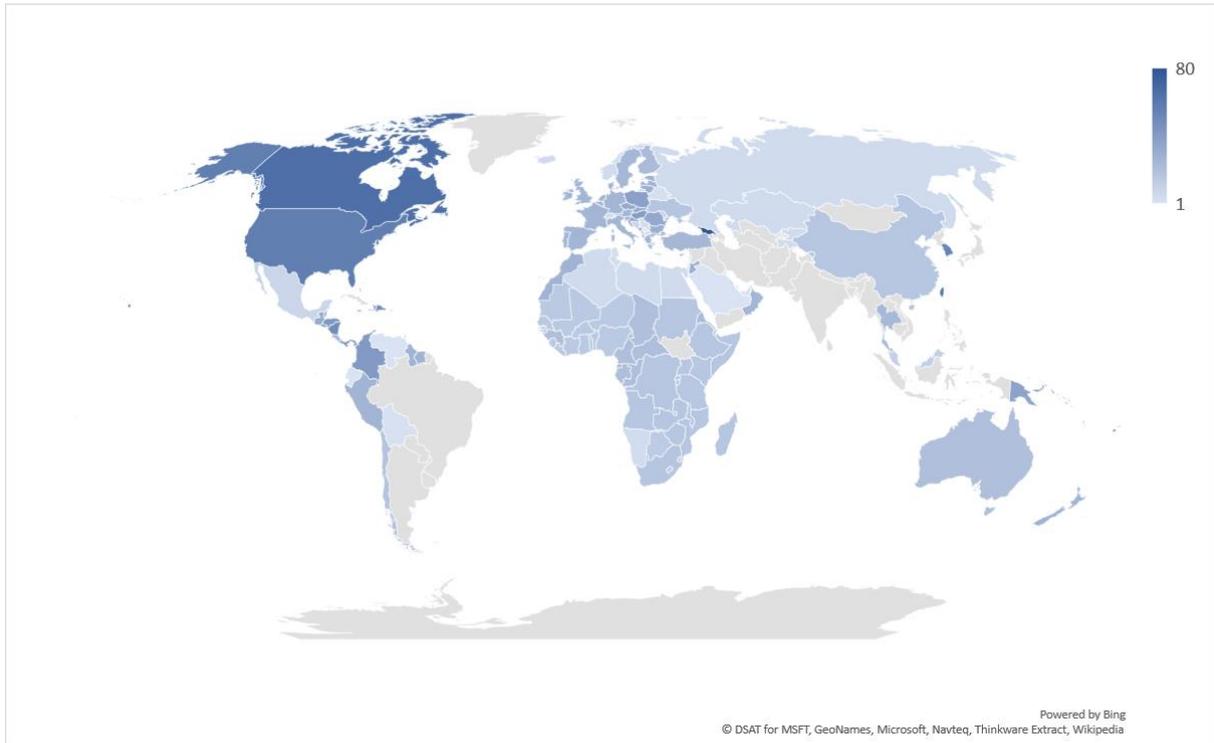
Figure 5. Number of PTAs with LPs by country



Note: The grey color in the map denotes countries that have not yet signed any PTA with LPs. To maintain the color distinction between countries that have not yet signed any PTA with LPs and countries that have signed PTA(s) with LP(s) the system takes the lowest value for countries that signed a PTA with LP(s) as the minimum value for the scaling (i.e., 1).

When considering the average number of LPs across all PTAs signed by a given country over 1990-2015, the picture is different (Figure 6). As the map shows, the countries with the highest averages include the US and Canada (together with Georgia and Taiwan), followed by predominantly Latin-American countries (Dominican Republic, Nicaragua, Honduras, Panama, El Salvador and Colombia), South-Korea and the EU-10. While much of this is determined by the combination of the extent of “PTA activism” and the time countries start to engage with PTAs with LPs, one can nevertheless see that North-American countries exceed the EU when it comes to the average number of LPs in their respective PTAs.

Figure 6. Average PSOECI score across all PTAs per country



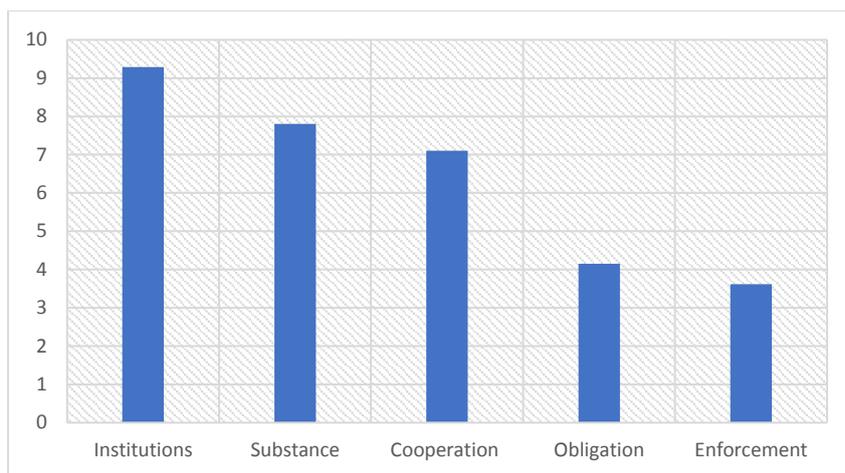
Note: see Figure 5.

The data equally allows for a variety of other types of disaggregation, depending on the specific question under investigation and can provide information on the overall or country-specific state of the types and stringency of LPs.

4.2. Types of LPs in PTAs

Looking at the types of provisions included in PTAs over the period of 1990-2015, on average most provisions concern the institutional framework set up for the monitoring and implementation of LPs in PTAs. This is closely followed by provisions concerning the substance of the commitments and those concerning labor-related cooperation commitments. However, as the graph shows, only about half of the substance-related commitments are formulated as obligations and even fewer are enforceable through at least one of the three coded dispute settlement mechanisms (Figure 7).

