

INCLUSION OF SOCIAL AND ENVIRONMENTAL STANDARDS IN FREE TRADE AGREEMENTS

NEW THINKING ON TRADE AND DEVELOPMENT



PSE

Socialist Group in the
European Parliament

This Socialist Group pamphlet is the latest in a series of publications on the links between Trade and Development. We wanted to open up the debate to contributions from outside experts, so that they can compare their approaches with those of our MEPs and help us to further develop our own analyses and proposals. This fifth pamphlet focuses on the inclusion of social and environmental standards in international trade agreements and in particular in bilateral free trade agreements (FTAs).

The EU's trade policy is rather inconsistent in this respect. On the one hand the EU stresses its desire to pursue multilateralism as a priority. On the other hand it has embarked on negotiating an impressive set of bilateral and regional agreements with the aim of concluding these by sometimes unrealistic deadlines (South Korea, India, ASEAN, Russia, Gulf Cooperation Council, Mediterranean countries) even though it has not yet succeeded in finalising longstanding negotiations, in particular with Mercosur.

Moreover, the EU wishes, quite rightly, to establish itself as the promoter of a regulated globalisation, which not only lays down multilateral trade rules but also enhances its social and environmental rules and ensures that they are effectively implemented. Its determination to combat climate change is real and well known. In 2005 it also adopted a communication on decent work which includes a commitment to making this a permanent element of its external policies. However, declarations of intent in this area have had little practical impact. Although sustainable development objectives are indeed mentioned in the draft free trade agreements currently being negotiated by the EU, compliance with fundamental social standards, in particular trade union freedoms, is notable by its absence. In fact, the United States does better than the EU in this area.

However, the negotiation of bilateral trade agreements is an important instrument for promoting a new link between opening up trade and respecting the fundamental social rights of workers.

This is the context that has led the Socialist Group to think about how best to use the new provisions in the Lisbon Treaty to influence the way in which European trade policy in the 21st century is defined. If the new Treaty is ratified it will strengthen Parliament's powers in this area. The Socialist Group's objective is to include high social and environmental standards in all new FTAs with a view to promoting sustainable development in all of its dimensions. Moving trade policy in this direction would contribute to balanced development in the countries signing FTAs. In addition, the Socialist Group wants to continue to combat the risks of social, environmental and fiscal dumping within the EU and in third countries. The Socialist Group is not trying to curb the opening up of trade but wants to promote a trade policy adapted to the accelerated pace of globalisation and changes in the global trade system.

This booklet contains contributions by Elisa Ferreira (MEP, PSE coordinator of the European Parliament's Committee on Economic and Monetary Affairs) and myself, and Thomas Greven (Visiting Researcher, German Institute for International Relations), Kevin Kolben (Assistant Professor, Rutgers Business School, New Jersey, USA) and Joël Decaillon (ETUC Confederal Secretary) which will help to launch the debate on the inclusion of social and environmental standards in FTAs. Please send your comments to the following address: pse-newtradethinking@europarl.europa.eu

Our next booklet will deal with the theme 'The WTO after Doha'

Harlem Désir

Social standards in trade agreements: the debate is not over

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The debate on including social clauses in trade agreements was blocked by developing countries at the first WTO Ministerial Conference in Singapore in 1996, then again in Seattle in 1999. Developing countries took the view that the higher costs involved in setting higher social standards would weaken their comparative advantage and that this was a new pretext by the rich countries to impose protectionist measures on them.

Does this mean that the debate is definitively over and no progress is possible; in short, that nothing more can be achieved in this area?

This widely accepted idea is convenient for many people, but it is incorrect: firstly, because the terms of the debate have begun to change; secondly, because social clauses have already found their way into trade agreements; lastly, because it can be seen that giving social guarantees as conditions for opening up trade is in the interest of those who want to avoid protectionism, not those who want to return to it.

