Architectural Digest for International Trade and Labor Law:
Regional Free Trade Agreements and
Minimum Criteria for Enforceable Social Clauses

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In the past decade and a half, the negotiation of free trade agreements (FTAs) has dramatically increased. The number of party states and the range of level of development among party countries have expanded drastically. At the same time, the subject matter scope of these treaties has grown by leaps and bounds. Agreements are no longer limited to trade in goods, but increasingly cover trans-national provision of services and cross-border mobility of investment capital. Bilateral agreements are proliferating at an astounding pace, but even more significant are the agreements, much smaller in number, involving three or more countries. At the global level, the World Trade Organization (WTO), whose predecessor body began with a mandate limited to trade in goods, has now expanded into trade in services, as well as intellectual property, with frustrated efforts to add elements addressing investment and government procurement. Plurilateral agreements, such as the treaties establishing the European Union (EU), the North American Free Trade Agreement (NAFTA), and the proposed Free Trade Area of the Americas (FTAA), combine more extensive coverage of goods, services, and capital, and constitute regional integration agreements.

Separate from these types of trade-related agreements, there are international labor rights instruments binding many of the same countries, under the auspices of the

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International Labour Organization (ILO), the United Nations, and regional international organizations such as the Council of Europe and the Organization of American States. Many countries also incorporate the right to form trade unions, the right to strike, the right to non-discrimination in employment and remuneration, and other internationally-guaranteed worker rights in their domestic constitutions as fundamental rights.[1] There has been a nearly complete disconnect until recently, however, between the deepening body of international trade regulation and the corpus of international and domestic worker rights commitments.

In regional integration treaties, this trend is changing rapidly. The EU, which, from its inception, has included a narrow band of worker rights within its treaties, has greatly expanded its competence in the fields of labor, employment and social policy. (Barnard 2000:ch 1; Bercusson 2001) The U.S. has moved from labor and environmental side agreements in NAFTA in the early 1990s, to placing labor and environmental matters in the main body of its bilateral FTAs negotiated with Jordan, Chile and Singapore at the start of the new century, to the 2002 adoption of "fast track" trade promotion authority legislation, mandating inclusion of a range of labor and other social provisions in the text of future FTAs as a condition of an up or down vote, without opportunity for amendment of the terms of the agreement, in the United States Congress (Weiss 2003). Labor rights provisions have been included in subsequently negotiated

[1] Hungary and Mexico are two of many examples. *See* A Magyar Köztársaság Alkotmánya [Constitution of the Republic of Hungary], 1949 évi XX. tv., arts. 63, 70/B, 70/C,70/E, available in translation at <http://www.mkab.hu/en/enmain.htm> (last visited April 15, 2005); Constitucion Politica de los Estados Unidos Mexicanos, art. 123, available at LEXIS Mexico Library, Legislacion File.

FTAs between the U.S. and Australia, and in somewhat weakened form, in the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA).

The labor rights, or "social clause" is a compromise between the views of advocates and opponents of freer trade. It is a treaty term, contractually binding the nation-state parties to the FTA not to use downward competition in domestically-regulated terms of employment as a means to attract and retain capital investment. For more developed countries, it operates as a circuit-breaker to disrupt and preclude inter-state bidding wars offering reduction in labor protections as a means of gaining or retaining investment and jobs. It also obligates party nation-states to improve to internationally-set minimum labor criteria when the state's regulatory starting point falls below that level. As the scope of FTAs expands from privately purchased goods to services, intellectual property, investment, government procurement, and beyond, the potential impact upon workers, their collective representation organs, and domestic government regulation of their conditions of work increases exponentially. This heightens the persuasive force of demands of free market skeptics that strong social clauses be incorporated in regional integration agreements.

The social clause also is a policy response to supporters of market forces, requiring them to put their money behind their theoretical assertions. Opposition to inclusion of a social clause in the text of FTAs has come primarily from advocates of a pure free market approach (e.g., Bhagwati 2002; Irwin 2002). Opposition also has come from some lesser-developed country advocates who regard labor constraints as "protectionist," depriving poorer countries of potential comparative advantage (e.g., Bhagwati 2004:47; Sukthankor and Nova 2004:230). If market forces in fact produce a

rising tide lifting all boats, the social clause will be superfluous, since it merely mandates what the market will accomplish on its own. If free market believers are wrong, the social clause will mitigate the adverse consequences for workers flowing from the move to more internationally-open markets.

