

# MOVING THE TRADE AND LABOUR STANDARDS DIALOGUE AND PROGRESS INTO THE WTO

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## *Abstract*

*This article examines the original promise by the Great Powers after the Second World War to ensure that improved labour standards would be part of a new global trade governance framework in the proposed International Trade Organization (ITO). In light of the demise of the ITO in the U.S. Congress, the article examines how that promise was ignored in favour of establishing first technical trade rules in the GATT multilateral rounds and then the expansion of trade rules into other areas of international investment and trade in the World Trade Organization, while the social and labour dimensions of trade were sidelined or ignored. The article then examines how the developing world fearful that the industrialized nations' focus on labour standards was a form of disguised protectionism argued that the primary role should be left to the International Labour Organization (ILO), perhaps with the knowledge that the plethora of labour conventions and standards were largely ineffective. The article then examines how the ILO's establishment of the core international labour standards has led to developed countries such as Canada and the U.S. to develop new generations of trade and labour side agreements with developing countries. These newer generation free trade agreements maybe attempting to fulfill the original promise of the ITO, without the accusations of protectionism alleged by the contracting developing states. However, the main challenge to these new trade and labour agreements is how to harmonize the essential aspects of these agreements and enhance cooperation and coordination between states entering these agreements while mainstreaming the key elements while seeking to reach a critical mass of countries entering into such linkages. The article suggests the first steps could include moving the analysis and debate on these new forms of linkages between trade and labour standards into the Trade Policy Review Mechanism (TPRM) of the WTO. While not a complete answer, the article suggests that the "soft law" approach with the TPRM could ultimately lead to more organized forms of cooperation, coordination and ultimately mainstreaming labour standards into the global trade governance framework.*

## 1. BROKEN PROMISES ON THE SOCIAL DIMENSIONS OF TRADE

In the Atlantic Charter signed by Roosevelt and Churchill was the famous declaration that while

freedom of trade would be supported by the two Great Powers, they also recognized the right of all peoples to have “improved labour standards, economic advancement and social security” and to “live out their lives in freedom from fear and want.”<sup>1</sup> In the final stages of World War II, the allies began a series of conferences to discuss how to prevent the reoccurrence of the economic conditions that led to the world wide depression of the 1920s and the rise of the Nazis in Germany. At this stage, it was clear that trade, economic stability, peace, international security and human rights were clearly linked. The most significant of the conferences was the Bretton Woods Conference held in 1944 in New Hampshire. The Conference was successful in developing the institutions and agreements that dealt with the financial side of post-war global reconstruction, with the establishment of the International Bank for Reconstruction and Development, later to become known as the World Bank and the International Monetary Fund (IMF). The IMF was established to re-establish the international monetary and exchange rate system that had disintegrated and caused the economic and social upheavals in Europe and North America. The World Bank’s main purpose in the post-war period was less concerned with development and more concerned with encouraging foreign investment which had also fallen victim to the pre-war economic collapse and the War itself.<sup>2</sup>

The third pillar of the Bretton Woods System was supposed to be the World Trade Regime, which began as a series of conferences which established General Agreements on Tariffs and Trade (GATT) from 1946 to 1948. There was supposed to be an integrated coherence to the Bretton Woods system, with the IMF, the World Bank and the GATT collaborating on monetary, investment and trade policies to ensure that Europe, North America and Japan would rebuild their economies to the benefit of all citizens through full employment, greater investment, stable exchange rates and the political stability that such conditions bring in their train. As many have pointed out this ambitious program of the Bretton Woods system had many contradictions that upset the grand plan for post-war economic reconstruction.<sup>3</sup>

The leaders of the industrialized world had not envisaged that the GATT would be the central piece in the world trade regime. The plan was to create an institutional infrastructure around the GATT, in part to fulfill the objective of collaboration with the other Bretton Woods institutions. It is ironic that the idea for an institutional framework, labelled the International Trade

Organization, (ITO) for the GATT came principally from the United States who saw the need for oversight of the international monetary and trade systems as crucial for global peace and security.<sup>4</sup>

In 1945, the United States introduced a resolution at the brand new Economic and Social Council of the United Nations (ECOSOC) calling for a United Nations Conference on Trade *and Employment* to begin the task of starting multilateral tariff negotiations and drafting the charter for the ITO. After meetings in London, Lake Success, New York and Geneva from 1946 to 1947, in addition to tariff negotiations a draft of the ITO was prepared to be finalized in Havana, Cuba in 1948. The GATT was also drafted in Geneva along with the tariff negotiations. The purpose of the GATT was intended to be a very limited one, encapsulating the tariff reductions and some restrictions and protective clauses to ensure the tariff commitments were protected. The GATT was supposed to be an integral part of the ITO which would have the powers for overseeing and enforcing the GATT. The Havana Conference in 1948 completed the draft charter of the ITO and the highest order of priority was to have the United States, as the most important economy in the post-war world, ratify the ITO Charter. It did not happen.<sup>5</sup>

Just as with the cooling off on the high vision of the Atlantic Charter and the human rights proclamations within it, the United States Congress had become less internationalist and more concerned about American self-interest than during the War or immediately after it. It became clear that the U.S. Senate would not ratify the ITO Charter. In December of 1950, the U.S. Administration announced that it would not re-submit the ITO Charter to Congress for approval. The ITO was dead.<sup>6</sup> The tragic flaw began to creep into the world trade regime when self-interest won out over the original high aspirations of the Bretton Woods Institutions, derived from the original vision of the Atlantic Charter.

The death of the ITO would have serious consequences for the development of one of the most important features of global governance today, the global trade regime. By default the GATT, a minimal code for trade relations became the main game for the organizing and coordination of international trade rules. But what also died with the ITO Charter were the intentions to have a world trade regime that would be infused with the social dimensions of trade. For example, the

Havana Charter made explicit reference to the need to link the world trade regime with fair labour standards as a principle not only of Justice but also related to the underlying rationale for a rules based trading regime:

*...all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions particularly in production for export, create difficulties in international trade and accordingly each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within the territory.<sup>7</sup>*

It could be argued that it is a moral, legal and indeed economic imperative that the world trade regime returns to the vision of the Havana Charter in the area of labour standards and trade.

