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Should there be enforceable international labor standards: The perspective of Developing Countries

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Introduction

I would like to start by expressing my appreciation to the School of Law of the University of Virginia for their invitation to contribute in this panel.

The idea that the regulatory framework of globalization should have a set of universally agreed human rights regarding working conditions or labor standards is by now widely shared, and this is, in itself, a remarkable feature of the new realities in the global economy.

As you know, there is a long tradition of international coordination of labor law around the International Labor Organization (ILO). The 1990s saw a growing international consensus on a number of core labor rights that led to the 1998 ILO Declaration on Fundamental Principles and Rights at Work that binds the 175 ILO members. The core labor rights are:

1. *freedom of association and the effective recognition of the right to collective bargaining,*
2. *the elimination of all forms of forced or compulsory labor,*
3. *the effective abolition of child labor, and*
4. *the elimination of discrimination in respect of employment and occupation."*

In other words, there is broad consensus around the objective of international coordination to improve compliance with core labor rights. Some think that this task is particularly urgent because they perceive that global trade and market governance have developed more quickly than global social governance.

All this is well and good. However, the debate became extremely polarized when labor rights activists started pushing the idea of enforcing labor standards via trade agreements, and specifically via trade sanctions.

It was precisely this question the one that produced an impasse in US trade policy in the 1990s when for more than eight years Republicans and Democrats could not agree on the model of trade-labor and trade-environment linkage to include in new "fast track" or "Trade Promotion Authority" Legislation. Uncertainty about US policy towards linkage in these issues was one of the major factors in the failure of the WTO Seattle Ministerial Meeting in December 1999. At that time the US was strongly advocating inclusion of these issues in the WTO, while most developing countries were resisting it.

So for almost ten years you had two fronts in this discussion: an internal front in the US, very much between Democrats and Republicans, and an external front where most developing

countries thought, and continue to think, that expanding the WTO agenda, or regional or bilateral agreements, to include labor standards is a very bad idea.

Now it can be argued that internally in the United States labor activists won the political debate. In August 2002, the US Congress approved TPA which includes labor standards as trade negotiating objectives and requires "equivalent" dispute settlement procedures and remedies for labor and environmental, as well as for commercial objectives.

The first FTA negotiated after TPA, with Chile, gave concrete expression to how US trade negotiators interpreted the parameters set by congress for the trade-labor link. The US-Chile agreement was approved by Congress in 2003 and most Congressmen seemed comfortable with the US-Chile model on both labor and environmental issues. There was no big debate about this and the FTA was approved by a large majority.

However, the US-Central America Agreement, the negotiation of which finished last month, has opened some old wounds. A group of Democratic Congressmen are saying that Central America is not Chile, and that they would like additional guarantees or stronger enforcement mechanisms. It seems that the US-Central America Agreement will reopen another chapter in the trade-labor debate all over again, despite the fact that many expected that TPA had put this issue to rest. And the fact that some democratic candidates are repeating this has added a bit more wood into the fire.

Central American countries and soon Andean countries with which the US is starting negotiations soon, as well as Panama and the Dominican Republic, have so much interest in a FTA with the US that even though these countries rejected the trade-labor linkage in the past, now they have accepted it, somewhat reluctantly, as part of the overall package. But whether Brazil will accept this type of linkage in the FTAA is still an open question, so far they have been opposing it. The point is that the question of this panel continues to be very much at the center of debate both within the United States and in trade negotiations with trading partners.

After this very quick exploration of the landscape, I would like to divide the rest of my comments in three parts. In the first two parts I would like to enumerate and briefly assess the main arguments about whether or not to include labor provisions in trade agreements. I know that after TPA we are beyond this debate, at least as regards bilateral agreements with the United States. The question now is not <u>whether</u>, but <u>how</u> to include these provisions. But to understand the background and particularly to understand the position of most developing countries, I think it is important to review these arguments.

After that I am going to look into some of the basic characteristics of the US-Chile and US-Central America labor cooperation chapters, and discuss some of the main issues in the present debate around CAFTA.