Figure 7. Average number of provisions per main category

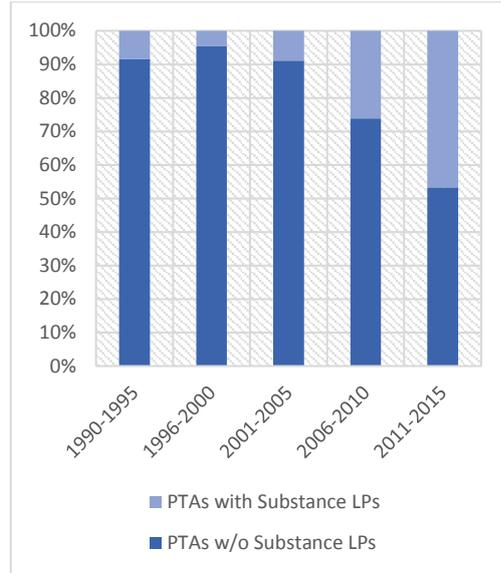
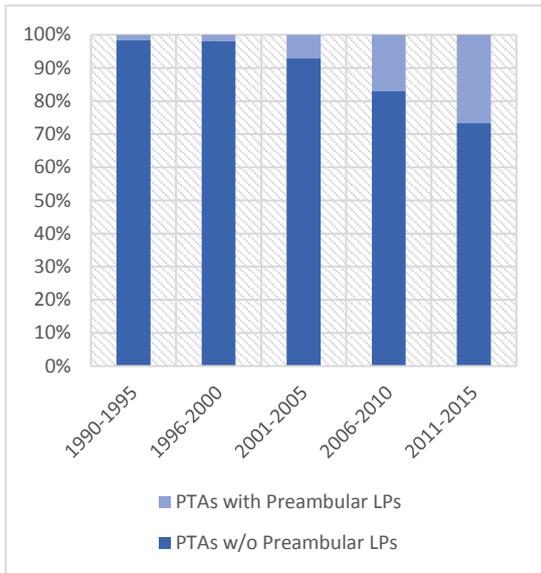


Note: the average number of provisions per category was calculated based on the sum of all items coded under a given category of LPs per PTA and averaged across all PTAs. To balance out the fact that different categories have different number of items coded under it (see above), we weighted the average number of provisions per category against a total of 21, the number of items listed under C.

As to the change in the share of PTAs with a given LP type in the total number of signed PTAs for windows of five to six years over the period 1990-2015, the largest increase between the first (1990-1995) and the last (2011-2015) window took place in relation to the adoption of institution-related LPs (39 percentage points, from 3.1% to 42.2%; Figure 8.F). This is closely followed not only by the increase in the share of PTAs with substance-related LPs (38.3 percentage point increase over the same time frame, from 8.4% to 46.7%; Figure 8.B), but also, at a very similar rate, the share of PTAs with obligatory commitments (37.7 percentage points, from 2.3% to 40%; Figure 8.C) and enforceable commitments (36.1 percentage points, from 8.4% to 44.4%; Figure 8.D), indicating a shift in the core design of LPs with an increasing emphasis on the bindingness and accountability of such commitments.

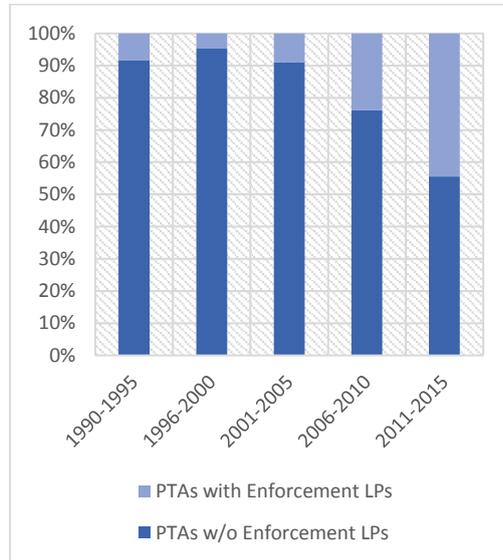
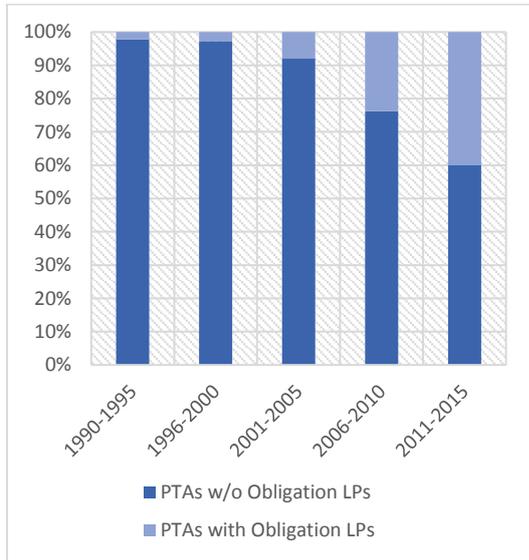
Figure 8. Share of LP types in total PTAs per five-year windows

A. Share of PTAs with Preambular LPs B. Share of PTAs with Substance LPs



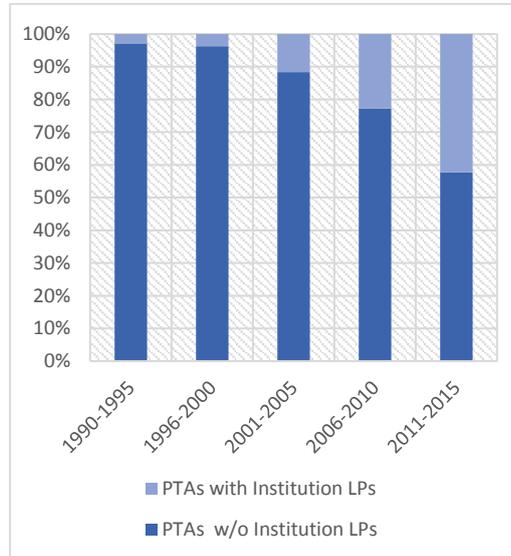
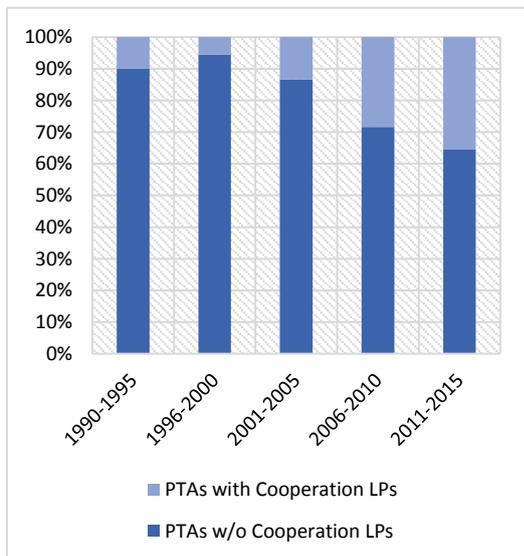
C. Share of PTAs with Obligation LPs