The origins of 'decent work'

The terms of the debate have begun to change over recent years. This is largely because of the efforts of the ILO and its Director-General, Juan Somavia, to define more clearly the nature of the social standards to be taken into consideration at international level. At the 'World Summit for Social Development' in Copenhagen in 1995, the ILO succeeded in establishing four principles as the basis of 'core labour standards': elimination of forced labour; effective abolition of child labour; elimination of discrimination in employment; and, finally, respect for freedom of association and the right to collective bargaining on pay and working conditions – which is tied in with trade union freedom. These principles are codified in eight conventions for which the ILO seeks universal ratification. These conventions do not allow any trade restrictions against a country in the South to be justified solely on the basis of a lower labour cost than in rich countries. Wage and labour cost differences linked to development gaps are an indisputable comparative advantage, which for countries with high wage costs, are compensated by greater labour productivity, technological advance and innovative capacity, etc., which enables high-cost labour products to be sold on the global market. However, competition cannot be based on suppressing social freedoms and fundamental human rights. This principle is already implicitly recognised by the exclusion of products made using prison labour from entitlements under WTO rules.

The ILO then took the initiative of setting up a 'World Commission on the Social Dimension of Globalization', co-chaired by the Presidents of Finland and Tanzania, and bringing together political, economic and trade union leaders from all continents. In 2004 this commission carried out an analysis of the impact of globalisation on employment and working conditions and proposed the global promotion of 'decent work'.

What is involved? The agenda for decent work goes beyond simply respecting the ILO's legal standards. It does not neglect them, but encompasses them in a wider approach, that is closer to the actual situation of workers. What is at stake and has to be defended is the fundamental right of every individual to live and not simply to survive by working – and to reap fair rewards from what they do. This agenda lays emphasis first of all on giving priority to job creation in economic and social policies; then on the fact that regardless of levels of development, wherever income is generated by labour it should enable workers and their families to be able to live (without this how can child labour be tackled, how can children be given schooling, etc.?); finally, employment must provide access to social protection and work should be carried out in conditions that are compatible with the safety, health and dignity of workers. Workers must also have the freedom to organise so they can voice their demands and negotiate. These are basic universal rights that all states should and can make a commitment to respecting. No under-development justifies letting trade unionists from a multinational subsidiary be assassinated by death squads as has been seen in Central America.

The ILO and the global trade union movement have launched an international campaign to promote the right to decent work. This defines the basis of the joint fight by workers in the North and the South for the rights of workers not to be hijacked by the conditions of global competition.

Decent work is currently making its way on to the international agenda. In 2005, an important stage was reached at the UN General Assembly on the implementation of the Millennium Development Goals. For the first time, all the members of the United Nations, both developing and industrialised countries, recognised in their final declaration that decent work is a priority in the context of poverty eradication. The issue now is to make it an effective goal of all policies of global institutions; not only the ILO, but also the World Bank, the IMF and the WTO, and obviously all members of the international community as well.

In 2006, decent work was the subject of a first European Commission communication, presented by the Commissioner for Social Affairs and the Commissioner for Trade.

China's entry into the WTO and the end of the multifibre agreements, of which China was the main beneficiary to the detriment of other developing countries, has shown that it could be in the interest of these countries themselves for minimum social standards to be respected in international trade.

Including social standards in free trade agreements

It is possible to establish a link between opening up to trade and respecting social standards in trade agreements, all the more so because this is already codified in some agreements. They are a useful precedent, even though the precedent so far has had little

impact. The European Union thus makes the signature of certain bilateral trade agreements conditional on ratifying UN and ILO treaties and protocols. As part of the GSP+ (Generalised System of Preferences plus), it grants developing countries preferential access to the European market with lower customs duties, in exchange, notably, for commitments of this kind from the beneficiary countries. However, the suspension of trade benefits is rarely applied in cases of breaches of the right to organise.

In the United States in recent years, the Democrats, having a majority in Congress, have imposed increasingly specific social clauses in all free trade agreements. This applies to the agreements with Jordan and Oman, and particularly rigorously to the conditions for the implementation of agreements signed with Peru, Guatemala and Korea, which are awaiting ratification.

Chapter 19 of the Free Trade Agreement between the United States and Korea, for example, takes as its basis the 1998 ILO Declaration on Fundamental Principles and Rights at Work: the guarantee of freedom of association; the right to collective bargaining; the elimination of all forced labour; the abolition of child labour and the elimination of discrimination in respect of employment and occupation. There are provisions in particular for mutual monitoring mechanisms and the possibility of suspending trade benefits if one of the parties does not meet these obligations.

