

Free & Fairer Trade – Protecting Workers’ Rights in Trade Agreements

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Introduction

Good evening and thank you very much for inviting me to join you this evening for a discussion of how a liberalized international trading environment can produce results that are equitable in our increasingly globalized economy.

Today, the focus of my remarks will be on protecting the rights of workers in trade agreements. Over the years, I have been on all sides of the debate over the relationship between trade and labour standards – not because my own views on the subject have changed but because I’ve worked for both Democratic and Republican political administrations in the U.S. and I have had to deal with this issue both as an official in the United States Government and as the Deputy Director-General of the World Trade Organization. I am now in the happy position of being able to speak to the issue from what is essentially an academic perspective – which means I can say pretty much what I really think about the question.

History of Labour-Related Provisions in Trade Agreements

Most of you would know that the most widely accepted rules governing international trade are those of the World Trade Organization. The only multilaterally-agreed rule on labour and trade that is found in the WTO system is the provision in sub-paragraph (e) of GATT Article XX. This rule permits countries to adopt measures relating to trade in products of prison labour. From the context, we understand that WTO allows this trade to be restricted or banned so long as the measures are not applied in a discriminatory manner.

Whether countries actually avail themselves of this provision is not widely known and probably not very important. The clause, negotiated and agreed nearly sixty years ago had its origins in the atmosphere of the immediate post-World War II era. An altogether different kind of debate has led to more recent incorporation of labour issues in multilateral, regional and bilateral trade negotiations.

The modern American approach to trade and labour has its roots in the North American Free Trade Agreement – NAFTA - negotiated in the early 1990s. The original agreement was negotiated by the Republican Administration of George Bush Senior but not submitted to the Congress before the Democratic Clinton Administration came to power. American labour strongly opposed the draft agreement – mainly from a protectionist standpoint - because many Americans feared massive job losses to lower wage Mexico. Demands from labour forced the negotiation of the North American Agreement on Labour Cooperation (NAALC) prior to NAFTA being submitted to the Congress for approval. Even then, organized labour opposed approval of the agreement, but the union movement failed to dissuade Congress and NAFTA was approved and entered into force.

Looking back on the NAALC more than ten years later, it's interesting to see what has been the experience. NAALC committed Canada, the United States and Mexico to the promotion of 11 key principles to protect, enhance and enforce basic workers' rights and created mechanisms for cooperative intergovernmental activities and consultations, as well as for independent evaluations and dispute settlement related to the enforcement of labour laws.

Organized labour in America still regards NAFTA as a disaster and its labour provisions as far from adequate. But where would labour be today without NAFTA and NAALC? Enforcement of labour laws in NAALC countries has demonstrably been greatly enhanced through a program of cooperative activities in key areas such as occupational safety and health, protection of migrant workers and workforce development. The Agreement established institutions and created a formal process through which the public could raise concerns about labour law enforcement with governments. In the first ten years of NAFTA and NAALC, 26 submissions were filed and reviewed under the NAALC on issues such as freedom of association; the right to organize and bargain collectively; the right to strike; child labour; minimum employment standards; employment discrimination; occupational safety and health; and the protection of migrant workers.

Over fifty cooperation programs have been carried out under the NAALC including conferences, seminars and technical exchanges and the three countries have established a Trilateral Working Group on Occupational Safety and Health. The purpose of this group is to review issues raised in public submissions, formulate technical recommendations for consideration by the governments; develop and evaluate technical cooperation projects; and, identify occupational safety and health issues appropriate for bilateral and trilateral cooperation.

Shortly after the passage of NAFTA, the U.S. labour movement in 1994 opposed American approval of the WTO Agreements resulting from the WTO Uruguay Round of multilateral trade negotiations. The Unions' opposition was couched as based on the WTO's failure to adequately deal with the need to respect international labour standards in trade agreements. Eventually, the WTO Agreements made it through the Congressional approval process but only after labour extracted a promise from the U.S. Administration that it would pursue the issue of trade and labour standards more aggressively in future negotiations.

From the start, the objective of the American labour movement was to obtain some form of trade agreement that would allow for violations of labour standards to be met by trade-related sanctions. Whether or not this position was motivated by protectionist tendencies or by higher social goals cannot be proved one way or the other, but to try to make it more saleable, the issue was re-cast as a question of human rights.

To make it a human rights issue required re-focusing on the so-called internationally-recognized core labour standards as opposed to what some would call "cash standards" relating directly to wage rates and

other economic differences affecting employment across national boundaries. So – in the trade community – when we talk about trade and core international labour standards, we are referring to so-called “enabling standards” addressed to:

- The right of association
- The right to organize and bargain collectively
- The prohibition on the use of any form of forced or compulsory labour
- Prohibition against exploitative forms of child labour; and,
- Non-discrimination in the labour force.

In the lead up to the WTO’s first Ministerial Conference, held in late 1996 in Singapore, the U.S. Government, aided by Norway and to some extent by individual EU Member States like France and Belgium, made clear that it wanted explicit endorsement by other WTO members of a trade and labour standards link.