D. Share of PTAs with Enforcement LPs



E. Share of PTAs with Cooperation LPs

F. Share of PTAs with Institution LPs



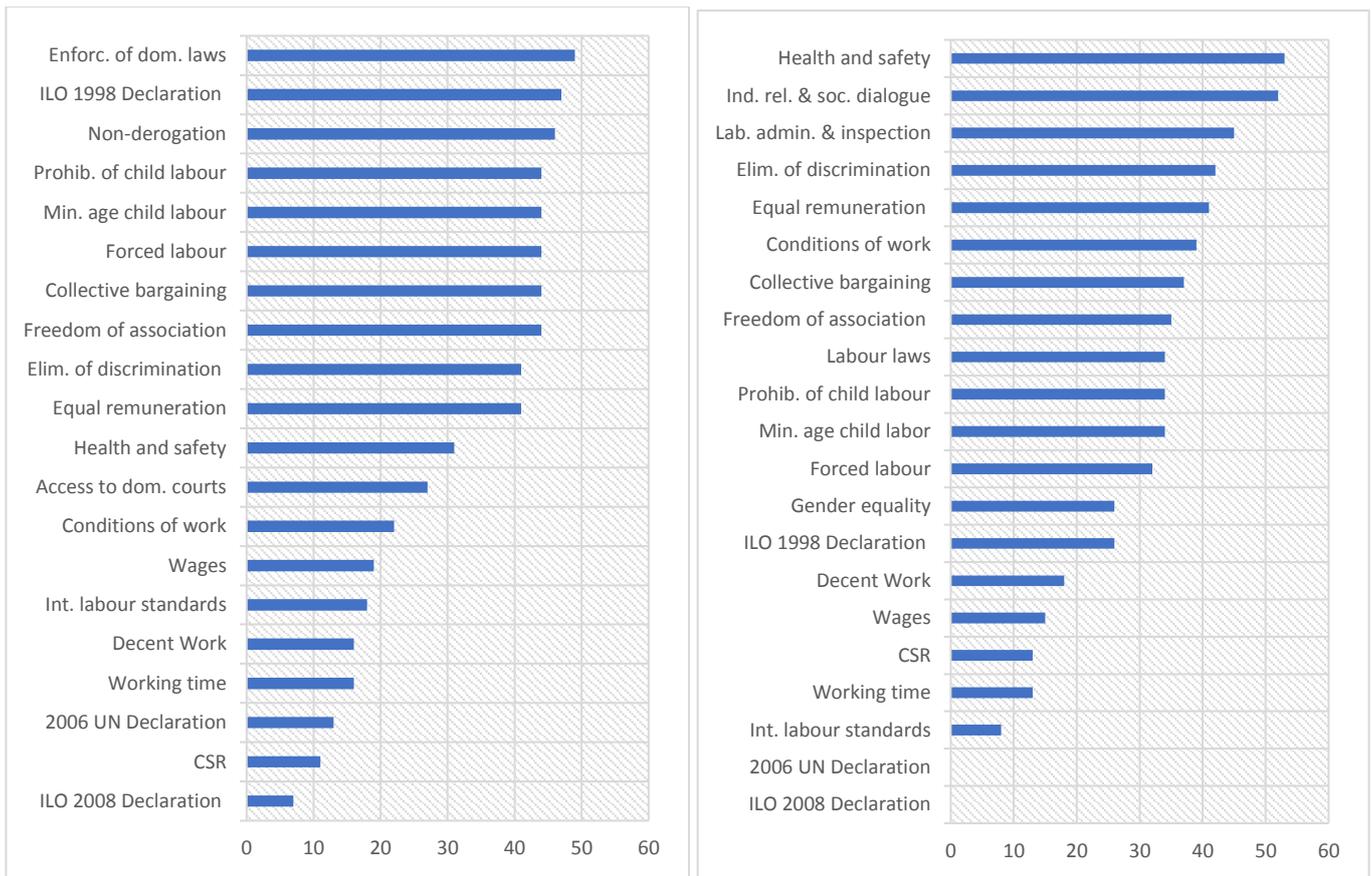
Although on average cooperation-related provisions are among the most frequently agreed commitments, comparatively speaking, a lower increase took place in the share of PTAs with cooperation-related LPs (25.6 percentage points between 1990-1995 and 2011-2015, from 9.9% to 35.6%; Figure 8.E). The lower increase in the share of cooperation-related LPs can be explained by the more frequent and early use of such provisions in the EU PTAs signed with post-communist Eastern-European States.

A closer examination of the substance- and cooperation-related commitments reveals that signatory parties have a different approach in the areas they wish to cover by such provisions. Substance-related commitments are dominated by the ILO 1998 Declaration on Fundamental Principles and Rights at Work and the related principles and rights on freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor and the elimination of discrimination in respect of employment and occupation (Figure 9.A). However, the provisions trade partners most frequently commit to relate to domestic law commitments, namely the effective enforcement of their laws and non-derogation from those as a way to encourage trade and investment. Under cooperation, the key focus – besides the most frequently noted health and safety commitments – is the improvement of the existing framework and practice of social dialogue and the strengthening of the labor administration and the inspection system (Figure 9.B).