It is important at this historical juncture to evaluate these instruments realistically, and with an eye to the optimization of their design. No matter how strong the substantive provisions of the social clause, if the structure of the treaty will render it unenforceable as a practical matter, those relying on it to moderate the effects of intensified free trade will find that they have been deluded, and deprived of the benefit of their political bargain.

The Social Clauses in Regional Integration Agreements

One can contrast the simple trade agreement of old with the more elaborate modern agreements. The simple FTA reduced existing national barriers to trade in goods between the party countries. It had little implementation and enforcement machinery apart from the trade ministries of the party countries.

The idea behind the original European Economic Community was always broader than this. Some proposed, from the outset, gradual creation of a federal European state, although the founding Treaty of Rome of 1957 fell far short of this. By the adoption of the Single European Act in 1986, Europe had embraced the "four freedoms:" free movement of goods, services, capital and workers, among the party countries (Barnard 2000). These four types of free movement provide a benchmark for the substantive range of other FTAs. Until the 1990s, most other international agreements limited themselves to free trade in goods, although a growing number separately addressed investment.

NAFTA combined free movement of goods, services, and investment within a single, unified agreement, although importantly, it excluded movement of workers (Weiss 2003).

The European Community (EC), as it eventually renamed itself, from the outset was divided over the extent to which it should depend purely on the growing internal market to yield upward harmonization of labor standards among the diverse Member States. The Treaty of Rome provided for a few areas of European level labor law-related competence, particularly equal pay for women and men. The European supranational structure has both deepened and widened through successive treaty iterations. It has become more and more like a con-federal, if not federal, state in the fields in which it has authority to act. It has established a set of executive, regulatory, and legislative institutions akin to a permanent government, although their largely inter-governmental nature has left them continually looking like the proverbial body established by committee. As the EC has morphed into the EU, it progressively has expanded its competence over the field of labor and social policy (Barnard 2000; Bercusson 2001).

A growing volume of EU directives has been adopted setting minimum standards or objectives for national legislation, most recently including workers' participation in workplace governance and in strategic corporate decisionmaking for companies operating in multiple EU countries. Nevertheless, through the present, the EU has left to Member States the regulation of many aspects of collective interest representation, has declined to regulate collective bargaining at the European level, and has refused to set standards for the use of economic weaponry such as the strike or lockout (Barnard 2000; Hepple 2002).

Substantively, the EU has moved constantly forward in expanding the scope of its authority over labor law and policy, although the form of its regulatory activity has been

changing. In addition, the jurisprudence of the European Court of Justice (ECJ), and resulting amendments to the treaties, have provided the workers themselves with the ability to seek remedies for violations of their EU-level rights, either against their employer, or against their home country for failing effectively to implement the EU legislation (Ward 2000). This has greatly bolstered the rate of full implementation of EU-established rights. It has, however, had the collateral consequence of reducing Member State enthusiasm for establishing additional rights which may be asserted by private individuals. It also has contributed to the adoption of a new mode of EU regulation which lacks the usual aspects of enforceability: the open method of coordination (OMC), regarding both fiscal and employment policy of the Member States. The OMC is lauded by some as a more flexible mechanism for shared governance in an EU now expanded to 25 Member States. However, it is deplored by others, including EU trade unions, as disempowering Member States, further reducing their sovereign control over social policy, while exacerbating the democratic deficit within the EU and reducing the ability of trade unions and other citizen representatives effectively to influence policymaking (e.g., Trubek and Trubek, 2005).

We may contrast these European developments with the nearly total formal retention of nation-state sovereignty in NAFTA and subsequent U.S. FTAs. The fight over inclusion of labor provisions in each of these agreements has been a bitter one. In NAFTA, it resulted in a labor side agreement, the North American Agreement on Labor Cooperation (NAALC), while the major advance in the U.S.-Jordan and later trade agreements was inclusion of the labor provisions within the core agreement (Weiss 2003).

The U.S. hit the high water mark in scope of substantive coverage when it negotiated eleven labor principles into NAFTA: (1) the right to organize; (2) the right to bargain collectively; (3) the right to strike; (4) the prohibition of forced labor; (5) labor protections for children and young persons; (6) assurance of minimum labor standards; (7) elimination of employment discrimination; (8) equal pay for women and men; (9) prevention of occupational injuries and illnesses; (10) compensation in cases of occupational illnesses and injuries; and (11) protection of migrant workers. Later U.S. trade agreements covered fewer labor principles, but provided somewhat stronger protections for those principles they did include. At the same time, however, they excluded coverage of U.S. state labor law, limiting U.S. commitments to those pertaining to federal law, even though there is overlapping state and federal legislative authority on nearly all labor-related matters except private sector union organizing and collective bargaining (Weiss 2003).

