



INSTITUTE FOR INTERNATIONAL BUSINESS, ECONOMICS & LAW

The Australia – USA Free Trade Agreement and Implications for Labour

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Introduction

Good evening and thank you very much for inviting me to join you this evening for a discussion of the proposed Free Trade Agreement between Australia and the United States – in particular its possible implications for labour. I should start by saying that although I have spent much of my life working on multilateral trade issues in the context of the World Trade Organization and its predecessor the GATT, I am no stranger to bilateral trade policy. In fact, I served as the USTR official in charge of bilateral trade relations between the United States and Australia in the late 1970's and early 1980's. I also want to say that although I had nothing to do with the actual negotiation of this proposed bilateral Free Trade Agreement, I think it is a very good trade agreement with benefits for both countries and I have given evidence to this effect to the Parliament's Joint Standing Committee on Treaties. Yesterday, in Canberra, I was a participant in the Senate Select Committee's roundtable discussion of the FTA.

Over the years, I have personally 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 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 U.S. Views on Labour Provisions in Trade Agreements

The only international rule on labour and trade that you'll find in the WTO system is the provision in GATT Article XX that allows countries to restrict trade in products of prison labour. Whether countries avail themselves of this provision is not widely known and probably not very important. That clause, negotiated and agreed more than fifty years ago had its origins in another kind of debate – and not at all related to the background discussions and legislation that resulted in the inclusion in the Australia – USA FTA of a chapter on labour.

The modern American approach to trade and labour had its roots in the North American Free Trade Agreement negotiated in the early 1990s. The original agreement was negotiated by the

Republican Administration of George Bush but not submitted to the Congress before the Democratic Clinton Administration came to power. American labour strongly opposed the draft agreement because it 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 the Agreement 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 labour 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.

To be honest, organized labour in America still regards NAFTA as a disaster and its labour provisions as far from adequate. But where would we have been 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.

In retrospect, I think that looks pretty good, but shortly after the passage of NAFTA, U.S. labour took the opportunity to oppose American approval of the WTO Agreements resulting from the Uruguay Round. While the WTO Agreement also made it through Congress, labour extracted a promise from the Administration that it would pursue the issue of trade and labour standards more aggressively in future negotiations.

Now, I have to tell you that 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 American Administration, 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. The Government of Australia in 1996 strongly opposed the U.S. move because Canberra was worried that sanctioning protectionist actions on the grounds of labour standards observance could lead to serious trade disputes with its Asian neighbours.

After no small amount of pushing and shoving and 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. As an aside, it's worth noting that this experience with the WTO sticking its fingers into ILO territory had the effect of frightening that Organisation'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.

If I can be permitted to engage in a bit more context setting, I would say that the next significant thing to happen on the US 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 Bush 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

So what's actually in this proposed bilateral FTA on labour standards and what are the implications for labour?

Well, the core obligation is pretty simple. 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.

There are a couple of qualifications here as far as Australia is concerned. First, there is a footnote addressed to the fact that Australia does not have legislation concerning a universal minimum age for employment, but secures this objective through Federal State and Territory government regulation on age levels for compulsory education.

Second, the Commonwealth is not able to enforce State laws even though the definition of "labour laws" for the purpose of the FTA goes beyond Federal levels of competence. Under the FTA, the Federal Government in Australia accepts responsibility for a failure to enforce effectively either Federal or State laws. If the United States were to raise a concern about the failure of an Australian State to effectively enforce its own labour laws, the Commonwealth Government would need to consult with that State Government.

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, if the SubCommittee is someday established, it may take on activities similar to those of the NAALC under NAFTA. Tentatively, it has 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.

What U.S. Labour Says About AUSFTA

So far so good? America and Australia both have a pretty hefty respect for labour standards and workers rights, so we might assume that the American labour movement can now get behind this trade agreement and support its approval by the US Congress.

For the past several decades, U.S. trade legislation has mandated the establishment of official private sector advisory committees tasked with interacting with the American Administration over the course of trade negotiations and reporting to the Congress at the end of the negotiation as to whether the proposed agreement serves American interests and should be approved by the Congress. For the most part, these groups are organized by sectors, but there are also overarching groups not restricted to industrial or services sectors in their mandate. One such group is the Labour Advisory Committee for Trade Negotiations and Trade Policy (a.k.a. LAC). The LAC should be a supporter of this FTA with Australia – right?

Wrong. In its report to the Administration and the Congress, the LAC has condemned the Australia-USA FTA and recommended that the American Congress disapprove the agreement. But why?

For starters, the LAC goes back to the FTA with Jordan and criticizes the FTA with Australia because it does not include an obligation for governments to meet international standards on workers rights. The LAC isn't content with enforcement of national legislation, it wants as well obligations to enforce ILO core labour standards – "in their core text and in parity with other provisions in the agreement". In contrast, the LAC calls the Australia –USA FTA an agreement that makes little progress beyond NAFTA and is based on an unacceptably narrow interpretation of the negotiating objectives laid out in U.S. trade legislation.