Figure 9. Frequency of substance- and cooperation-related issues

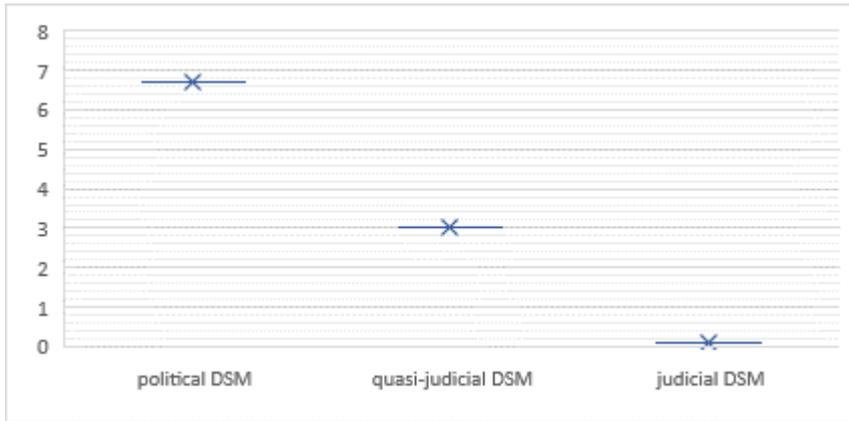
A. Substance-related issues

B. Issues covered by cooperation



Regarding the distribution of the three types of dispute settlement mechanisms, on average the use of political dispute settlement is still agreed two times more often by trade partners than the arbitration based quasi-judicial dispute settlement (Figure 10). Resorting to judicial DSM remains a rare feature of PTAs and mainly of those that besides regulating trade relations also establish a broader economic area (African Economic Community (1991); European Economic Area (1992); East African Community (1999)) or common market (East African Common Market (2009)).

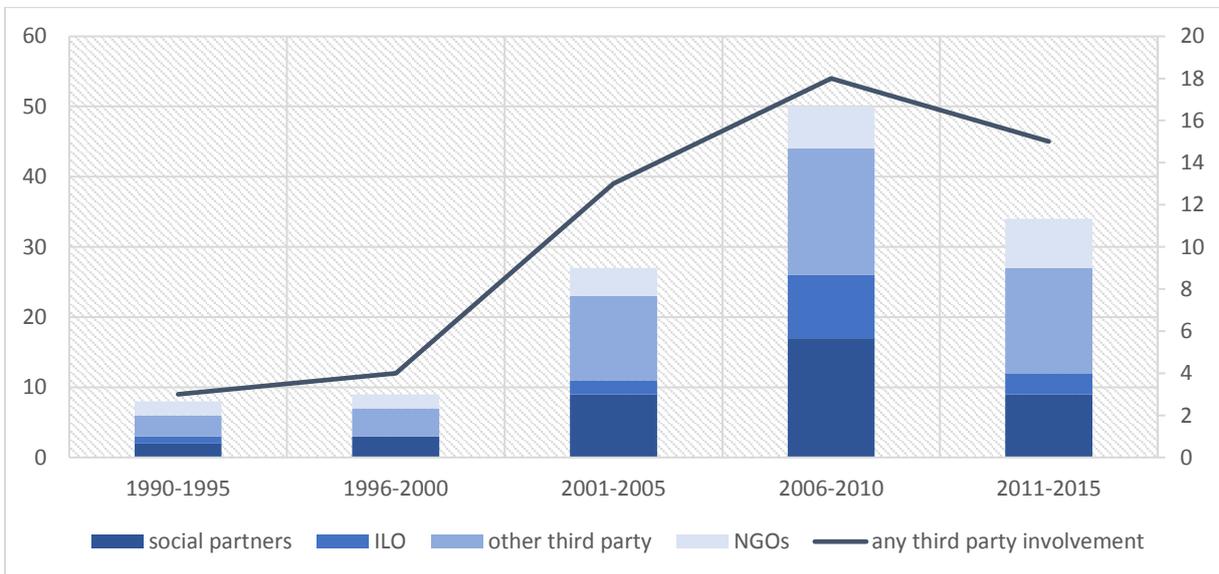
Figure 10. Average number of provisions relating to dispute settlement mechanisms



Note: the average number of provisions was calculated based on the sum of all items coded under political, quasi-judicial and judicial DSM per PTA and averaged across all PTAs.

As discussed earlier, one significant change over time has been the rise of provisions regulating the institutional framework responsible for the monitoring and implementation of LPs. An interesting development in this regard is the increase in the involvement of third parties (i.e., social partners, ILO, NGOs, other third parties) (Figure 11).

Figure 11. Number of PTAs with third party involvement under institutions per five-year windows



Note: The secondary axis depicts the number of PTAs with reference to any third-party inclusion over the five-years windows.

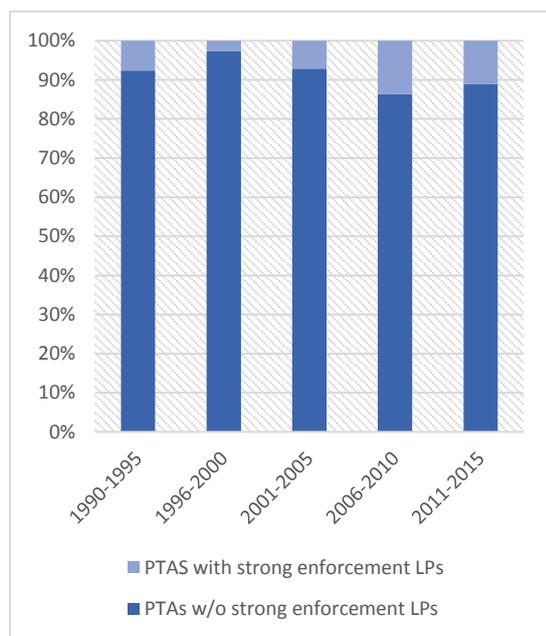
4.3. Stringency of LPs in PTAs

To further document the increase in the stringency of LPs over time, we develop two new measures, one for each of our two dimensions of stringency: strong enforcement and