Devoid of its institutional framework, the GATT proceeded to develop over several rounds of multilateral negotiations with the major values underlying such negotiations being non-discrimination and reciprocity. There have been eight rounds of negotiations since the original GATT of 1947. These rounds became very technical in nature, focussing on tariff reductions and rules to prevent the subverting of negotiated tariff concessions. When global governance institutions develop from highly technical foundations, there is a tendency for such institutions to treat their technical objectives as ends in themselves. There is also the tendency for such institutional development lead by technical experts to become isolated from the other institutions of global governance. Experts tend to walk only in their space and talk only in their language. Some have argued that this is what occurred with the successive rounds of the GATT negotiations.<sup>8</sup>

The first five round rounds of the GATT dealt primarily with tariff reductions among the industrialised nations of the world and were of relatively short duration. The sixth round called the Kennedy Round from 1963 to 1967, achieved greater reductions of tariffs and began to discuss some of the trade issues of developing countries. There were minor concessions to these countries in terms of exemptions or lesser obligations in the emerging trade discipline of the GATT. The seventh round, the Tokyo round form 1973 to 1979 continued with the goal of

reducing tariffs further and began the complex and as yet unfinished business of dealing with non-tariff barriers. The move to deal with non-tariff barriers meant increasing intrusion into domestic policies of GATT contracting parties in order to protect negotiated concessions. This included the first discussions on subsidies and technical barriers to trade, taxation that discriminates against imports, dumping practices, state trading, customs procedures and other domestic practices that cause trade dislocations.<sup>9</sup>

The eighth round of the GATT negotiations called the Uruguay Round belatedly established the institutional infrastructure for the world trade regime in the form of the World Trade Organization (WTO), to continue the work of the GATT. In terms of global governance of the world economy, there is little doubt that this was the most significant change since the Bretton Woods conference and the failure of the ITO in the post War period. The creation of the institutional structure could not have come sooner. With WTO membership now extending to 153 nations, the global trade regime had to deal with areas formerly exempt from GATT rules or managed under separate agreements, such as agriculture, textiles, trade in services and intellectual property. Yet, the connection of labour standards to free and fair trade which was thought so central to the ITO was abandoned.

The WTO becomes the institutionalized personification of all the GATT rounds from 1947 to the Uruguay round which is termed GATT 1994, together with agreements established in the Uruguay round dealing with the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Trade Related Investment Measures (TRIMs) and agreements on trade in textiles and clothing together with an institutionalized dispute resolution system, a Trade Policy Review Mechanism (TPRM) and an annex with four “plurilateral agreements”. With the establishment of the WTO, the “contracting parties” of the GATT become the “members” of the WTO.<sup>10</sup>

In April 1994, the Final Act incorporating all these agreements was signed by 111 GATT member states in Marrakesh and it took effect in January of 1995, when the WTO came alive, but did not completely bury the ghost of the ITO. The technical success of the Uruguay Round and the establishment is significant although as we shall discuss there remain serious problems originating from the failure of the ITO.

First, the GATT rules from 1947 to 1994 provide an impressive “Code” of rules for the promotion of global free trade. These rules are designed to put limits on member states abilities to undermine negotiated concessions and so create restrictions or distortions of the policy goal of liberalized global trade. Fundamental “grundnorms” assist in this goal. These include the “Most Favoured Nation Clause” (MFN) that prohibits contracting parties from discriminating against products from other members. It also includes the “National Treatment” (NT) principle of non-discrimination against imports from other members of the WTO. The tariff concessions must not be exceeded by contracting parties and reinforced by other GATT rules. There are stipulated some limited exceptions to the above rules, such as those relating to national security, health and morals, trade related environmental measures, safeguards or escape clauses for temporary import restrictions, permission for regional trade agreements and a “waiver” power.<sup>11</sup>

The GATS extends the reach of the WTO deep into the economies of member states to encapsulate more than a hundred different types of services, such as banking, insurance, transport, communications etc. The GATT rounds of the 1980s extended to services because the world economy was generating more and more of its wealth from services and therefore increasingly in need of protection against anti-competitive and protectionist measures by contracting parties of the GATT. The trade negotiators and experts developed rules in this area by making analogies to trade in goods and eventually developed counterparts to the MFN and NT rules and schedules of concessions in the area of services. The GATS went further to develop rules on competition, anti-trust and government procurement together with similar exceptions to those dealing with trade in goods. There were also new provisions on transparency.

The TRIPS deal with an even more complex area than the global trade in services. As the global economy draws more of its wealth from knowledge based industries and activities, it was inevitable that trade rules would move from promoting liberalization in tangible goods to intangible assets which are protected by national and international intellectual property rules.

The rules aim at providing a minimum level of protection for all kind of intellectual property and to provide for enforceability of such rules through the WTO dispute settlement. The rules include

the requirement for member states to provide the legal infrastructure for protection of intellectual property, including legal remedies. There is also the equivalent of the MFN and NT provisions in the TRIPS rules.<sup>12</sup>

The above brief descriptions of the evolution of the world trade regime and the WTO show how the international trade negotiators and technical experts seemed to respond to evolving trends in the global economy, especially in the area of services and intellectual property. The power of the WTO rests partly in the fact that its Charter ties together all the various agreements in the Uruguay round and that countries wishing to become members of the WTO must accept the entire package. This allows the GATT type of multilateral negotiations to extend to the new areas of services and intellectual property. The fact that the WTO has legal status and functional powers to meet the challenges of changing trends in the global trade regime is the most major institutional improvement from the GATT.

The technical responsiveness to the changing picture of global trade shown in the establishment of the WTO, is not matched by responsiveness to existing and emerging trends in the social dimensions of trade, including labour, environment and human rights. Indeed many have argued that the impressive responsiveness to the growing importance of services and intellectual property by the trade experts have ignored the possible conflict between rules in these new trade areas and labour standards and human rights.

