

**Presentation**  
**Conférence de Montréal – FOCAL initiative**  
**Trade and Prosperity in the Americas**  
**18 April 2001**

**Comments on « Breaking the Labor-Trade Deadlock » by the Carnegie Endowment for International Peace (presentation by Scott Otteman)<sup>1</sup>**

There has been considerable progress over the last decade in the debate about trade and labour standards, once referred to as the « social clause » debate, particularly since the WTO issued its Singapore Declaration in 1996, which rejected protectionism and reaffirmed the importance of the ILO.

A tight convergence can be seen to have emerged in several areas, including the following three :

- on the standards, the ILO's 1998 Declaration of Fundamental Principles and Rights at Work, has allowed the international community to prioritize freedom of association, forced labour, child labour and equality rights. In the process, the ILO has taken back the ability to set the international agenda on fundamental labour rights.
- on the importance of incorporating a sound technical cooperation dimension, the ILO Declaration has also served the complementary role of assisting the ILO to rationalize its activities at an institutional level, to ensure that resources are mobilized and concentrated on priority areas, like child labour,

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<sup>1</sup> These comments draw heavily on two of my recent publications, Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31Colum. Hm. Rts. L. Rev. 1 (1999); *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of*

and structural adjustment-led labour law reforms to ensure that technical assistance is provided to those countries that are seeking solutions, whether their inhabitants work in the trade-related sectors of the economy or other sectors that are the subject of serious labour rights abuses.

- on the need to reject protectionism, the affirmations in the WTO's 1996 Singapore Declaration were actually reaffirmed in the ILO's 1998 Declaration. Arguments like social dumping and the race to the bottom are less likely to be raised without solid empirical evidence, of which there is a dearth. Instead of focusing on labour costs and wages, most of the proponents of a social dimension to trade focus instead on the fundamental principles and rights at work on which there is increased international consensus. Moreover, the WTO holds a healthy concern about unilateral measures, which tends to be expressed in dispute resolution reports like *Shrimp Turtles*, and the recent *Asbestos* case as efforts to ensure that protective measures are neither arbitrary nor discriminatory.

These elements are reflected effectively and consistently in the paper presented by my co-panelist, Scott Otteman. The Paper seeks to establish a sensible point at which broad agreement can be reached in the Americas, building on these elements of consensus. The proposal to broaden the authorizations contained in the Summit of the Americas Declarations to promote deeper study and a potential labour agreement in the FTAA are constructive, practical, and forward-looking.

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Corporate Conduct 8 Ind. J. Glob. Leg. Stud. 1 (2001), as well as a third manuscript entitled *Trade and Labour Rights in the Americas* (publication pending, 2001).

But there is another element, which underlies the tightening convergence on labour standards and trade. This element seems less apparent in my colleague's work, and I would like to pause to consider it here.

The element is the growing realization that labour is not just a separate, additional matter that could be considered because people in the hemisphere care about it.

It is that labour is linked to trade. It is linked to trade whether one expressly includes it in a trade agreement or not. The link is not purely textual or created by those who want to piggy-back on the progress made in the area of international trade to promote «other» issues. The link is inherent to the nature of trade law as we now know it, and labour policy making.

Recognition of the link is not new. It was recognized at the founding of the ILO under the Treaty of Versailles in 1919, and is reflected in the ILO's constitution, which states in the preamble that « the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries. » In the 1940s, the proposed Havana Charter to form a permanent International Trade Organization would have included rules to govern international aspects of domestic employment policies. However, as you know, only the GATT was adopted at the time, and the Marrakesh Agreement ending the Uruguay Round and establishing the WTO keeps trade and labour separate.

To the extent that the liberalization of trade and the rules on foreign investment facilitate the mobility of capital, there is an impact on employment and labour policy. This does not mean, however, that multinational enterprises necessarily roam the globe in search of the cheapest possible labour; nor does it mean that low labour standards are synonymous with low labour costs. Indeed, the OECD's 1996 study on Trade and Labour generally challenges that easy equation, and shows a more positive correlation between fundamental labour rights and economic growth. However, the fact that labour is largely immobile, subject to restrictive national immigration controls, while capital or FDI is mobile, creates pressures on individual states to attract and keep investment; while there is a mix of tax incentives, infrastructural considerations and technology-led productivity packages to accomplish this, some particularly low-income states invariably compete based on labour standards, and the lack of enforcement. And, the threat of exit that MNEs wield – particularly when they boast annual revenues that exceed the GDP of their host countries -- can have a tremendous impact, irrespective of whether labour standards can accurately be considered to be synonymous with higher cost.

Over and above this increasingly-recognized link between labour and the global economy is the link created by the recent changes to the scope of international trade law. The expanded WTO no longer occupies the limited terrain of eliminating trade quotas and reducing tariff barriers; it has therefore ventured into the broader field of government policy-making, by taking up the more daunting task of reducing anything that can be considered a barrier to trade. The notion of subsidy is much broader now than it once

was, and is the subject of contention in distinct policy areas that affect the Americas. The Agreement on Trade-Related Intellectual Property Rights has yet to be tested, but there are serious concerns about the potential breadth of its coverage notably in relation to health policy concerns. Some have expressed surprise that the Agreement on Sanitary and Phytosanitary Substances has been interpreted not to include a precautionary principle.