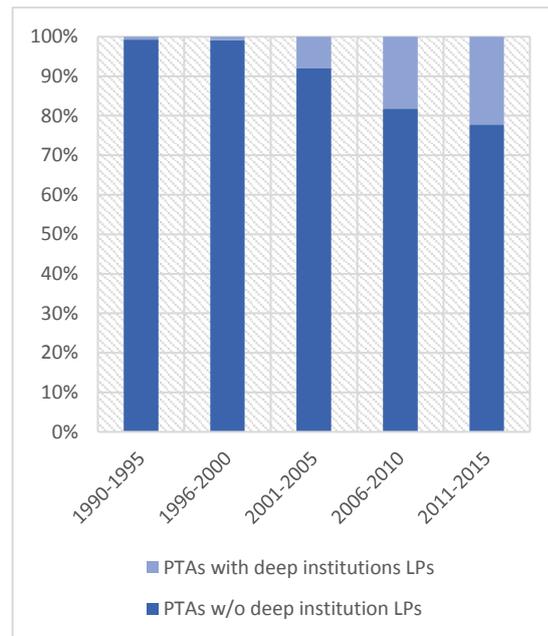
deep institutional LPs. Strong enforcement is defined through the simultaneous coding of quasi-judicial or judicial DSM *and* any of the following three unilateral sanctions: other appropriate measures, monetary compensation or trade sanctions. Deep institution is defined as the combination of a separate body established specifically for the monitoring and implementation of LPs *and* the inclusiveness of the institutional mechanism, that is, the possible involvement of any third parties in the monitoring and implementation of the agreements. Looking at the share of such provisions in the total number of signed PTAs for each of the five windows, the data indicates that the use of either of those concepts showed a more modest increase over time compared to provisions described earlier (Figure 12.A-B).

Figure 12. Share of PTAs with strong enforcement and deep institutions LPs in total PTAs per five-year windows

A. Strong enforcement



B. Deep institution

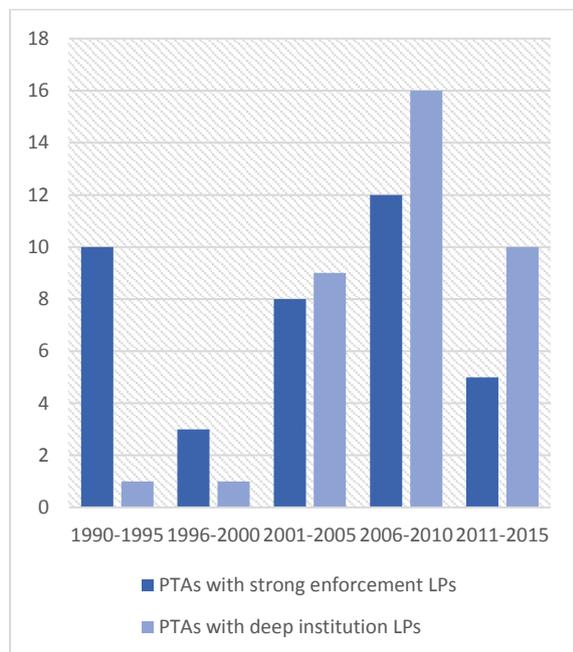


As Figure 13.A indicates, new provisions related to strong enforcement were more prevalent in the early 1990s than those related to deep institutions, a trend that seems to have reversed during the last window of five years (2011-2015): while the arrangement of deep institutional framework was not used during the 1990s, such provisions grew more rapidly than strong enforcement provisions from the early 2000s onwards. This variation is in part explained by the large number of trade agreements signed by the EU with Central- and East European countries in the 1990s, providing not only for arbitration based dispute settlement regarding the – rather narrow types of – LPs, but also the possibility for the use of “other

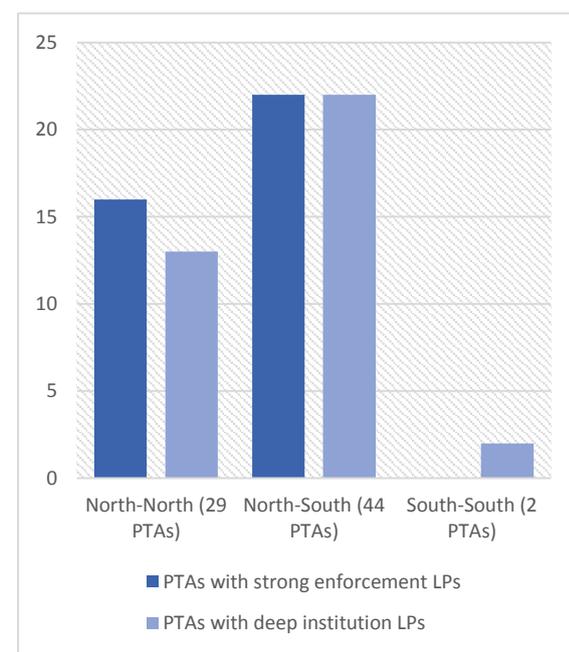
appropriate measures” as sanctions in case of non-compliance. On the other hand, it should also be noted that the US did not sign any PTA in the last five-year window (2011-2015), resulting in the lower number of PTAs with strong enforcement in that period. Regarding the distribution of such provisions by the level of development of PTAs members, the data indicates that the majority of PTAs with such provisions belong to the North-North and North-South agreements, while they continue to be a rather rare feature of South-South agreements (Figure 13.B). Interestingly, while strong enforcement is more often featured in North-North PTAs compared to deep institutions, the opposite holds in South-South PTAs.