The various rounds of the GATT negotiations produced only a passing reference to “raising living standards” in the preamble of the GATT and an important exception to the MFN and NT groundnorms under Article XX(e) which permits GATT contracting parties and now WTO members to ban the import of goods made with prison labour. Likewise Article XX permits trade restrictions on certain public purpose grounds. However, any measures taken under this exception are to be “least trade restrictive”. Many argue that this approach, reinforced by GATT/WTO panels has narrowed rather than preserved the public purpose exceptions in the area of the environment and public health and safety.

## 2. THE FEAR OF PROTECTIONISM AND THE ROLE OF GLOBAL TRADE AND LABOUR INSTITUTIONS

It has the western industrialised countries who tried to get labour issues on to the WTO agenda, but have been stymied from doing so by the developing world. These countries regard western motivations in this area as profoundly protectionist and a disguised form of taking away the lower labour cost comparative advantage of the developing world. As we shall see, this perspective can be effectively countered, not only from a moral and legal perspective, but also from an economic perspective. At the first Ministerial Conference of the WTO in Singapore in 1996, the developing world was successful in blocking the WTO adopting a fair labour standards agenda. Instead, they succeeded in having the final communiqué dressing up the status quo in flowing rhetoric which affirmed that WTO members would:

*“...renew their commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased international trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage countries, must in no way be put into question. In this regard, we note that the WTO and the ILO Secretariat will continue their existing collaboration.”<sup>13</sup>*

In essence, the developing world pushed back the issue of fair labour standards to the international organization that was created to deal with it, namely the ILO. Some would argue that this was done, because of the track record of the ILO.

The ILO is the world’s oldest international organization, created in 1919 at the end of World War I with the mission of the “improvement of labour standards” as a condition of sustainable peace. The Declaration of Philadelphia in 1944 passed concurrently with the establishment of the Bretton Woods Institutions updated and expanded the mandate of the ILO to cover the promotion

of labour standards, economic advancement and social security, without taking a particular bias towards these issues, e.g. a trade union perspective. In previous books, co-authors and I have argued that this unique mandate has been both a strength and a weakness.<sup>14</sup> In the post World War II era the ILO has been sidelined by the tremendous growth of the international trade and financial markets, and the institutions that oversee them such as the WTO, the World Bank and the IMF, to the extent that even its own leadership questioned its survival. It was far more successful in the inter-war years, where it exercised global leadership in stopping practices such as slave trading.

In the post-war years the ILO seemed to have adopted a mission of assembly line standard setting, outside the trade realm. It has adopted some 175 international labour standards covering health and safety in the workplace, social security, minimum wages, collective bargaining, freedom of association, employment promotion, training, migrant workers, women and child workers and many sectoral standards. The enforcement of these standards has been abysmal. As we shall see, unlike the WTO or the IMF, the ILO has lacked an effective incentive system to obtain implementation of the plethora of labour standards it has promulgated. We have argued in a previous text that this external weakness is a reflection of an internal weakness of the ILO's governance structures. We have particularly critiqued the Eurocentric and legalistic approach to labour standards development by the ILO. It also continued to make the focus of its traditional tripartite structure the churning out of labour standards, unrelated to the growing trade and financial markets agenda, thus making its isolation greater and bringing its relevance more and more into question.<sup>15</sup>

Realizing its growing ineffectiveness, in the last two decades of the 20<sup>th</sup> Century, the ILO turned its attention to other critical functions such as technical assistance in promoting the Decent Work Agenda, employment, manpower planning corporate social responsibility and labour market development. Perhaps the most critical function that was taken on in this period by the ILO was the development of core labour standards which are binding on all member states.<sup>16</sup> Co-authors and I have argued elsewhere, however<sup>17</sup>, that the present structure of the ILO prevents it from taking its proper place in the system of global governance that can, by itself, promote a truly fair global labour market. In brief, the reasons for this scepticism are as follows.

The key three structures in the ILO are the International Labour Conference (ILC), the International Labour Office (the Office) and the Governing Body (GB). The ILC was developed on a unique tripartite basis where government, employer and worker representatives of the 170 members meet annually for three weeks to set broad policy orientations of the ILO, including adoption of resolutions and monitoring of the Conventions. The Office implements the policies and other directions of the GB. It is headed by a Director General elected by the GB every five years. The GB itself is elected every three years by the ILC, with 28 government representatives and 14 representatives for both workers and employers. Ten seats are specifically reserved for “States of Chief Industrial Importance” as determined by the GB. The extent of the implementation machinery of the ILO is as follows:

*“ Reports on ratified Conventions are required at regular intervals - two years for the “core” and a few other Conventions, and less frequently for the technical Conventions. Workers’ and employers’ organizations have the right to provide information. The reports are examined by the Committee of Experts on Application Conventions and Recommendations (the Committee of Experts), an independent technical body, and then by a tripartite Conference Committee of the ILC (the Conference Committee) which is a political body.*

*...In the case of serious, long standing violations of core Conventions, the Committee of Experts will decide to include the non-complying government in a special list in the Committee’s report to the Conference Plenary, which usually adopts these reports with little discussion.<sup>18</sup>*

As co-authors and I have shown elsewhere, these extremely weak supervisory procedures are supplemented by complaints procedures that may allow for more in-depth investigation and fact-finding. We have also discussed that as regards the most high profile of the complaints procedures, the Committee on Freedom of Association (CFA) there is conflicting evidence of its effectiveness, with at least one academic claiming a large degree of compliance with its findings while labour organizations have lambasted the record of compliance with CFA determinations. If the track record of compliance with CFA determinations by Canada, against whom a large

number of complaints have been lodged, is any example, the labour organizations are probably correct.<sup>19</sup>

This weak supervisory structure of the ILO stands in contrast to the more powerful structure of the WTO.<sup>20</sup> The highest body of the WTO is the Ministerial Conference which meets every two years and comprises representatives of all the member states, usually the Trade Ministers being the official representative. The Ministerial Conference is the highest authority over all WTO matters. The General Council holds its session between Ministerial Conference meetings and are comprised of country trade delegates. It is the main operational body of the WTO and has the authority of the Ministerial Conference between its meetings. The General Council also has the mandate as The Trade Policy Review Body (TPRB) and The Dispute Settlement Body (DSB). The Council for Trade in Goods, the Council for Trade in Services and The Council for Trade-Related Aspects of Intellectual Property are subsidiary bodies to the General Council to oversee their respective agreements established under the Uruguay Round, namely the GATT, the GATS and the TRIPs.