Now to the real "rub" with the proposed agreement. The LAC actually uses the vehicle of its report to Congress on the AUSFTA to criticize a number of Australian labour law provisions as inadequate in the light of ILO core standards requirements and suggests that the FTA, because of its inherent inadequacies, will not contribute to righting these many "wrongs". Some examples are in order:

The LAC starts off by stating that "Australia's laws contain a number of onerous restrictions on workers' right to freedom of association and their right to organize and bargain collectively. The LAC alleges that many of these restrictions were created by the 1996 Federal Workplace Relations Act (WRA). The LAC characterizes the WRA as not the result of insufficient enforcement resources or the inheritance of outdated labour legislation from another era but rather "the result of a conscious and recent decision in the Australian Government to restrict the fundamental rights of workers." Among the grievances within the context of the WRA cited by the LAC are the following:

- The possibilities for employers to conclude "Greenfield" agreements with labour representatives of their own choosing before they have even employed any workers;
- Anti-union discrimination that permits regulators wide latitude to exclude whole categories of workers from the Act's most comprehensive protections against dismissal based on trade union activities;
- The replacement of the previous Federal Awards system with new Australian Workplace Agreements (AWAs) which are inferior to the awards system in terms of their wage rates and other standards;

- WRA limitations on the right to strike, wherein only some categories of strike activity are protected.

The LAC also raises a number of other objections against the labour provisions of the FTA and the Agreement more generally. First of all, it criticizes the penalty provisions as far from adequate given the \$15 million limitation on awards and far larger penalties provided for in the case of commercial violations of the FTA.

Second. The LAC finds a number of other provisions of the FTA which it feels unfairly discriminate against the rights of workers.

For example, in the Agreement's Chapter on intellectual property rights protection, the LAC notes that the language about "national treatment" that is vital to the economic interests of performers, is undercut by the last sentence of the paragraph that states that rights of performers may be limited to the extent that the other party already restricts the rights of performers. Because American performers already have no performance rights with respect to broadcast events, this language, for example, will work against American workers' interests in Australia.

LAC is also critical of the FTA's provisions on Government Procurement (implying that both Australia and the USA should use procurement as an employment-creation tool and restricting the use of taxpayers' funds to employment of nationals). Similar criticisms are leveled at the AUSFTA on trade in services, investment liberalization, and even rules of origin.

So labour in the USA is not happy with this Agreement. It should be noted, however, that the only trade agreement supported by the organized labour movement in the USA over the past ten years or so was the agreement with Jordan. Almost all of the other advisory committees in the USA support the agreement with Australia, even the agricultural sectoral advisory committees. Australia also continues to enjoy a great deal of friendly feeling in the Congress as a result of its support for the United States position in Iraq and it seems to be a better than even bet that, even in an election year, the U.S. Congress will make an effort to approve the FTA with Australia before Congress breaks for the North American summer.

Conclusions

I am not sure what conclusions we can really draw from this other than that the interaction of trade and labour standards seems to be an issue that is with us to stay – even if only in a more moderate form than organized labour would like. What we find in AUSFTA seems pretty mild in terms of its potential impact on the labour scene in Australia, but remember that the American labour movement that is so critical about AUSFTA being just a small improvement on NAFTA and the NAALC can't deny the fact that even under that inadequate agreement, some 26 cases have been brought over the past ten years – and that's twenty-six more labour cases than we would have seen with out NAALC.

It's clear that the American requirements for a trade and labour chapter in all of the US FTA's are something that grew out of the general tendency to negotiate trade agreements with lesser developed countries where labour abuses might have been a real concern. The law wasn't drafted with Australia in mind – but it has to apply to the Australian agreement as well.

Clearly, this situation creates the potential for real implications for labour. Australian labour leaders or organizers that believe, as the US LAC says it does, that the WRA is not applied in a way that safeguards basic labour rights might try to use the FTA as a means of pressuring the Commonwealth Government in the future. But a great deal is going to depend upon the attitudes of the governments in power in Washington and Canberra and it is hard for me to see that we are likely to find ourselves anytime soon in a situation where the USA tries to pressure Australia to enforce a labour law it is not itself enforcing adequately as a result of this proposed Free Trade Agreement.

Finally, trade is an election issue in the United States this year – but not the FTA with Australia. In Washington, the twin preoccupations seem to be “outsourcing” and China. Here in Australia, it seems to me that there is a real possibility that this Agreement could be an important election issue. Yesterday, things got a little ugly in the Senate Select Committee. So, who knows...

I hope that I have made a worthwhile contribution to your discussion.

Thank you very much for your attention.