Figure 13. Strong enforcement and deep institutions

A. Rise over time



B. By type of level of development



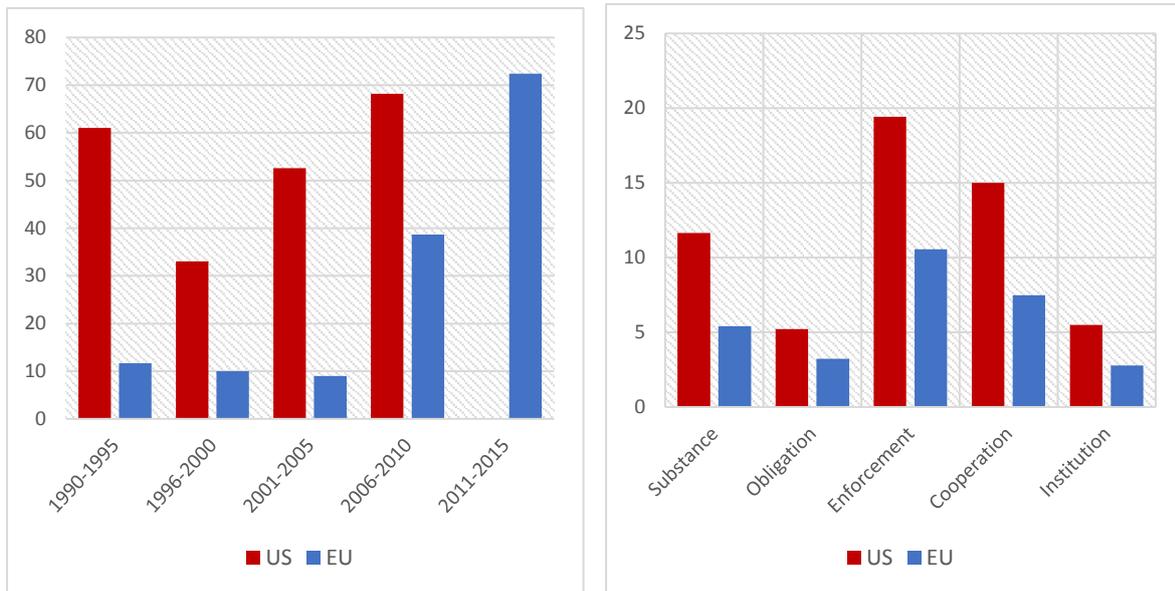
4.4. LPs in PTAs by key players

The actors that have - until now - largely shaped the design of LPs in PTAs are two of the largest players in international trade: the US and the EU. As noted above, while the EU has since the early 1990s signed more PTAs with LPs than the US, on average the US continues to have higher number of LPs included in its PTAs (Figure 14). The trend has recently started to change particularly with the introduction of the EU’s last generation of PTAs in 2010 (Figure 14.A).¹¹ Regarding the specific design, previous literature sums up the key differences by suggesting that the US uses a hard-law while the EU uses a soft-law approach. While it is true that the US applies overall a more stringent approach to LPs in

PTAs, the difference between the two approaches are more subtle than previous studies indicated. On the one hand, obligation and enforcement related provisions are not absent from the EU signed agreements. On the other hand, US signed agreements continue to include on average more cooperation-related provisions that those of the EU signed agreements (Figure 14.B).

Figure 14. LPs in US and EU signed PTAs

A. Average number of LPs per five-year windows B. Average number of LPs per main categories (cumulated over 1990-2015)

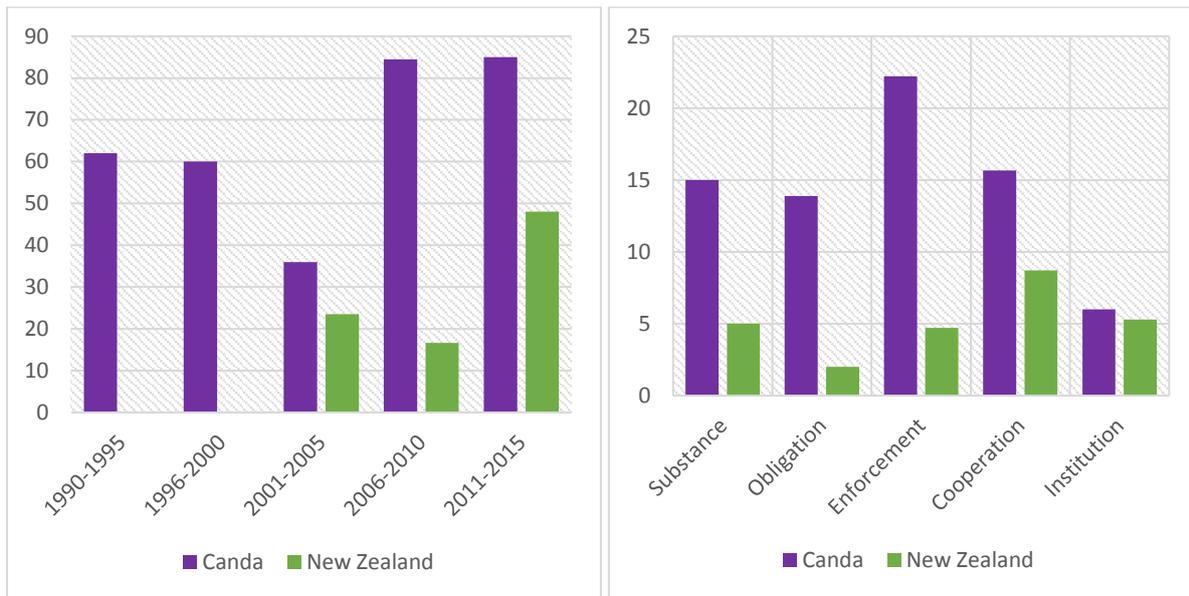


Canada and New Zealand, albeit the latter only since the early 2000s, also belong to the main drivers of LPs in PTAs. Here a more pronounced difference can be identified: while Canadian PTAs follow a stringent design for LPs with high averages both in terms of obligation/enforcement and cooperation-related provisions, PTAs signed by New Zealand are shallower but they embody an ideal-typical soft approach, more so than the EU, with predominantly non-binding and non-enforceable LPs (Figure 15.B). Interestingly, the types of provisions which do not show significant differences between the two countries are those related to the institutional framework set up for the monitoring and implementation of LPs in PTAs. Comparing Canada with the EU or the US, however, the data indicates that Canada has on average a higher number of LPs than the other two key trade players (especially with respect to substance, obligation and enforcement) (Figure 14-15). Canada's more progressive

approach is also corroborated by its recent proposal of a more ambitious approach to advancing labor rights under the ongoing NAFTA negotiations.¹²