This was a very hard “sell” in the WTO and a country with less negotiating leverage than the United States probably could not have made it happen. But eventually – and after no small amount of pushing and shoving in late night negotiations - a text was finally agreed that has more or less put this issue to bed in the WTO context. At Singapore, WTO members endorsed the promotion of core labour standards but at the same time (a) rejected their use as the basis for protectionist trade actions and (b) clearly identified the ILO – not WTO – as the place to deal with these labour standards. By the way, this experience of having the WTO stick its fingers into ILO territory had the effect of frightening that Organization’s management and membership into a far more activist approach to looking at trade and observance of labour standards in the context of the globalization debate.

The next significant thing to happen on the international trade scene was the negotiation – by the Democratic Clinton Administration - of a Free Trade Agreement with Jordan which, while economically insignificant, took the trade and labour standards debate to a new plane in the United States. In that agreement, only reluctantly submitted for Congressional approval by the current Republican George Bush Junior Administration, the parties are obliged not just to enforce their own laws and regulations in respect of labour rights but also to ensure that those domestic laws and regulations are consistent with the internationally recognized core labour standards.

Under the Jordan agreement, the failure to do so is punishable by fines and sanctions. In addition to covering the other core labour standards, the Jordanian agreement also obliged the two parties to ensure that their labour laws provided for “acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.” The provisions in the Jordanian FTA became the gold standard for the American labour unions and for their Democratic Party allies in the Congress.

In 2002, the American Congress passed the statute that governs the United States Administration’s participation in trade negotiations at the multilateral, regional and bilateral level. The 2002 Trade Act and its Trade Promotion Authority (TPA) for the Administration, directed the USTR to ensure that workers’ rights would be protected in new trade agreements. One of the overall negotiating objectives is “to promote respect for worker rights....consistent with the core labour standards of the ILO” in new trade agreements. When the United States and Australia sat down at the negotiating table for their own FTA talks, both sides knew this would necessarily need to be a part of the bargain.

Labour-Specific Provisions in AUSFTA

The core obligation on labour in our bilateral agreement is pretty straightforward. Both sides agree that they will not fail to enforce their own labour laws in a way that would affect trade between the parties. The actual language is “neither party shall fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties...” and this is the only obligation relative to labour which is subject to dispute settlement under the proposed FTA. This core obligation is also conditioned on the laws in question being “directly related to the internationally recognized labour principles and rights” which are set forth as:

- Right of association;
- The right to organize and bargain collectively;
- A prohibition on the use of any forced or compulsory labour;
- Labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour; and,
- Acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health.

What about a potential breach of obligations with respect to this aspect of the FTA? The penalties are found in the Dispute Settlement Chapter of the FTA. In the event of a successful challenge under the established mechanism, the penalties could take the form of a fine of up to US\$ 15,000,000 per annum, to be paid by the party complained against into a fund, to be spent at the discretion of the Parties on appropriate labour initiatives.

Institutionally, the Australian – United States FTA envisages the discussion of trade-related labour standards issues in the Joint Committee created to supervise the overall operation of the Agreement and the possible establishment of a SubCommittee on Labour Affairs. Australia and the United States have also agreed to establish a consultative mechanism for cooperation on promotion of the respect for workers rights consistent with ILO core labour standards. Presumably, the SubCommittee may be empowered to take on activities similar to those of the NAALC under NAFTA. It has already been agreed that cooperative activities may be implemented through exchanges of information, joint research activities, visits or conferences and such other forms of technical cooperation as the parties might agree.

Broader Context of Trade and Labour Standards

I have so far been talking about labour standards and trade in a fairly narrow context of WTO NAFTA and the AUSFTA. Although time constraints preclude me from spending too much more time on the issue, I would be remiss if I didn't mention some examples in a broader context.

Prior to Cambodia's accession to the WTO, the United States Department of Labor, working with the ILO, worked with Cambodian garment manufacturers to establish a system to certify Cambodian clothing makers as producing their goods in accordance with recognized labour standards. This system has worked well and today Cambodian-labeled garments enjoy a special niche market in the USA and elsewhere because consumers care about where their clothes are produced. At a time when the end of the former quota restrictions on trade has led to many developing countries' textile and clothing interests closing shop and moving to China, this niche status has worked very much to the advantage of Cambodia.

Private companies are also very involved in the promotion of core labour standards in their production of garments. Companies like Levis and the GAP employ hundreds of inspectors to police their overseas suppliers and ensure that labour standards are adhered to. Certainly they do this out of self-interest because they cannot afford to be labeled in the marketplace as running sweatshops in developing countries; however, whatever the motivation, the result is the same: the rising tide of economic development enabled through greater international trade is able to “lift more boats”. Making a big deal out of this issue in trade negotiations – whether in WTO or in bilateral deals – clearly has raised the profile of respect for workers’ rights with positive spill-overs into other contexts like I have just described.

Conclusions

I am not sure what conclusions we can really draw from this discussion other than that the interaction of trade and labour standards seems to be an issue that is with us to stay. Trade agreements regularly protect business rights like those relating to intellectual property and I can see no good reason why workers’ rights should not also be protected in international trade agreements. Some progress has been made over recent years, including in the WTO where the 1996 commitment to protection of internationally recognized core labour standards is important. Treating the question in bilateral agreements also helps. Government interest in the question, combined with consumer concerns about alleged sweatshop conditions, has helped to make the issue an important one for major corporations. All of this is translating into greater protection and better working conditions.

I hope that I have made a worthwhile contribution to your discussion. Thank you very much for your attention.

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