I. Assessment of the Case for Inclusion of Labor Provisions in Trade Agreements

The arguments in favor of including labor provisions in trade agreements can be grouped into five categories: common sense arguments; economic arguments; pragmatic reasons and finally, moral and human rights rationales. I will not have time to review all of these in sufficient detail to convince you here today, but let me tell you that I wrote an article on these issues and concluded that the only rationale that stands to close scrutiny is the human rights rationale. (Salazar-Xirinachs and Martínez-Piva, 2001).

Common Sense and Trade-Relatedness

The common sense argument for linkage says that since trade and labor issues are intimately related, there should be no reason to oppose linkage. Although widely used in political discourse, particularly by trade union leaders, and perhaps appealing to the intuition, this is not a good enough basis to make decisions in this area. For instance, trade and income distribution issues are also related. Should there be an income distribution clause in trade agreements? I think a common sense approach does not take us very far. [1]

Economic Arguments.

The second category of concerns behind the pressures to include labor provisions in trade agreements is economic. There are four basic sets of economic issues:

1. The race to the bottom argument,
2. The idea that to compete with countries where low-wages prevail is unfair competition
3. The notion that trade liberalization without harmonization of labor standards is bad for wage dispersion and income distribution in the north, and
4. The concern about job dislocation and displacement produced by competing imports.

Let me briefly comment on each one of these issues.

<u>Race to the bottom</u>

The race to the bottom refers to the fear that in the absence of international coordination, countries will have an incentive to lower their own standards to be more attractive to foreign investment or to gain a competitive advantage. Notwithstanding how appealing this argument

[1] Of course instead of common sense one can take a strongly pragmatic view: trade-related is anything governments decide to define as trade-related. This realpolitik view has some merit, and according to many it was precisely this that led to the inclusion of IPRs in the Uruguay Round, and it might also be this power politics what is driving inclusion of labor provisions in trade agreements, but then we would not be anymore in the realm of logical arguments but of lobbying and pressure groups.

may look intuitively, there is simply no evidence to support it. A review of the relevant literature suggest the following:

- As regards export performance one of the principal findings of a well-known OECD study (1996) was that there is no evidence that countries with low core labor standards enjoy a better global export-performance than high-standards countries. And the 2000 update of this study states that this finding has not been challenged by new evidence. Another authoritative study (Aggarwal, 1995) concludes that comparisons across more export-oriented and less export-oriented sectors indicate that core labor standards are often lower in less export-oriented or non-trade sectors.
- As regards investment, studies of investment location decisions of multinational companies show that these decisions are influenced by many factors of which critical ones are political and macroeconomic stability, quality of infrastructure, logistics and labor skills, rather than low quality of labor standards.
- In addition, the 2000 OECD study concludes that: "With the notable exception of China, countries where core labor standards are not respected continue to receive a very small share of global investment flows. There is no evidence that low-standards countries provide a haven for foreign firms." (OECD, 2000, 13).
- As regards wage levels, the evidence is clear that wages in Export Processing Zones tend to be higher than average wages in the rest of the economy.

Therefore, there is no conclusive evidence that export performance or FDI flows are correlated with low labor standards or low wages. In fact, labor standards and wages are higher in export sectors than in non-traded sectors. Even in cases where there might be an incentive to lower standards, democracy, accountability, strong local institutions and international cooperation are the best deterrent for any country to engage in such race.

This is one of the reasons why even though recent bilateral trade agreements introduce a provision to the effect that "each Party shall strive to ensure does it does not waive or otherwise derogate from (labor) laws in a manner that weakens or reduces adherence to the internationally recognized labor rights…as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion or retention of an investment in its territory", these agreements do not make this specific provision actionable for dispute settlement under the agreement.

Low wage competition is unfair competition

What about the idea that to compete based on low-wages is unfair competition? This argument rests on two implicit assumptions: (a) that low-income countries have discretion to define the level of wages, and (b) that a competitive advantage based on low wages is illegitimate and consequently unfair. Neither of these propositions is good economics or is supported by solid evidence.

The level of wages in an economy is determined by the relative factor endowments, the skill profile of the labor force, the general standard of living, technological conditions and the growth of productivity over time. In other words, it is closely linked to the stage of development of a

country. So except on the margin, it is not a variable that the government can establish by decree to gain a comparative advantage. Differences in factor endowments and their relative prices have always been part of legitimate advantages in trade. The 2001 Communication from the European Commission on Promoting Core Labor Standards recognizes this by adopting the position that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. (European Commission, 2001).