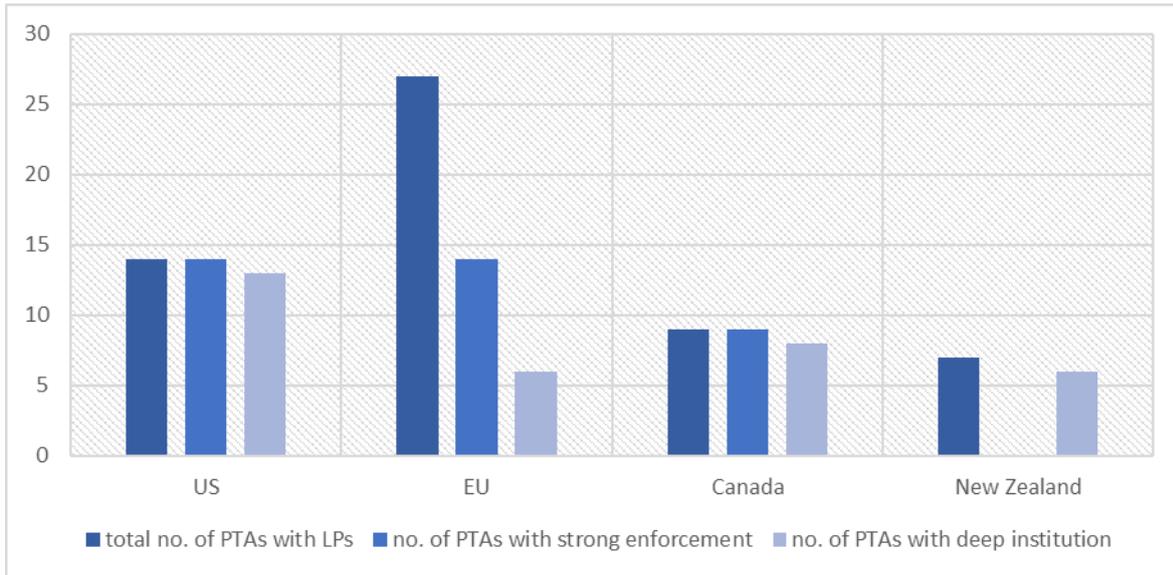
Figure 15. LPs in PTAs signed by Canada and New Zealand

A. Average number of LPs per five-year windows B. Average number of LPs per main categories (cumulated over 1990-2015)



Regarding the provisions pertaining to strong enforcement and deep institutions, as Figure 16 indicates, the US and Canada negotiated LPs with strong enforcement provisions in all of their PTAs signed since 1990; and with deep institutions in all but one of their PTAs (US-Jordan 2000 and Canada-Costa Rica 2001). The EU offers a more varying picture with more PTAs including strong enforcement than deep institutions provisions. As noted above, this latter is mainly explained by the enforcement provisions included in PTAs signed during the 1990s with candidate countries, a design that is also found in some of the more recent EU PTAs (e.g., CARIFORUM-EC 2008). The increase in deep institutions relates mainly to the design of last generation agreements, negotiated by the EU since 2010. By contrast, in the case of New Zealand, while none of the PTAs signed so far includes provisions pertaining to strong enforcement, almost all PTAs provide not only for a separate committee but also for the inclusion of third parties.

Figure 16. PTAs with strong enforcement and deep institutions, key players

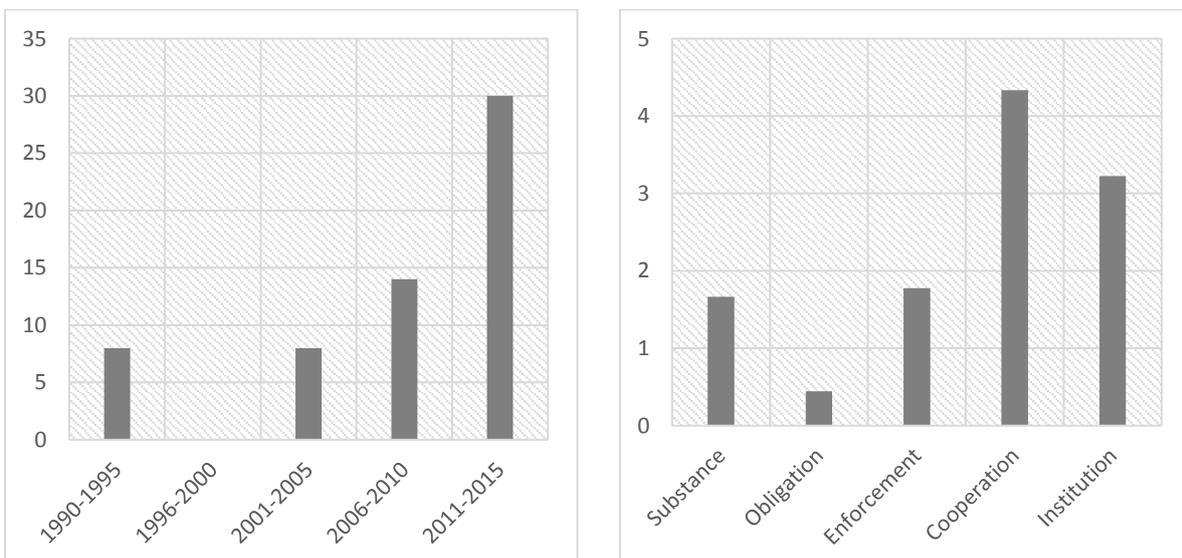


4.5. LPs in South-South PTAs

Throughout the past decades, and particularly from the early 2000s onwards, countries from the South have also embarked on the inclusion of LPs in the PTAs signed among themselves,¹³ although these agreements continue to remain rather limited both in terms of their scope and stringency. The most noticeable increase in the average number of LPs took place during the last window (i.e., 2011-2015) (Figure 17.A) with the majority of those relating to cooperation or the institutional framework (Figure 17.B).

Figure 17. LPs in PTAs signed by countries from the South

A. Average number of LPs per-five-year windows B. Average number of LPs per main categories (cumulated over 1990-2015)



In terms of the stringency of PTAs with LPs signed between countries from the South, our coding shows that none of those agreements contain provisions concerning strong enforcement and only 2 out of the 9 PTAs containing comprehensive LPs provide for deep institutions (China-Peru 2009 and Colombia-Panama 2013) – leaving these agreements with LPs the least stringent ones.

5. Conclusion

Discussions regarding the role and effectiveness of LPs have over the past decade intensified among scholars and practitioners, particularly with the negotiation of the now defunct (?) mega-regional trade agreements, such as the Trans-Pacific Partnership and the Transatlantic Traded and Investment Partnership. The primary goal of the paper was to introduce a brand-new dataset on LPs in PTAs (LABPTA) and to offer a detailed and up-to-date description of the design of existing provisions. By providing a fine-grained approach to the mapping of LPs in PTAs the dataset allows for a better assessment of the trade-labor nexus on a global scale both for researchers, policy makers and practitioners – a contribution that has become much timely with the 2017 US elections, the ongoing Brexit negotiations or even the possible re-negotiation of previously signed PTAs.