On the other hand, the later FTAs importantly exceed the NAALC in the strength of the commitments undertaken. In the NAALC, the major binding obligation was that each of the three countries would effectively enforce their own domestic labor laws, but Party governments retained full freedom to modify those laws. In the U.S.-Jordan agreement, for the first time, the standards of the ILO Constitution and Declaration on Fundamental Principles and Rights at Work were incorporated as benchmarks, with a commitment to "strive to ensure" that domestic labor laws satisfied those international obligations, and were not watered down as a means to compete for investment. However, the ILO Declaration, hence the internationally-set minimum standard for domestic law, covers only four areas: freedom of association, including the right to organize and to

bargain collectively, elimination of forced labor, elimination of child labor, and elimination of discrimination in the workplace. As a result of requirements contained in the 2002 fast track trade promotion authorization legislation, similar language benchmarking international labor norms has been included in subsequent FTAs. Nevertheless, although these commitments are technically binding, they are weak. The commitments to satisfy ILO obligations and not to derogate from domestic labor law to attract foreign trade or investment from other Parties continue to be prefaced by "strive to ensure," and are not covered by the enforcement provisions of the trade agreements.

The post-NAFTA FTAs all, however, contain NAALC-like promises to "effectively enforce domestic labor law;" these commitments are stronger than those provided in the NAALC in that they are subject to the same trade agreement dispute resolution provisions applicable to the commitments regarding trade in goods and services. This is usually touted as "equivalent" or "parity of" enforceability. The "parity" claim is a bit misleading, since the private right of action remedies for investors under the investment chapter of these agreements are far stronger. Moreover, in DR-CAFTA, a monetary assessment is substituted for trade sanctions as the primary remedy, and the money is used to fund labor rights development programs by the offending government within the offending country. Finally, although expansion of free trade treaties into services, investment, and government procurement may increasingly create conflict with domestic labor law (as well as consumer, environmental, and other non-commercial law) obligations, the FTAs still do little to establish meaningful institutional implementation mechanisms to preserve labor rights.

To contain the seemingly inexorable trend toward deregulatory globalization, as opposed to progressively upwards-harmonized labor law, we must go beyond rectifying substantive omissions in the obligatory labor standards mandated for future trade agreements. We also must crack the tough nut of devising an institutional framework which could make effective implementation and enforcement of social clause commitments a reality.

The Dilemma of Effective Schemes for Social Clause Implementation

Let me say a few words about why incorporation of labor provisions inside of trade agreements is important, even though so many countries already are parties to separate international labor commitments under ILO and UN auspices, and why it matters, even if we cannot realistically promise full implementation. The social clause ensures that the labor commitments have equal dignity and binding force with the trade commitments, and pretermits investor claims that labor regulatory interference with their unfettered business freedoms counts as the international equivalent of a regulatory taking. Because an international tribunal usually has competence only over the treaty pursuant to which it is acting, it is common for a tribunal to decline to take into account obligations under other bodies of law. The result is that the trade treaty before the tribunal may "trump" externally created labor rights. Inclusion of a social clause prevents a tribunal interpreting the treaty's free trade obligations from asserting that it need not take labor obligations into consideration.

In addition, sanctions for violations of trade and investment provisions of trade treaties are usually severe, while the remedies for stand-alone, ILO and UN-based international labor convention violations traditionally have been largely hortatory (e.g.,

Hepple 2002. It is true that inclusion of labor rights within the trade agreement does not on its own produce equivalent enforcement, even when seemingly identical remedies are written into the text. Inclusion, however, does prevent a government from having to risk imposition of possibly severe trade sanctions in order to comply with its (non-sanctionable) international labor obligations.

These purposes served by inclusion of a social clause in a trade agreement are sufficient to warrant insistence upon this as a condition of acceptance of trade agreements. Much more, however, is necessary to fulfill the implicit political promise of trade negotiators, that the social clause will accomplish its role as circuit breaker in the threatened downward spiral of labor standards under pressure of free trade. For that, we must rethink the institutional arrangements established in trade agreements.