While all members of the WTO have an equal vote, the initial voting is usually done by consensus under Article IX of the WTO Charter. However, if a decision can not be arrived at by consensus, voting does take place and decisions are made by majority vote. It has been asserted that the initial decision making by consensus is a form of weighted voting because the mood of the Ministerial Conference and the General Council is often dominated by the powerful economic powers, especially the United States, the European Union and more recently China, India and Brazil. In addition, because the voting is by show of hands, again there is considerable influence by these nations in terms of how other nations, especially aid dependent nations and regional allies, will follow their lead in voting.

The DSB is responsible for the crucial dispute settlement system under the WTO Charter. This includes the critical functions of establishing the Dispute Settlement Panels (DSPs), adopting panel and appellate panel reports, authorising the use of sanctions by members pursuant to panel rulings and monitoring the implementation of the panels' rulings and recommendations.

As co-authors and I have discussed elsewhere, in the WTO Charter the adjudicatory model of hard rules and remedies as a means of enforcing the global trading regime was chosen over the softer and diplomatic model of reducing trade tensions and resolving trade disputes by diplomatic talks and compromise.<sup>21</sup> The previous GATT system had imposed a consensus model of approval of trade rulings before they could be implemented. This had led to long and sometimes permanent delays in resolving trade disputes. Under the WTO Charter, panel decisions are automatically adopted unless there is consensus to reject them, the opposite of the GATT system. Further hardening the world trade regime into a quasi-legal system are the strict time limits imposed and the recourse to appellate panels is available where there are disagreements on issues of trade law. The decisions of the appellate panels are binding on all parties and are monitored by the DSP as described above. Under the WTO Charter, cross-retaliation is permitted under which a member state can use tariffs to retaliate against trade practices which have been ruled contrary to the WTO Code.

What we have seen in the structure of the WTO, compared with the previous structure of the GATT, is a move from somewhat soft law to increasingly harder law as more and more WTO member states accept the discipline of the WTO Code as a prerequisite for being a member in good standing of the global economy. Unilateral trade distorting practices is likely to be used by fewer and fewer member states, given the possibility of recourse to the dispute settlement system by aggrieved member states.

It must be emphasised that the WTO does not itself have the power to sanction member states that violate the WTO Code. The legacy of the former soft law regime of global trade still lingers in that after the WTO trade dispute panels have ruled, the first preferred option is that the member in violation of the WTO Code cease the impugned practice. The second choice is that the member state in violation, pay compensation or failing that as a last resort, the aggrieved state can take WTO sanctioned retaliatory measures. In this sense, just as in soft law regimes, the WTO regime could be said to rely on self-help. However, unlike the ILO, which has no enforcement or deterrent power to get member states to adhere to adopted conventions, the WTO dispute settlement system can impose economic costs on members violating the WTO Code which may have deterrent effect. As we have discussed in a previous text,<sup>22</sup> while the more

dominant economic powers, like the United States, can still present significant challenges to the rules based WTO system, weaker member states have increased access to more equitable remedies in trade disputes with more powerful members through the dispute settlement panels. Whether this will actually be the case remains to be seen, given the fact that in 1996 about 90 % of trade disputes within the context of the WTO are between North American members, the European Union, Japan and increasingly China.

Nevertheless, the track record of the dispute settlement system of the WTO has been an excellent one since its establishment. One leading jurist, William J. Davey described the success of the system in the following manner:<sup>23</sup>

*The success of its dispute settlement system is critical to the success of the WTO itself. Only an effective dispute settlement can ensure rule enforcement, which in turn provides predictability and stability in trade relations....*

*Such an impressive record of implementation of the WTO Code stands in marked contrast to the lack of implementation of ILO Conventions by member states.*

It is obvious then, that the call by the 1996 WTO Ministerial Conference in Singapore to have the ILO as the competent body to deal with labour standards, while affirming their support for its work in promoting them, was a successful bid to maintain the unsatisfactory status quo on the linkage between trade and labour standards. From the same declaration, one can assume that the ILO and the WTO secretariats are collaborating, perhaps with a view to changing the unsatisfactory status quo. There is not much that is publically known about such collaboration.

Indeed the ILO may well have surprised everybody by taking the lead in changing the status quo by the development of core labour standards which are now binding on all member states of the ILO. Since such membership overlaps substantially that of the WTO, the emergences of new possibilities for change are on the horizon. As discussed above since 1919, the ILO has promulgated some 175 Conventions covering a huge variety of labour matters, sectors and categories. As discussed this productivity has also been the source of the ILO's ineffectiveness in impacting on the world trade regime.