Among the main findings derived from the descriptive analysis is a twofold trend: on the one hand, LPs in PTAs are in general becoming more stringent (with more binding and enforceable provisions) mainly as a result in the design adopted by key trade players such as the US, Canada and the EU; on the other hand, evidence also indicates for the continuation of less stringent provisions (with few binding and even fewer enforceable provisions), particularly by actors that more recently started to incorporate LPs in their trade agreements (i.e., New Zealand, EFTA or countries from the South signing PTAs among themselves). However, one key commonality is the increased emphasis put on the institutional framework responsible for the monitoring and implementation of LPs in PTAs, resulting – although to a different degree – in more inclusive and specialized institutions.

With the ongoing NAFTA negotiations and the EU's renewed debate on Trade and Sustainable Development,¹⁴ the possible design of LPs in PTAs has yet again come to the center of attention. In both cases labor unions are pushing for the broadening of the scope of issues incorporated in PTAs and for more efficient, sanctions-based dispute settlement mechanisms.¹⁵ Such demands gained momentum in light of the recent ruling handed down 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.

At the same time, with the expansion of countries agreeing to LPs in their PTAs, particularly those from the South (but also with the increasing convergence in the scope of LPs), the possible reintroduction of the trade-labor linkage at the WTO's agenda could be seen as a possible avenue for the future of labor governance through trade. Looking at the large emerging economies, China has already signed four PTAs with LPs (with Chile, New Zealand, Peru and Switzerland), while Brazil and India, who have not signed any PTAs with LPs, are currently in negotiation both with the EU and EFTA. In spite of India being among the key countries objecting to the social clause during the 1990s, current available reports no longer indicate that the inclusion of LPs would constitute a remaining obstacle in the negotiations. The same holds for Brazil.

In choosing between existing designs, one of the key challenges has been the limitations in quantitative research on the relationship between trade and labor and the possible effectiveness of LPs. At the core of this has been the lack of available data on existing LPs in PTAs. While our hope is to fill this gap, limitations to our method should also be acknowledged: on the one hand, the binary coding does not always allow for nuanced distinction between varying scopes of the same commitment across different PTAs¹⁶; on the other hand, our scope-driven approach to DSM leaves out important procedural features that – as the US-Guatemala case presents – can be decisive in the settlement of labor-related disputes. Subject of future discussion is the possible weighting of our items, all of which is treated now as equally-weighted. Finally, given that it is intrinsic to such provisions to evolve over time, inclusion of additional items both under scope and stringency might be warranted.

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¹ Preferential trade agreements are agreements liberalizing trade between two or more countries without extending this liberalization to all countries.

² Search keywords used are: labour, labor, employ, work, strike, social, ILO, right, disrim, health, capacity, training, education, equal, equality, poverty and safeguard (in order to identify the section on safeguard measures and verify whether there are references relevant for us).

³ See for example the Trans-Pacific Partnership Agreement's three Labor Consistency Plans signed bilaterally between the US and Brunei Darussalam, Malaysia and Vietnam.

⁴ See for example the Colombian Action Plan Related to Labor Rights adopted in relation to the U.S. – Colombia Trade Promotion Agreement.

⁵ Horn *et al.* (2010) differentiate between coverage (or scope) and legal enforceability.

⁶ We also code references to corporate social responsibility (CSR) under international labor standards commitments when those are noted specifically in relation to labor provision. Exception to this rule is our coding of references to CSR in the preamble which are by nature formulated in a more general manner.

⁷ That is, PTA members have no right to veto a referral to third-party adjudication.

⁸ Domestic law commitments are not coded under C by design (i.e., implementation in the other parties' country is not an option). Note also that we did not find such provisions.

⁹ The classification of countries is based on the World Bank's 2017 Country and Lending Groups classification. We considered high-income countries to belong to the North and middle- and low-income countries to belong to the Global South. Countries pertaining to the high-income group but not OECD member states are: Andorra; Antigua and Barbuda; The Bahamas; Bahrain; Barbados; Brunei Darussalam; Cyprus; Faroe Islands; Greenland; Hong Kong; Kuwait; Liechtenstein; Lithuania; Macao; Malta; Monaco; Oman; Palau; Qatar; San Marino; Saudi Arabia; Seychelles; Singapore; St. Kitts and Nevis; Taiwan; Trinidad and Tobago; United Arab Emirates; Uruguay.

¹⁰ For the EU and the Europe Free Trade Association (EFTA) we used the average number of PTAs with LPs across their member states.

¹¹ It is worth noting that should the Trans-Pacific Partnership (TPP), the last PTA with labor provisions negotiated by the US, be included in the analysis, the US with 90 items coded under the TPP would have still preceded the EU in the last five-year window – although to a noticeably lesser extent.

¹² <https://www.cigionline.org/articles/what-nafta-negotiators-can-do-about-worker-anxiety>

¹³ South-South PTAs with comprehensive LPs signed between 1990-2015 are: African Economic Community (1991); Common Market for Eastern and Southern Africa (COMESA) (1993); Economic Community Of West African States (ECOWAS) (1993); Eurasian Economic Community (EAEC) (1999); East African Community (EAC) (1999); Caribbean Community (CARICOM) (2001); China Peru (2009); East African Common Market (2009); Colombia Panama (2013)

¹⁴ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1689>

¹⁵ <https://www.etuc.org/documents/etuc-resolution-eu-progressive-trade-and-investment-policy-adopted-executive-committee#.WhsQ3kqnE2w>; <https://aflcio.org/statements/written-comments-how-make-nafta-work-working-people>

¹⁶ In the Canada-Chile (1996) PTA, quasi-judicial DSM is not available for the parties on the effective enforcement of domestic laws in general, but only should the effective enforcement concern “occupational safety and health, child labour or minimum wage technical labour standards” (see Agreement on Labour Cooperation, Art. 25 (1)).