Impact of trade with low-wage economies on industrial economies

The third type of economic concerns is linked to the idea that increased trade with low-wage economies, has contributed to wage dispersion and income inequality in the North, particularly by hurting employment and income of unskilled workers. There has been a big debate among economists about this issue. It is a widely recognized fact that since the early 1980s the United States has experienced a fall in real wages of the lowest skilled workers (measured either in real terms or relative to wages of high-skilled workers); a fall in the relative employment of less-skilled workers; and, as a result, an increase in the share of total labor income going to high-skilled workers.

Many volumes and papers have been written on these issues. Two main factors are widely cited as possible explanations of these changes: international competition from low-wage countries and skill-biased technological change that has increased the demand for skilled workers. A recent volume and survey of this literature by the National Bureau of Economic Research concludes that: "A large amount of research during the past two decades has sought to evaluate both explanations, with the result that … skill-biased technological change is often thought to be more important". (Feenstra, 2000, p 3). [2]

The general conclusion is then that the notion that trade liberalization without harmonization of labor standards is bad for wage dispersion and income distribution in the North, is not supported by the available evidence.

Job dislocation and displacement

The fourth and final economic argument is the concern about job dislocation: it is clear that trade and the shifting pattern of comparative advantage can indeed produce job displacement and dislocation. But the answer to this, as economist Joseph Schumpeter told us many decades ago, is that it is precisely the process of "creative destruction" that drives a healthy process of economic transformation and provides vitality to capitalist or market economies. The right response to this effect is not to resist these changes with protectionist responses but rather to facilitate adjustment

[2] A variation of this literature analyses not just the differences in the level of wages but the associated question of whether wages are related to labor standards. No robust relationship is found between labor standards and the level of wages. A recent survey concludes that in general, the link from low labor standards in low-income countries to the wage of unskilled workers in industrialized countries is not strong. (Drusilla Brown, 2001, p 99).

via trade adjustment assistance policies, including income support, retraining programs, workers relocation and other safety nets mechanisms. [3]

Pragmatic Issues

Let me now turn to the pragmatic reasons that labor rights activist have used to advocate the inclusion of labor provisions in trade agreements and in the WTO. This is the idea that the ILO has no "teeth", that is, no enforcement power, while the WTO and trade agreements do. Several questions emerge here: Is the enforcement capacity of the ILO really as weak as sometimes portrayed, and if so, can it be improved? Can the WTO really be a better enforcer than the ILO? Which institution could be more effective in local-capacity building in this area?

The idea that the ILO has no teeth is not entirely correct. Traditionally, the ILO has relied on principles of voluntary participation, transparency, tripartite social dialogue and capacity building to achieve its objectives. In particular, the ILO approach has recognized that the feasibility of raising labor standards depends on national circumstances and that a significant time period and capacity building may be required to achieve the recommended improvement. In fact, many have argued that this relatively "soft" approach is the strength of the organization, not its weakness. And that this is much better than an inflexible and legalistic approach in which little allowance can be made for national peculiarities and where the asymmetries in market size mean that small economies have very limited ability to punish strong countries who break the rules. This pragmatic approach means that weaker and smaller countries do not have reason to regard the ILO as an instrument of more powerful countries or sectors within countries, and this induces cooperation rather than confrontation and resentment.

Even the conventional wisdom that because of its reliance on trade sanctions the WTO is a better enforcer has been questioned. A distinguished lawyer, Steve Charnovitz (2001) has recently reviewed this issue and makes a strong case that, as he puts it: "The WTO may have the best dispute settlement system of any international organization, but it does not have the best compliance system."[4] Based on the WTO experience Charnovitz concludes that the disadvantages of the sanctions tool outweigh its advantages, that the current WTO system is too coercive and state-centric, and that the WTO needs to design better ways to get governments to follow WTO rules. He suggests that pulling out the WTO's teeth and substituting them for a variety of softer, non-trade distorting mechanisms will improve the WTO compliance system.

I would also like to mention here that the position of the EU as regards labor standards in the WTO is quite different from some of the mainstream positions in the U.S. debate on these issues. While in Seattle the Commission seemed to be interested in involving the WTO in Labor issues,

[3] Of course, there is a complex political economy dynamics behind any such process and countries must be able to afford these programs. In addition, it must be recognized that the WTO and trade agreements have mechanisms such as transition periods, safeguards against import surges, anti-dumping, and others that can be used to help workers and industries to adapt to the new competitive environment.

