VIII. REGIONAL INTEGRATION IN HISTORICAL PERSPECTIVE: NAFTA, MERCOSUL AND THE EUROPEAN UNION

Crafting a Social Dimension in a Hemispheric Trade Agreement

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Rejection or Engagement?

The breakdown of negotiations on a Free Trade Area of the Americas creates an opportunity to rethink trade-labor linkage in the Americas.[1] In this rethinking, what can advocates of a strong social dimension in hemispheric economic integration learn from existing regional trade regimes in North and South America? The lessons drive a policy choice between rejection and engagement. Choosing rejection, critics can point to flaws in existing labor-trade linkages: NAFTA's labor side agreement, the North American Agreement on Labor Cooperation (NAALC), and Mercosur's Social-Labor Declaration. All signatory countries show job and wage stagnation, growing inequality in labor markets, and continuing problems of serious violations of workers' rights. Review of these instruments leads critics to conclude that an effective workers' rights regime in trade agreements is an impossible goal. Instead, advocates should reject the globalization model and push to strengthen national economic frameworks in which citizens can influence a democratic political process.

This paper argues instead for taking an engagement path—not from any rose-colored view of existing labor-trade links, but from a belief that global trade and investment will continue to expand, pausing at times, but not reversing. In short, stopping agreements will not stop trade and investment.

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It will merely ensure that trade and investment go on with no link to workers' rights and other social concerns. Without such linkage, trade alone will benefit only multinational companies and banks, and advocates will have no means to address workers' rights in the Americas.

This paper suggests that labor rights advocates can shape a new, viable social dimension in trade in the Americas. The emphasis here is on viable, not definitive or triumphant. Workers do not triumph in the current conjuncture of economic and political forces. They do not will their way to victory with the sharpness of their criticism or the strength of their denunciations. They hold their losses and make small gains where possible. Workers' advocates must coldly calculate what can be done with the reality they are dealt, in the hope that outcomes will advance the longer-term struggle for social justice.

Start Over or Build on What Has Been Done?

Commitment to a workers' rights clause in an Americas trade agreement raises another choice. Should labor rights advocates scrap existing rights models in the hemisphere and start from zero with a totally new worker rights system, one with international standards and enforcement? As good as this approach might be, it is just not going to happen in one giant step to a new Americas trade agreement. For all their flaws, existing agreements represent often hard-bargained compromises among governments in this hemisphere.

Improvements will be incremental, not enormous, especially when so much economic disparity marks the negotiating parties. The embedded *national* framework of labor rights and labor standards did not take shape casually. In each country, it resulted from national histories replete with anticolonial wars, civil wars, constitutional crises, domestic regional conflicts, and class struggles. Three dozen countries sitting down to negotiate a social dimension in a hemispheric trade agreement are not going to undo those histories and defer to an untested supranational authority. By contrast, existing agreements lay a foundation for new advances in labor-trade negotiations.

Labor Rights in Existing Regional Trade Agreements

This paper aims to explore prospects for weaving together "best practices" in a new plan that labor rights advocates can support and that governments can accept.[2] The NAALC sets forth eleven "labor principles" covering freedom of association, nondiscrimination, child labor, minimum wages, workplace health and safety, and migrant workers' rights. Countries commit themselves to promote these principles in their national labor law systems. They also take on "obligations" to fulfill the principles: to provide high labor standards, to enforce their law effectively, and to guarantee due process in their labor law systems.

Key to understanding the NAALC is to see two things it does *not* do. First, it does not set new common standards to which countries must adjust their laws and regulations. Instead, the NAALC stresses sovereignty in each country's internal labor affairs, recognizing "the right of each Party to establish its own domestic labor standards." Second, the NAALC does not create a supranational tribunal empowered to overrule decisions of national authorities that arguably fail to "enforce" the NAALC. Decisions by national boards and courts are undisturbed by the NAALC.

Instead of an international enforcement system, the NAALC countries created an oversight, review, and dispute-resolution system designed to hold each other accountable for meeting their obligations on the labor principles. The theory underlying the NAALC is that, over time, mutual oversight and scrutiny will generate more effective labor law enforcement by national authorities.