In 1994, at the 81<sup>st</sup> Session of the ILO its future orientation and the reform of the workings of the Organization were high on its agenda. Various parts of the ILO, including the International Labour Office were tasked with developing strategies to increase its effectiveness. The work of various ILO Working groups and committees revealed that there was a desire to draw the link between social and economic development. There was a recognition that developing countries had a right to progress at a different pace from that of the developed world. There was also an acceptance lower labour costs by developing countries were a legitimate comparative advantage. However, there seemed a growing consensus in the ILO that this legitimate comparative advantage must be counterbalanced with three fundamental core labour rights, namely 1) Freedom of Association (ILO Convention 87) (2) The Right to Bargain Collectively (ILO Convention 98) and (3) The Absence of Forced or Compulsory Labour (ILO Conventions 29, 35 and 105). The ILO discussions on balancing social with economic development felt that within the trade context, these were a minimum threshold requirements for establishing the legitimacy of lower labour costs as a comparative trade advantage. In essence with these three fundamental labour rights as a threshold requirement, there would be a symmetry between freedom of trade and freedom of workers to trade their own commodity, namely labour. Outside the parameters of the link between fair trade and fair labour standards, the ILO discussions in 1994 and thereafter added two more core labour standards: (1) Prohibition of Exploitative Child Labour and (2) Freedom from Discrimination in Employment (particularly with respect to gender discrimination). At the 268<sup>th</sup> Session of the Governing Body of the ILO, the organization seemed galvanized by the recognition given to the strengthened role in the protection of fundamental labour rights by the ILO by the 1995Copenhaged World Summit on Social Development and ironically by the 1996 WTO Ministerial Conference in Singapore, discussed above. The urgency of finding a new focus for the ILO through such discussions and studies on the linkage between social and economic development, eventually lead to consideration by the Governing Body to formulate a Declaration that would confirm the existing obligations of all member states regarding certain fundamental labour standards. Both the Governing Body and the Director General were keen to emphasize that such a Declaration would not modify the Constitution of the WTO, but clarify its meaning in relation to fundamental principles of labour rights. The Governing Body finally authorized the Director General to prepare a draft Declaration of

principles concerning fundamental labour rights and its follow-up mechanism. The ILO distributed the draft Declaration and consulted with the tripartite constituents on the contents in May of 1998. Such careful preparation proved successful when the ILC at its 86<sup>th</sup> Session in June of 1998 to adopt a *Declaration on Fundamental Principles and Rights at Work* which set down the above five principles as the “core labour standards”. The relevant part of the Declaration states:

....all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) Freedom of association and the effective recognition of the right to collective bargaining;
- (b) The elimination of all forms of compulsory labour;
- (c) The effective abolition of child labour; and
- (d) The elimination of discrimination in respect of employment and occupation.<sup>24</sup>

The declaration specifically mentions that even these fundamental rights should not be used for protectionist trade purposes, nor to call into question the comparative advantage of any country. However, the follow-up provisions in keeping with the general weak supervisory mechanisms of the ILO, essentially involves annual reports by member states and reviews of such reports.

It is inevitable that those who oppose any linkage between trade and labour standards will claim that even these core fundamental labour rights are too vague to be effectively enforced through the WTO dispute settlement system. It could be argued for example that the freedom of association has proved to be a very complex concept even within the context of domestic legal systems such as that of Canada's.<sup>25</sup> In a previous text, my co-authors and I have argued that in domestic legal systems, labour markets and laws that regulate core labour standards work out the complexities meeting out both equity and efficiency considerations and address market failures, rather than a zero-sum game of winners and losers.<sup>26</sup>

In addition, as others have pointed out, the WTO Charter and affiliated agreements are replete with far more ambiguous and complex matters than the core labour standards outlined in the ILO Declaration on fundamental principles and rights at work. In particular, the relatively new WTO agenda on the GATS and the TRIPs, present much greater challenges in terms of ambiguity and complexity than those dealing with core labour standards as promulgated by the ILO.<sup>27</sup>

Given the particular linkage between trade and labour standards first enunciated in the Atlantic Charter, it is virtually irrefutable that all 175 members of the ILO, by remaining members, have accepted the legal obligation “to respect, to promote and to realize” the fundamental labour rights detailed above. This linkage must be acknowledged particularly as regards countries that have *existing legislation* that, in theory, obliges those covered by the legislation to respect such fundamental labour rights. The problem lies in the lack of enforcement of such domestic laws or complicity by the State in lax enforcement, as is often the case in Export Processing Zones (EPZs) around the world.

### **3. THE NEW GENERATION OF TRADE AND LABOUR AGREEMENTS; ATTEMPTS TO RESURRECT THE ORIGINAL PROMISE OF THE SOCIAL DIMENSIONS OF TRADE?**

The problematique then is that there are conflicting controversies spiralling around the link between trade and labour standard. While many in the developed world will allege that unfair or illegal distortion of trade relations results from exploitation of labour, the developing world will accuse it of disguised protectionism. The goal of any attempt to mediate this conflict is to demonstrate how labour standards are critical to economic development and social stability and can't be regarded as luxuries while protectionism can be examined from the lens of how labour standards are being urged upon by the developed world, not from the uncontested acceptance of fundamental principles related to all countries living up to their international legal and human rights obligations, including the universally recognized core ILO standards.

It is in this context that many of the western industrialized countries, including Canada has

embarked on an ambitious plan of developing primarily bilateral trade agreements that include labour and environmental provisions that are legally free-standing parts of the free trade agreement (FTA) but are a fundamental part of the entire agreement. The following description of the approach taken by Canada is based on a lecture at the University of Ottawa, Faculty of Law, presented by Pierre Bouchard, Director and Lead Labour Negotiator, Bilateral and Regional Labour Negotiations, HRSDC, Government of Canada.<sup>28</sup>

Canada asserts that its new approach to labour standards and trade supports its international development strategy by advancing growth, promotes good governance and enhances the rule of law. At the same time, it helps to build public support for liberalized trade through non-protectionist mechanisms that ensure that weak labour standards do not distort critical trade and investment flows. Indeed, the fundamental basis of the new FTA that include labour side agreements is that all parties have a commitment to observe the universally recognized core standards, effectively enforce domestic labour laws regarding these standards and agree to mutually beneficial mechanisms of consultation and cooperation. The Canadian FTAs also attempt to integrate effective dispute settlement processes that are transparent and may involve third-party assistance. In this manner, the new FTAs that Canada and others are establishing hope to have a more effective promotion of these core standards rather than rely on just the ILO ratification and weaker oversight processes.

Canada's new generation of FTAs that include these side agreements on labour have the following key characteristics:<sup>29</sup>

- A. Recognition of the universally recognized labour ILO labour standards.
- B. Obligation of bilateral FTAs to recognize and effectively implement core ILO labour standards in labour laws.
- C. These obligations include a chapter in the FTA and the side agreements.
- D. If dispute resolution determines FTA party is in breach, monetary assessments are imposed and deposited in a cooperation fund.
- E. Robust non-derogation clauses in the FTA and side agreements to prevent weak or improper labour laws enforcement used to attract trade and investment and so distort normal trade/investment flows.