[4] Charnovitz (2001) p 792.

the 2001 European Community proposal for promoting labor standards is based on strengthening the ILO's role and rejects any sanctions based approaches.[5]

In conclusion, a hard sanctions based approach is not necessarily the best approach. Even as regards the WTO there is an ongoing controversy about whether this is the best approach to compliance.

Moral and Human Rights Arguments

The final category of arguments is moral and human rights related. I think that in fact the only rationale on which a strong case can be built for inclusion of labor provisions in trade agreements is the general philosophy of labor rights as part of general human rights.

Thus I draw two main conclusions from this review:

First, that it is very important to be clear that justifications based on the idea of a race to the bottom, or the idea that competing with countries with low wages is unfair, or the idea that trade with low wage countries damage income distribution in the US or Europe, are wrong or unsupported by the economic evidence. These reasons only play into protectionist interests and could lead to wrong conclusions and serious damage to trade policies.

Second, that although from a rights perspective there is nearly universal consensus on core labor rights, adopting uniform labor standards in operative terms is very complex and controversial.[6]

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[5] The EU proposal has a number of premises:

- It rejects any sanctions-based approaches;
- It is based on the principle "that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question";
- It also stresses the idea that "poverty, poor governance and extensive informal sectors are often the main cause of the weak implementation of core labour standards in developing countries";
- And it emphasizes that "sustained economic growth can contribute to the respect and effective application of labour standards and of the social regulatory framework and vice versa".

A central element of the integrated strategy proposed by the EU is making the ILO a more effective enforcer by giving more weight to observations in reports; giving greater publicity to the supervisory mechanism; improving the effectiveness of complaint procedures; and consideration of positive incentives.

There are also other elements in the proposal: increased multilateral technical assistance, including the ILO; launching a forum for international dialogue; increasing trade incentives through the generalized system of preferences; addressing the issue in bilateral relations through assistance and capacity strengthening; supporting private and voluntary schemes for the promotion of core labor standards through social labeling and industry codes of conduct.

[6] In a recent paper Drusilla Brown (2001) analyzes the complex relationships between labor standards and economic efficiency and concludes that "Taking steps to reduce forced labor, child labor, and discriminatory behavior, or to support free association and collective bargaining will often have a mixture of effects… We cannot make a general statement that universal labor standards derived from commonly held moral values will always produce positive economic outcomes. The effect on economic performance and the lives of workers and their families of legally

In other words, even if we can agree on the choice of objective this does not settle the issue of what instrument to choose nor what institutional arrangement to put in place. In particular, this does not justify a sanctions approach to compliance.

Let me give you an additional example of why a trade-based approach fails to address some of the main issues: in the case of child labor, less than 5% of child laborers in developing countries are employed in export industries, 95% of the problem lies in the non-tradable sectors. Therefore, even if morally well intended, a sanctions approach to compliance with labor standards fails to have any effect on the non-tradable sectors and the general conditions of underdevelopment that are actually at the root of the child labor problem.

II. Why are most developing Countries opposed to a Sanctions-Based Approach?

Let me now turn to the issue of why most developing countries have been opposed to include labor provisions in the WTO and in regional trade agreements, particularly under any approach involving trade restrictions or sanctions?

To be brief, let me just enumerate the six main reasons:

1. The fear that such inclusion will distract attention and energies away from the main market access negotiating priorities of developing countries.

2. The perception that besides the morally-driven human rights groups, the pressures to include labor provisions emanate from politically powerful lobbying groups, concerned about competitiveness, and interested in defending protection and privileges.

3. Various issues related to stage of development differences, particularly the problems with the strict application of uniform labor standards in very different labor market conditions.

4. Questions concerning the logic of trade negotiations, in particular, the fact that given the enormous asymmetries in market size and relative importance as trading partners, only countries with large markets could threaten with credibility and actually produce damage, in many cases disproportionate damage, by closing their markets to others. Thus accepting a link to market access is seen as a way of institutionalising unilateralism in a multilateral context. No win-win outcome is perceived in this.