Historically, under public international law, treaties in many ways have functioned like contracts between nations, even when the terms they established were intended to benefit or regulate party country-resident individuals or businesses. Only governments negotiated treaties and only governments could administer and enforce them. For lawyers and legal scholars, a useful metaphor is to characterize the citizen or business as a third party beneficiary of the treaty. The domestic actor had no rights regarding what terms would be negotiated into the treaty, except in terms of domestic political processes and constitutional rights. The domestic actor, like the third party beneficiary in nineteenth century common law contract cases, had dubious enforcement rights except to the extent that she or he could persuade the contractual party, the government, to intervene and exercise its rights on the beneficiary's behalf.

For industrial relations specialists, an alternative metaphor is the U.S. labor union's status as exclusive collective bargaining representative of the employees in the bargaining unit. For the employee to vindicate a claim that the employer has breached the worker's rights under a collective bargaining agreement, the employee must file a grievance, over which the union will have nearly exclusive control throughout the labor contract dispute resolution procedure. Nation-state sovereignty traditionally has kept domestic law insulated from external regulation in a fashion similar to the U.S. labor law notion of the union's status as exclusive collective bargaining agent.[2]

In a traditional international treaty, domestic actors whose interests have been injured by treaty violations have recourse only by seeking diplomatic intercession by their home country. It remains up to their government to determine whether and how vigorously to press a claim of breach of treaty obligation. Unless the treaty itself sets up enforcement machinery, or the country parties have by separate action subjected themselves to the jurisdiction of the International Court of Justice, there are only three options for one country to seek to remedy the breach of another. (1) The enforcing country can negotiate, that is, inform the breaching country of its claim of violation and demand redress. (2) The enforcing country can withdraw totally from the treaty. (3) The enforcing country unilaterally can impose proportionate, countervailing measures to offset its losses caused by the breach of the other country. Negotiation, of course, is meaningful largely because of the threat either of withdrawal or of unilaterally imposed sanctions, or because of threats pertaining to collateral aspects of international relations between the countries. Although in some areas, particularly international human rights,

[2] The exclusive bargaining representation metaphor is the subject of more extended treatment in my work in progress, "Exclusive Bargaining Representation: Parallels Between the Roles of Trade Unions in U.S. Collective Labor Law, and the Nation-State in International Law."

international treaties have moved to a more pluralistic model, U.S.-negotiated FTAs have remained designed predominantly on the traditional pattern, with the exception of their investor-protection provisions.

The problem of a means to induce governments to comply with their labor obligations is the flaw which threatens to render hollow the political bargain, in which the social clause is accepted as quid pro quo for trade liberalization. In the international human rights area, there is much enthusiasm for "naming and shaming," for international, independent monitoring of each party government's compliance with its treaty obligations, but with voluntary compliance and domestic and international political repercussions as the only enforcement mechanism in the event of violation. In the labor rights area, with the contending economic as well as political interests at stake, long experience demonstrates that stronger remedies are needed; one need only look at the rate of non-observance of core ILO conventions by countries which have ratified them.

The government failing to enforce its laws, or watering them down to attract or retain job-providing foreign investment, victimizes the workers of their own country, whose confidence in domestic law enforcement is likely to be nonexistent, and who have no FTA claim against their home government. Foreign competitors and their employees are competitively disadvantaged by the breach of labor obligations, yet under these trade agreements they have no private ability to institute action. They may seek enforcement intervention by their own government, but it is likely to pursue the matter only if there are extraneous reasons to do so.[3]

[3] Peter Danchin makes a similar point regarding the reluctance of the U.S. government to enforce the International Religious Freedom Act of 1998. (Danchin 2002:58-63)

Moreover, diplomatic representation is of dubious value for several reasons. First, as the U.S. FTAs state, in the dispute resolution process, the primary means is consultations with a view to gaining voluntary compliance. In light of the strong domestic political and economic interests underlying the typical breach of party country labor obligations, this voluntary mechanism is doomed to fail. Second, diplomacy involves far too many trade-offs for the risk of further enforcement to serve as an effective motivator to a developing country not to breach its labor obligations under pressure from would-be foreign investors or from multinationals threatening to relocate to another country.