- F. Emphasis on transparency for complaint procedures and in Council meetings of trade officials.
- G. Promotion of the ILO's Decent Work Agenda and corporate social responsibility.
- H. Canadian technical cooperation enhanced with such assistance being regarded as key to the success of the trade and labour side agreements. Canada provides approximately US\$9 million on labour related capacity building assistance in the Americas where much of the FTA work is focused while keeping the emphasis on the needs of the partner countries and involving the participation of labour, business and governments.

The latest FTAs that include such enhanced provisions in the trade and labour side agreement are the Canada-Peru FTA in effect since August of 2009 and the recently concluded Colombia, Jordan and Panama FTAs.<sup>30</sup> Negotiations for similar trade and labour agreements are continuing with the European Union, Caricom, CA3, South Korea, Singapore, Ukraine and Morocco.

The U.S. has also negotiated and are negotiating similar trade and labour side agreements most of them in Latin America, the Middle East and Asia and some of them have moved the labour provisions into the main free trade agreement.<sup>31</sup> The most controversial one seems to be U.S.-Colombia Trade Promotion Agreement that is still not ratified due to the concerns in the U.S. Congress on human rights abuses in the country, especially targeted at trade union activists.<sup>32</sup>

These new trade and labour linked FTAs stand in contrast to the much discussed and often maligned older generation of bilateral and regional FTAs such as the North American Agreement on Labour Cooperation established in 1994 and the Canada-Chile FTA of 1997 along with the Canada-Costa Rica FTA of 2002.<sup>33</sup> It was the criticisms levelled at these older generation FTAs that eventually lead to Canadian and U.S. governments, in particular, to negotiate enhanced legal obligations and their enforcement under the newer FTAs. Most of these new generation FTAs negotiated by the U.S. and Canada require the incorporation of core international labour standards into national laws while the US-Colombia FTA goes further by denying lack of resources to enforce national law and tightening up timelines for consultation, review and enforcement processes.<sup>34</sup>

Despite these enhancements, at least one leading expert in this field, Kevin Banks warns that while these newer generation FTAs “offer important potential gains in effectiveness for international labor law. However, in their present form these agreements are unlikely to lead to widespread improvements in respect for even the most fundamental of labor standards. This is because they rely too heavily on a complaints adjudication model of governance. The influence of adjudication is likely to be too episodic, too uninformed, too lacking in strategic focus, too divisive and too easily contained to handle the problem of raising labor standards on its own, or even as the principal strategy within a more complete toolkit of approaches.”

#### **4. THE NEXT FRONTIER FOR TRADE AND LABOUR STANDARDS AND CHALLENGES; BRINGING BACK THE SOCIAL DIMENSIONS OF TRADE INTO THE WTO?**

Given the multiplying number of similar trade and labour agreements from the United States and the European Union, there are key emerging challenges and opportunities:

- A. How does Canada work with the United States and European partners to promote the mainstreaming of trade and labour linkages resulting in the a critical mass of effective bilateral and regional trade agreements that include labour standards provisions.
- B. If Canada and other countries develop innovations that work in such FTAs, how can they be marketed to other actual and potential FTA negotiations that include labour standards provisions and perhaps even result in innovations that can further enhance the promotion of free and fair trade through respect for core labour standards.
- C. Using the track record of effective implementation of such enhanced trade and labour agreements to demonstrate to the developing world that the protectionist fears may not be justified.
- D. Examine alternative strategies proposed to accompany the new generation of FTAs, such as that proposed by Kevin Banks called the “leveraged deliberative cooperation” model exemplified by New Governance theory and experience under the U.S.- Cambodia Textiles Agreement.<sup>35</sup>

What is the most critical challenge and at the same time an opportunity is for there to be much

more developed countries coordination and cooperation. This challenge and opportunity is critical to draw in the larger developing countries such as India and China while at the same time assisting larger numbers of the smaller countries to obtain the political will and resources to negotiate such FTAs. In this regard, it is critical that Canada along with its main U.S., European, Australian and New Zealand partners to think about expanding the dialogue on the effective and non-protectionist trade and labour standard agreements to the WTO to achieve the objectives stated above.

I have suggested, along with co-authors, in two previous texts, the immediate dialogue on how to promote greater cooperation and coordination on the linkage between trade and labour standards (and indeed trade related environment issues), should take place in the Trade Policy Review Mechanism (TPRM) established within the WTO institutional structure. The following is how the WTO itself describes the TPRM:<sup>36</sup>

*The Trade Policy Review Mechanism was an early result of the [Uruguay Round](#), being provisionally established at the Montreal Mid-Term Review of the Round in December 1988. Article III of the Marrakech Agreement, agreed by Ministers in April 1994, placed the TPRM on a permanent footing as one of the WTO's basic functions and, with the entry into force of the WTO in 1995, the mandate of the TPRM was broadened to cover services trade and intellectual property.*

*The objectives of the TPRM, as expressed in [Annex 3](#) of the Marrakech Agreement, include facilitating the smooth functioning of the multilateral trading system by enhancing the transparency of Members' trade policies.*

*All [WTO Members](#) are subject to review under [the TPRM](#). The Annex mandates that the four Members with the largest shares of world trade (currently the European Communities, the United States, Japan and China) be reviewed each two years, the next 16 be reviewed each four years, and others be reviewed each six years. A longer period may be fixed for least-developed country Members.*

*In 1994, flexibility of up to six months was introduced into the review cycles, and in 1996 it was agreed that every second review of each of the first four trading entities should be an "interim" review.*

*Reviews are conducted by the [Trade Policy Review Body \(TPRB\)](#) on the basis of a policy statement by the Member under review and a report prepared by economists in the Secretariat's [Trade Policy Review Division](#).*

*The TPRB's debate is stimulated by two discussants, selected beforehand for this purpose.*

*In preparing its report, the Secretariat seeks the cooperation of the Member, but has the sole responsibility for the facts presented and views expressed.*

*The reports consist of detailed chapters examining the trade policies and practices of the*