When the Common Market of the South (Mercosur) took shape in 1991, a reference to "social justice" in the Preamble of the Treaty of Asunción was the only nod to a social dimension in regional trade plans.[3] But Mercosur countries quickly realized the need to respond to demands of workers, trade unions, and allied civil society forces for measures to ensure that expanding regional trade did not create new incentives for social dumping and worker exploitation to obtain competitive advantage.

In 1994, Mercosur created a new body called the Economic and Social Consultative Forum. The ESCF is a setting for trade unions, employers, and nongovernmental organizations (NGOs) to voice their views and concerns about economic integration in the region. Like other Mercosur institutions, the ESCF is tripartite in structure, but with a key distinction: the forum does not include government representatives. The three sectors of the ESCF are labor, business, and NGOs.

The 1998 Social-Labor Declaration creates a tripartite Mercosur Social-Labor Commission, to which each government must submit an annual report on changes in national law and practice on matters addressed in the declaration, on progress in promoting the declaration, and on difficulties in applying it. Consisting of twelve government, labor, and business members (one per sector per country), the commission is empowered to act by consensus to review government reports, develop recommendations, examine "difficulties and mistakes in the application and fulfillment" of the declaration, and write its own analyses and reports on application and fulfillment.

Gleaning Positive Elements

Labor rights advocates should demand a labor rights chapter in a hemispheric trade agreement promoting a strong institutional role for civil society actors. The NAALC and NAALC-like agreements are weak on civil society

involvement. They put trade union and employer representatives on advisory committees, but these committees are largely inactive. Applying the labor agreement is strictly a government-to-government operation marginalizing civil society.

In contrast, Mercosur provides a valuable model of openness to civil society and respect for social actors. The ESCF creates a role for business, labor and NGOs to develop recommendations on human rights, labor, and environmental matters in the member countries. The Social-Labor Commission gives ample space for trade union, business, and government collaboration in setting a social agenda for member countries.

Participatory mechanisms leading to consultations and recommendations are not enough for a viable labor rights system. A robust complaint system is needed to give voice and recourse to workers victimized by labor rights violations and to advocates who can act on behalf of victims. Mercosur lacks such a mechanism. But here roles are reversed: the NAALC has something important to offer.

The NAALC has several positive elements of a labor rights complaint mechanism to weave into a new Americas trade agreement. For one, the NAALC has no "standing" requirement for complaints. "Any person" can file a complaint about violations of one or more of the eleven labor principles and a government's failure to enforce related laws effectively. An important contrast should be noted here with the U.S-Jordan trade pact's labor provision, seen by many advocates as a stronger model of trade-labor linkage. That agreement does not provide for a labor or citizen-initiated complaint mechanism. Only governments can file complaints, which they are usually loath to do.

The NAALC's unusual requirement that complaints over violations in one country be filed in another country (to avoid conflict with national labor law bodies) forces advocates to work collaboratively in international coalitions, a valuable spin-off effect of the NAALC. Most NAALC complaints have been submitted jointly by trade unions, human rights organizations, independent worker support groups, and others from two or three countries working in a cross-border alliance.

A new hemispheric labor rights regime should also preserve the ample use of public hearings, commissioned research and detailed reports like those by the National Administrative Offices (NAOs) of the NAALC countries. Public hearings, in particular, allow affected workers and their advocates to state their claims through dramatic first-hand testimony. Hearings also create opportunities for protests, press conferences, and other elements of strategic media campaigns.

Finally, the NAALC contains, at least in principle and in its text, a "hard law" enforcement edge with the availability of fines and trade sanctions against labor rights violators, including firms and industries. Such sanctions,

however, are applicable only to violations of three of the NAALC's eleven labor principles, those on minimum wage, child labor, and health and safety standards. Although there is ample evidence of such violations, the NAFTA governments have not had the political will to press complaints toward a sanctions stage, and the original civil society complainants are not able to "appeal" cases to higher levels. These subject matter and appeal limitations are flaws in the NAALC that must be corrected in any hemispheric trade-labor pact.