Third, this remedial approach was originally designed to address party government violations in legislation addressing goods crossing the country's border. Customs rules, tariffs, and discriminatory imposts, for the most part are easily definable and measurable, and involve a regulatory matter whose effective implementation is within the government's own control. Labor matters, however, are more complicated. Although the obligation is that of the government, expressed in terms of formal regulation and its formal and informal implementation, the goal is to alter the behavior of employers, in the private as well as public, the informal as well as the formal sector. This additional articulated joint in the transmission of the international norm into actual application for the intended beneficiaries, the workers, plays havoc with easy measurement of party-state compliance with its obligations once one goes beyond mere facial transposition of the international norm into domestic law.

In addition, there is good reason to be cautious about international tribunals, particularly those whose main concern is with tariffs, customs duties and similar more traditional commercial trade issues. These may well be inherently biased fora for

interpreting labor rights which operate in contradistinction to other deregulatory aspects of the trade agreement. Moreover, using an equivalent remedy to address violations of provisions regarding labor, the environment, and trade in goods or services may be to treat alike things which are unlike, yielding a remedy formally the same but in practice very different in its deterrent effect against further violations. Thus, although a neutral tribunal is needed to develop a coherent and consistent interpretation of future trade-labor treaties, it runs the risk of further erosion of state sovereignty, and further undermining democratic input into economic and social policy-making. More thought about appropriate, innovative institutional design is required if the problem of a suitable institutional architecture for truly enforceable labor rights is to be solved.

The underlying fundamental problem with U.S.-signatory FTAs is that both in negotiating and in implementing the FTA, each party government is aggregating preferences among a host of domestic constituents, and these types of international obligations are to a great extent both third party beneficiary agreements, and third party burden agreements. Domestic actors benefiting from their own or another government's breach are exposed to no legal responsibility on the international plane. Employers whose home government and courts look aside when businesses fire union activists or pay sub-minimum wages bear no international law obligations or penalties under these trade agreements. Domestic actors injured by another government's breach – be they foreign competitors, workers, or trade unions – have little recourse against the other country, little clout to induce their home government to press their cause, and no avenue of recourse against the real beneficiaries of the other government's breach, which may well be multinational corporations based in their own home country. Those harmed may

likewise lack meaningful avenues of redress even against their own government's breach of social clause obligations, depending on the reality and effectiveness of the rule of law in their domestic regime.

In the EU, the European Commission has some highly useful enforcement powers, particularly when a government has failed to fulfill its obligation appropriately to transpose European law into domestic legislation. In addition, individuals foster enforcement by filing cases in domestic courts, which may lead the home country courts to apply EU law, or if the law is unsettled, to refer the legal question to the ECJ. That is, the domestic courts have been drafted into implementation of European law, despite their limited role in its interpretation, and workers function to a modest degree like private attorneys general in vindicating their own labor rights under European law (Alter 2001; Ward 2000). Of course, Europe aspires to be a supranational state, an aspiration disavowed thus far in other regional integration schemes.

Even if U.S. FTAs provided for a private ability to commence international enforcement proceedings, the costs of doing so would be prohibitive for most workers, small businesses, and trade unions, and the linguistic and organizational obstacles, as we have seen from the NAALC experience (e.g., Weiss 2003), would be daunting. These FTAs establish no European Commission-type institution to investigate and prosecute systemic violations, no international agency is charged with the duty to ensure uniform implementation of the international obligations, nor is there a standing tribunal like the ECJ, to develop a consistent body of treaty interpretation. Of course, were there such treaty organs, issues of adequate funding and independence from government and multinational corporate interests also would have to be addressed. Some variation of an

independent enforcement framework, as well as a private right to initiate proceedings appears necessary if the "social clause for free trade" bargain is not to be illusory.

A separate cautionary note is the problem of government reaction if one creates a private right of action with strong remedies. The EU shift toward the "Open Method of Coordination," a collective benchmarking, mutually-set and monitored goals and timetable exercise devoid of legal enforceability, may be understood in part as an EU Member State backlash against undue liability exposure and domestic political embarrassment resulting from ECJ rulings making truly effective the promise of "effective enforcement" of EU-created citizens' rights. The U.S. and Canadian retreat from strong investor rights to sue and recover damages for regulatory "expropriation" provides another example.

Governments are loath to relinquish real control over interpretation and implementation of international instruments, a reluctance directly proportionate to the domestic political volatility of the consequences. Labor rights are among the most politically-divisive and hard-fought issues. The irony of the FTA labor rights commitments is that as presently constituted, they are a form of false advertising; they do not meet minimum criteria for effective enforcement.

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