*Member and describing trade policymaking institutions and the macroeconomic situation; these chapters are preceded by the Secretariat's [Summary Observations](#), which summarize the report and presents the Secretariat's perspective on the Member's trade policies. The Secretariat report and the Member's policy statement are published after the review meeting, along with the minutes of the meeting and the text of the TPRB Chairperson's [Concluding Remarks](#) delivered at the conclusion of the meeting.*

It is critical that there is a place at the WTO for member states to examine the complementarity between trade and labour standards in a constructive and non-confrontational way. As co-authors and I have previously discussed,<sup>37</sup> the TPRM was designed to institutionalize the periodic reviews of trade policies and practices of member countries in order to have a mechanism to oversee the evolution of the global trade law system. These reviews have been conducted since the Uruguay mid-term review in 1989. Member states that wish to show leadership in this area working with the WTO Secretariat including the Trade Policy Review Body (TPRB) and the ILO, could integrate their labour market policies into the review of their trade policies in order to examine the possibility of unfair trade restricting or distorting practices arising from such policies. This approach could be negotiated between the WTO member states the WTO Secretariat and the TPRB in association with the ILO, as the guidelines for TPRM reports.

There is no impediment (other than political will) to member states that wish to show leadership to work with the WTO Secretariat, with the assistance of the ILO, to go one step further and incorporate the newer approaches to bilateral and regional trade and labour standards FTAs into their review of their trade policies and practices. Charnovitz<sup>38</sup> has briefly suggested such an approach and Waer<sup>39</sup> suggests that given the lack of consensus on aspects of any social clause at the WTO, bringing labour standards within the ambit of the TPRM may be a significant achievement for those who support some sort of social clause in global trade rules.

The TPRM could be the locus to start the global debate on how the new generations of FTAs can either assist liberalised trade while avoiding the dangers of actual or perceived protectionism. If such leadership with the TPRM proves successful, then the WTO can be encouraged to include as a guideline for TPRM reports, analysis of how such FTAs can promote greater coordination and cooperation with other trading partners and enhances the global trading regime. The assistance of the ILO can be offered to developing countries who wish to embark on negotiations

of such trade and labour agreements without the obstacles of protectionism. The WTO Secretariat can monitor the development of such trade and labour FTA agreements within the TPRM and encourage other member countries to follow suit through the Trade Policy Review Body (TPRB) which reports to the WTO General Council on the implementation of the TPRM and how the global trading regime is developing. The TPRB working with the ILO would probably require additional resources if it is to take an active role in monitoring systemic barriers to global trade arising from weak enforcement of labour policies or worse still unacceptable exploitation of labour. There are reports that the WTO has admitted that, even without formal mandates to do so, labour issues are raised regularly in meetings of the TPRB.

For countries who recognize that their labour systems and markets may fall short of the ILO Declaration, incentives could be offered by the World Bank working in concert with the ILO and the TPRB to upgrade such labour systems and enforcement regimes and in implementing complimentary human resource development strategies.

## **5. CONCLUSION: MOVING THE DIALOGUE FROM SOFT LAW TO HARD LAW**

The benefit of this non-confrontational approach is that it may be the best way to develop conceptual and empirical understandings of the linkages between non-protectionist trade and labour agreements which could help to avoid the aggressive unilateralism in international labour standards by the U.S. or the European Union such as preferential tariff or financing status policies towards favoured developing countries. The non-confrontational approach could also expose potential trade related labour policies problems before they fester into full-blown trade disputes. In this sense, the reviews could be an exploratory first step that still allows an opportunity to turn back or proceed forward with more confidence.

We suggest this approach to the linkage between trade and labour standards because it does not need another WTO multilateral round of negotiations to achieve it. It needs, above all else, leadership and political will from member countries, especially those in the developed world who profess to be champions of the universally recognized core labour standards. Some may ask, what will it accomplish? One could have asked the same question when the ITO died and all that

was suggested was just more focussed talk and negotiations. The history of the GATT and later the WTO shows that much can emerge from forums that focus on the conceptual and empirical foundations of free and fair trade, while avoiding the possibility of unilateralism that could be a cover for protectionism. The TPRM can not be a vehicle for protectionism since paragraph A.i. of Annex 3 of the WTO Charter establishing the TPRM states clearly that the TPRM is not intended to serve as a basis for enforcement of specific obligations, or for dispute settlement procedures or to impose new policy commitments on members.<sup>40</sup>

Prior to those countries that have the political will to introduce the impact of the new generation of FTAs into the TPRM and the TPRB, there is great merit in establishing a global labour governance network. This network could comprise officials from states entering into these new FTAs, trade and labour standards experts, practitioners and academics and think tanks along with their counterparts from other states from around the world who are, or should be, contemplating entering into similar or complementary agreements. The purpose of such a network would be to establish the best knowledge and lessons learned foundation to continue the non-protectionist search to fulfill the original promise related to the social dimensions of trade and investment. This would then, hopefully, be translated into the trade and labour standards dialogue at the TPRM and TPRB at the WTO. Such a network could also promote new and innovative forms of strengthening labour standards that complement the newer FTAs through what Kevin Banks calls leveraged deliberative cooperation as exemplified in the U.S.-Cambodia Textiles Agreement.<sup>41</sup>

Such a soft law approach to a critical aspect of the social dimension of global trade will not satisfy those who advocate the inclusion of the social clause into the WTO Charter. However, it is not meant to be the exclusive means to address the labour dimensions of trade, but rather just the first step. Justice carefully planned and nurtured can sprout and grow with unexpected vigour. We have discussed elsewhere how this happened with the Universal Declaration of Human Rights which was intended to be only a non-binding resolution of the UN General Assembly.<sup>42</sup> There is no reason why it can not happen in this vital area of global trade and fundamental labour rights.