NAALC complaints technically run against governments' failure to enforce national laws effectively. In practice, however, targeted governments have been joined in the dock by corporate abusers of workers' rights. Cases are called the GE case, the Sony case, the Duro Bag case (all cases "against" Mexico), the Sprint case ("against" the United States), the McDonald's case ("against" Canada), and so on. When the NAALC first took effect, employer groups demanded a prohibition on naming any corporation in complaints or NAO reports.[4] Fortunately, the NAOs rejected this employer demand. Thus, complaints can weave together allegations about countries' failure to effectively enforce their laws with specific workers' rights abuses by corporations.[5]

In the years since it took effect, NAFTA's labor side agreement has given rise to a varied, rich experience of international labor rights advocacy. Nearly thirty complaints and cases on behalf of workers in all three countries have arisen under the NAALC. They embrace workers' organizing and bargaining efforts, occupational safety and health, migrant worker protection, minimum employment standards, discrimination against women, compensation for workplace injuries, and other issues.

To be effective, labor rights advocates using the agreement must seek help from their counterparts across the border. In each of these cases, new alliances were built among groups that had hardly ever communicated until the NAALC gave them a concrete venue for working together. For leaders and activists of independent Mexican trade unions in particular, access to international allies and to a mechanism for scrutiny of repressive tactics long hidden from international public view provided strength and protection to build their movement.[6] Advocates get results not through direct enforcement by an international tribunal, but through indirection, by exploiting the spaces created by this new labor rights instrument to strengthen cross-border ties among labor rights advocates and to generate unexpected pressures on governments and on transnational enterprises.

This accounting is not meant to overstate the NAALC's impact. Each of the cases noted here is more complicated than these capsule summaries can convey, and the advantages gained are uneven. Asking workers to turn to the NAALC to air their grievances must be joined by honest cautions that it cannot directly result in regained jobs, union recognition, or back pay for violations.

Gains come obliquely, over time, by pressing companies and governments to change their behavior, by sensitizing public opinion, by building ties of solidarity, and taking other steps to change the climate for workers' rights advances.

The NAALC and agreements modeled on the NAALC (U.S.-Chile, Canada-Chile, Canada-Costa-Rica) all make "effective enforcement" of national labor laws a central obligation of the parties, distinct from a need to change laws to comply with new supranational standards. This is a reasonable starting point for a new hemispheric agreement, as long as national laws comport with fundamental rights.

Enforcement capacity is critical for protecting workers' rights. One need only see the reemergence of apparel sweatshops in many U.S. cities or the well-documented failure of U.S. authorities to protect workers' organizing rights to appreciate that effective enforcement of national law is a general problem, not one limited to poor countries. Fixing it should be a priority in hemispheric trade. This threshold promise to improve performance enforcing national laws is one that countries can readily accept.

Conclusion

A full gleaning of helpful or harmful language and existing labor rights agreements in the Americas would take many times more the length of this paper. The purpose here is to provide some examples for the main argument: that governments negotiating a hemispheric trade pact can include a viable workers' rights chapter by building on models they have already freely adopted. This is not to say labor rights advocates should be content with patching together current models. We should also demand achievable new provisions that advance workers' interests. One example of a tough new clause would be based on the principle of compliance with national law. It would allow targeted trade sanctions against companies found guilty of repeated violations of national labor laws linked to labor principles or other charter-like statement in an Americas trade agreement labor rights chapter.

This is all easy to say in a policy paper. The hard part in months and years ahead will be building a cross-border movement of trade unions and allies to demand an effective labor rights chapter in a hemispheric trade agreement—and a credible threat to defeat an agreement if governments fail to include such a chapter.

Notes

1. See *Inside U.S. Trade* (2004, 3).

2. For important, creative contributions to this discussion from Canadian perspectives, see Verge (2003) and Mercury and Schwartz (2001).

3. The four Mercosur members are Argentina, Brazil, Paraguay and Uruguay. Chile and Bolivia are associate members.

4. See letter from U.S. Council for International Business to U.S. NAO (1994).

5. For more discussion of the shaping of NAO procedures, see Compa (1995).

6. For more on this point, see Lujan (1999).

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