The same point is even more apt in the NAFTA context. The NAFTA has labour and environmental side agreements (the NAALC and the NAAEC respectively) that put in place mechanisms to promote the enforcement of labour and environmental laws in each member State. However, the impact of the NAFTA on policy-making has been shown to go beyond the discrete scope of the NAALC and the NAAEC. The scope of investor-state mechanisms under Chapter 11 of the NAFTA has recently been the subject of some concern – including concern expressed by the Canadian government – that it is being interpreted to include a much broader range of actions that can constitute « expropriation » and that can enable individual investors to challenge by private arbitration the determinations made by domestic governments, at the local, provincial, state or national levels.

This broadened scope means that trade agreements are increasingly having an effect on domestic policy-making. Domestic governments, and their constituents, are realizing that they are less able to regulate matters over which they once had a fairly significant level of

control. Indeed, trade is not a panacea, and trade may limit states' abilities to take a range of domestic policy decisions.

By keeping domestic policy out of trade negotiations, the opportunity that might have existed to balance the range of considerations is lost. In addition, trade agreements come equipped with powerful dispute resolution systems. Consequently, what is possible, or permissible, at the domestic level is interpreted in these fora strictly in light of what is best for the promotion of international trade. For some countries, particularly small open economies, the decisions of trade bodies can have a devastating impact, not only on particular industries but on the industrial and employment policies of entire economies. The impact of the EC Bananas decisions on several eastern Caribbean countries is but one of the most palpable examples. Trade sanctions already have a disproportionate impact on small open economies. Trade liberalization can have profound effects on domestic policy.

What is special about labour in all of this, is that labour policy is the site where traditionally governments have sought to mediate between the law of the market and the law as it applies to people, in an essential, meaningful aspect of their lives : that is, their work.

Labour law has a protective dimension, and a democratic participation dimension. It is profoundly redistributive. And, it is the traditional terrain of domestic governments, who are often guided by international and regional standards that have been set through

broadly participatory tripartite mechanisms at the ILO, and not infrequently with ILO technical assistance – drafting labour laws, helping to establish machinery like inspection services, labour dispute mechanisms, tripartite advisory and consultative bodies – to ensure that labour machinery are indeed functioning well.

If governments and civil society actors are unable to regulate labour, because of changes to trade, then it might be the trade rules that require some attention. One of the reasons why attempts are made to keep labour standards out of trade agreements is that those so-called « non-trade » issues will overburden the well-functioning trade liberalization machinery. In other words, if trade negotiators have to focus on too many other considerations, they will be unable to move the liberalization agenda forward in a meaningful way. However, what we have seen over the last several years is that trade liberalization is perceived as moving rapidly ahead, without making a serious, sustained effort to bring the broad range of concerned citizens and groups along with it.

Paradoxically, attempts to seal out competing policy considerations from the scope of trade agreements instead overburden international trade, because they lead to increased challenges to the democratic legitimacy of international trade.

This is the post-Seattle WTO attempted millenium round message, broadly understood by a wide range of civil society actors who otherwise might be seen to have little in common with each other, and some of whom are in principle pro free trade. This is the message that they are carrying to the Summit of the Americas.

The implications for intelligent proposals like that proffered by my colleague, Mr. Otteman are many; I shall flag the issue of adjustment costs, but pause here on only one:

- meaningful democratic participation is a crucial part of the trade liberalization project

Individuals and civil society groups need participatory channels to ensure that they can have a say, not only on narrowly defined «labour» side dimensions, but on the broader range of policies that will be taken that will have an impact on domestic regulatory policy, including in the field of labour. The FTAA therefore should draw from some of the positive lessons of the NAALC, which seem to be an underlying influence for Mr. Otteman's paper, but move beyond that model to grapple with the inherent normative implications of accepting that there is a democratic deficit associated with excluding those affected by the link between trade and labour from its scope.

One key conclusion, therefore, is that permanent, as well as ad-hoc, consultative and advisory fora – transnationally and domestically – are a necessary component to the trade-in-the-Americas negotiating package. And, organizations like the OAS (including its Inter-American Conference of Ministers of Labour) can play a crucial role in bringing together trade ministers and labour ministers, other concerned governmental representatives, and civil society representatives, to think broadly about the implications of the link between trade and labour.

At the stage of FTAA negotiations, the Canadian Government's Proposal to render this Committee of Government Representatives on Civil Society under the FTAA more robust should be encouraged. Although this is an important step, however, it is but a partial step. First, FTAA documents need to be made public, a point that has also been recently acknowledged by governments in Buenos Aires. Second, a Civil Society committee needs to have a more precise, representative role, which ensures that it is indeed a helpful channel for information to and from the negotiating table.

In this latter regard, there may be important lessons to draw from aspects of the other regional agreements in the Americas which seem to garner less attention – the customs unions of MERCOSUR and CARICOM, which in different ways have developed over time channels through which a broader range of civil society actors can participate in trade policy-making. The challenge in the Americas will be to mainstream consultative and advisory bodies, so that inputs are meaningfully incorporated into negotiations, the final texts, the process of treaty interpretation in dispute resolution and into review mechanisms that would function once the agreement has come into force.

Meaningful participation rights will invariably imply that member States will have to make some concessions to groups that previously were not heard; in return, however, they can reasonably expect to have greater overall acceptance of the broader trade liberalization.