ENDNOTES

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- <sup>1</sup> See Paul Gordon Lauren, *The Evolution of Human Rights, Visions Seen*, (University of Pennsylvania Press, 1998) at pg. 142.
- <sup>2</sup> See John H. Jackson, William J. Davey, Alan O. Sykes, Jr., *Legal Problems of International Economic Relations*, 3<sup>rd</sup> Edition, (West Publishing Co., 1995) at pg. 278.
- <sup>3</sup> *Ibid* at pg. 279
- <sup>4</sup> *Ibid* at pp. 293-294.
- <sup>5</sup> *Ibid*.
- <sup>6</sup> *Ibid*. at pg. 295.
- <sup>7</sup> Cited by Raj Bhala, "Clarifying the Trade-Labour Link", (1998), *Columbia Journal of Transnational Law*, Vol. 37, no.1, 1998 at pp. 30-31.
- <sup>8</sup> See Tony McGrew, "The World Trade Organization, Technocracy or banana republic?" in Annie Taylor and Caroline Thomas, *Global Trade and Global Social Issues*, (Routledge, 1999) at pp. 197-216.
- <sup>9</sup> *Supra*, note 2 at pg. 314-317.
- <sup>10</sup> *Ibid*. at pp. 301-310.
- <sup>11</sup> *Ibid*. at pgs. 289- 291; See also, Asif H. Qureshi, *The World Trade Organization, Implementing International Trade Norms*, (Manchester University Press, 1996) at pp. 10-45.
- <sup>12</sup> *Ibid*.
- <sup>13</sup> Quoted in Report of the Standing Committee on Foreign Affairs and International Trade (SCFAIT Report), Bill Graham, M.P. Chair, "Canada and the Future of the World Trade Organization, Advancing a Millennium Agenda in the Public Interest", (House of Commons, Canada, 1999) at pg. 13-5.
- <sup>14</sup> Ozay Mehmet, Errol Mendes, Rob Sinding, *Towards a Fair Global Labour Market, Avoiding the New Slave Trade*, (Routledge, 1999) at pg. 10.
- <sup>15</sup> *Ibid*. at pp. 70-74.
- <sup>16</sup> *Ibid*. at pp. 74-77.
- <sup>17</sup> *Ibid*.
- <sup>18</sup> *Ibid*. at pg. 71.
- <sup>19</sup> *Ibid*. at pg. 74.
- <sup>20</sup> For an excellent description of the structure of the WTO, see Qureshi, *supra*, note 11, at pp. 5-9.
- <sup>21</sup> Mehmet, Mendes and Sinding, *Supra*, note 14, at pg. 78.
- <sup>22</sup> *Ibid*. at pg. 81.
- <sup>23</sup> William J. Davey, "The WTO Dispute Settlement System", *Journal of International Economic Law* (2000) 15-18.
- <sup>24</sup> ILO Declaration on Fundamental Principles and Rights at Work, 86<sup>th</sup> Session, Geneva, June 1998. The Declaration can be located at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm>
- <sup>25</sup> See R.T. Stranks, "Look Before You Leap: 'Core' Labour Rights", Policy Staff Commentary, No.14, (Department of Foreign Affairs and International Trade, Ottawa, 1996).
- <sup>26</sup> Mehmet, Mendes, Sinding, *supra*, note 14, at pg. 89.
- <sup>27</sup> SCFAIT Report, *supra*, note 13 at pg. 13-8.
- <sup>28</sup> Guest lecture by Pierre Bouchard to a law class at the Faculty of Law, University of Ottawa, January, 2010.
- <sup>29</sup> *Ibid*.
- <sup>30</sup> The full texts of these FTAs can be found at <http://www.hrsdc.gc.ca/eng/lp/ila/index.shtm> .
- <sup>31</sup> The United States Trade Representative website has the full text of these agreements: <http://www.ustr.gov/trade-agreements/free-trade-agreements>
- <sup>32</sup> United States-Colombia Trade Promotion Agreement, U.S.-Col., Nov. 22, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta>
- <sup>33</sup> See the excellent analysis of the challenges under the NAALC, see Marley S. Weiss, "Two Steps Forward, One Step Back – Or Vice Versa: Labor Rights under Free Trade Agreements from NAFTA, Through Jordan, Via Chile, to Latin America and Beyond", 37 U.S.F. L. Rev. 689 (2003). For a discussion of some redeeming features of the NAALC, see Kevin Banks "Trade, Labor and International Governance – An Inquiry into the Potential Effectiveness of the New International Labor Law" at pg. 41 et seq., Electronic copy available at: <http://ssrn.com/abstract=1657745>
- <sup>34</sup> Kevin Banks, *ibid*. at pg. 9
- <sup>35</sup> *Ibid* at pgs. 58 et seq.
- <sup>36</sup> See the website of the WTO at the following url: [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp\\_int\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp_int_e.htm)  
There is a growing body of academic analysis of the TPRM mechanism, see e.g.:

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Qureshi, Asif H. (1995), "Some Lessons from 'Developing' Countries' Trade Policy Reviews in the GATT Framework: An Enforcement Perspective", *The World Economy*, Vol.18 No. 3, pp. 489-503; Krueger, Anne (1995), "U.S. Trade Policy and the GATT Review", *The World Economy: Global Trade Policy 1995*; Wonnacott, R. (1996), "Canada", *The World Economy: Global Trade Policy 1996*.

<sup>37</sup> Mehmet, Mendes, Sinding, *supra*, note 14 at pp. 202-204.

<sup>38</sup> See Steve Charnovitz "Environmental labour standards in trade" *The World Economy* Vol 15(3), 335 (1992).

<sup>39</sup> P.Waer "Social clauses in international trade: the debate in the European Union" *Journal of World Trade Law* Vol 30(4) (1996).

<sup>40</sup> For further discussion of the TPRM, and the TPRB, see Qureshi, *supra*, note 11 at pp. 108-125.

<sup>41</sup> Kevin Banks, *supra*, note 33 at pgs.87 et seq.

<sup>42</sup> For a discussion of how the soft law of the Universal Declaration of Human Rights evolved into the foundation of the massive body of international human rights law, see Errol Mendes & Ozay Mehmet, *Global Governance, Economy and Law, Waiting for Justice*, (Routledge; London & New York, 2003) at pgs.9-17.