5. The fifth source of opposition is precisely grounded on scepticism that sanctions are the best way to achieve results in improving labor standards or other social conditions and that there are superior ways. Most countries see institutional deficiencies and underdevelopment as the main obstacles and therefore consider cooperation through technical assistance and capacity building as first-best instruments to achieve results. Institutional deficiencies have been in fact one of the major difficulties for developing

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imposed labor market constraints of the sort contemplated by labor rights activists cannot be presumed to be positive, but instead must be empirically investigated on a country-by-country basis." (p 97).

countries to implement some aspects of trade agreements, particularly in resource-intensive areas, which suggests that it is not enough to write a trade provision to ensure compliance.

6. Finally, there are arguments related to the architecture of the global trading system that many developing countries share but are part of a much wider debate. Trade negotiators and many experts are concerned about overloading the WTO, in particular, the dispute settlement body with disputes that are rather about labor or environmental issues than about trade. Many believe that the WTO has neither the expertise nor the legitimacy to adjudicate these disputes and that asking it to arbitrate in such matters undermines its credibility and diverts attention from its first priority, opening-up markets and enforcing free trade rules. I am personally quite attracted to the idea of having a more decentralized system in the allocation of global regulatory responsibilities, where each agenda is pursued by a separate responsible agency, with appropriate coordination between them.

But the point is that for all these reasons the developing countries have been resisting the inclusion of labor provisions in the WTO and in trade agreements generally, particularly under any approach involving trade restrictions. The outcome of Doha, where Ministers decided that the ILO is the competent body to set and deal with labor standards and the social dimension of globalization, represents a success for the developing countries on this issue and a disappointment for certain groups in the US and the EU.

III. Regional Innovation on Trade and Labor Issues

But of course, as we know, the labor issue has been pursued very proactively by US trade policy at the regional level in bilateral trade agreements.

The US-Chile and CAFTA agreements are the most recent ones to include labor as a full chapter in the agreement, and with dispute resolution mechanisms that are roughly equivalent to the mechanisms used in any other core commercial area of the agreement.

The main characteristics of these agreements are:

1. The objective of all three agreements is the promotion of compliance with and effective enforcement by each Party of its own labor law, they do not establish minimum or common standards for domestic law.

2. The only provision of the agreements that provides a basis for dispute settlement is the one that reads: *"A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, after the date of entry into force of this agreement"*.

3. The agreements commit the parties to wide ranging cooperation in specific labor areas and instruct direct coordination between the labor authorities in each party.

4. As regards enforcement, if the phase of political consultations fails to resolve the matter, the complaining Party may request the establishment of an Arbitral Panel. If the Panel determines that a disputing Party has not conformed with its obligations, the Parties are given some time to eliminate the measure or agree on a mutually satisfactory action plan to resolve the dispute. If the Panel determines that a Party has not conformed with its obligations (under Article 16.2.1(a)) the complaining Party may request that the panel be reconvened to impose an annual monetary assessment on the Party complained against. The amount of the assessment shall not exceed 15 million US dollars annually. If the Party complained against fails to pay a monetary assessment, the complaining Party may take other appropriate steps to collect the assessment or otherwise secure compliance. These steps may include suspending tariff benefits, as necessary to collect the assessment.

Let me conclude by reiterating that clearly there is a broad global consensus around the view that the regulatory framework of globalization should have a set of universally agreed human rights regarding labor conditions.

However, as regards the choice of instrument and institution to do this, at the global level, the Doha agenda settled this issue in favor of allocating global regulatory responsibilities to the ILO.

In contrast, in terms of regional governance, the US is proceeding with inclusion of labor issues along the lines of the US-Chile and US-Central American agreements. Time and experience will surely give us some lessons as to how effective this approach to enforcement will be. My own personal view is that if this approach is backed by sufficient cooperation and capacity building it has the potential to improve compliance. But that if the capacity building component does not mobilize resources then this approach will produce more litigation than good results.

I also strongly believe that by far the biggest contribution that trade agreements can do to improve living conditions and reduce poverty in small and less developed countries, is precisely the additional trade, investment and growth opportunities it might create for the countries concerned. If the trade agreement does not provide sufficient additional access to the large country market or does not generate sufficient additional growth and prosperity, compliance with international labor standards will probably not improve much, irrespective of what kind of labor chapter you include in the agreement.

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