All bilateral free trade agreements currently being negotiated between the EU and Korea, India, etc., should include similar social clauses. This is not happening, however, and the US is currently doing better than the EU in terms of promoting freedom of association and social standards in return for trade.

The debate also needs to be reopened within the WTO. Cooperation has been established between the WTO and the ILO, under the aegis of the two directors-general, Juan Somavia and Pascal Lamy, both of whom are socialists. The ILO should, however, be given genuine observer status as is the case for the IMF. It should be able to give opinions on the agreements negotiated and on rulings by the Dispute Settlement Body. ILO decisions on trade rules in cases of breaches of fundamental social standards would have to be recognised as having precedence and ratifying the main ILO conventions would have to be a prerequisite to joining the WTO, which was not the case recently for China or Vietnam. The EU could start by asking for a 'Trade and Decent Work Committee' to be set up within the WTO to debate these issues, based on the model of the 'Trade and Environment Committee' which has enabled great progress to be made. It should be noted that the European Parliament included all the proposals from the Socialist Group in its report on decent work adopted in 2007.

However, to ensure that changes take place at the WTO, an institution whose rules are fixed by its member states, then the battle has to be fought not only within the WTO, but also at a national level, by mobilising public opinion, the trade union movement and MPs so that these demands become part of the negotiating mandate of national governments as well.

Making 'decent work' a reality...

Protectionism is certainly not the right response for industrialised countries and the EU in the face of the upheavals in the global economy and the growing power of emerging countries. One would have to be blind, however, not to see the pressure building in this direction, both from public opinion and the trade union movement. The US presidential campaign illustrates this, as does the debate in Europe on the relationship between trade and combating climate change. Growing economic and social concern as a result of the downturn following the sub-prime crisis will not reduce this trend.

However, it is liberalisation without rules, of which the absence of a social dimension is a part, which contributes to people protesting against globalisation. This is trade without social standards, leaving the door open for all kinds of abuses, such as forced labour, overexploitation, absence of trade union freedoms, which ends up triggering protectionist reflexes. Giving globalisation a social dimension and standing up for respect for the rights of workers not only promotes a fairer world but also keeps our chances of a more open world alive.

This is why the socialist movement has to make decent work a key part of its international campaigns. It means the social question can be put back at the heart of international debate through a regulatory and non-protectionist approach. It contributes to creating the conditions for equitable globalisation and fair trade by combating all forms of modern slavery. It strengthens the links of solidarity between trade unions in the South and in the North.

The EU should commit itself much more vigorously to this fight which so deeply matches its values and interests. This is why it must put decent work at the heart of its development aid policies and its trade policy.

The Global Progressive Forum (GPF)¹, created at the initiative of the PSE with the support of the Socialist International, wants to help in this process and continue the fight through its actions carried out with international trade unions and NGO platforms in the 'Alliance for Decent Work', so that, as a priority, decent work becomes a reality.

A Socialist Priority: the inclusion of social and environmental standards in FTAs

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In 2006, when the Doha Round negotiations were temporarily suspended, the European Commission presented a 'second-best plan' until the multilateral negotiations either come to a successful end or to its ultimate demise. This plan consists, among others, of Free Trade Agreements (FTAs), also known as bilateral or regional agreements, which the EU plans to sign (and is in practice negotiating) with various key trading partners, in a parallel move to the strategy of other major trading blocks, namely the USA.

According to the Commission, FTAs can help EU companies enter and benefit from the gains of strong fast growing emerging markets, whereas opening European markets can stimulate internal competition and benefit European consumers.

The real question is: what will these Free Trade Agreements consist of? The Commission, in its *Global Europe: Competing in the World* Green Paper, claims that these Free Trade Agreements 'are a stepping stone for future liberalisation, not a stumbling block, by building on the WTO'² and that 'economic criteria' will be a primary consideration for these agreements. Does this mean that the EU will enter into agreements *solely* on economic value *alone*? It seems rational to suppose so; what other reasons would there be but mutual economic gain for either partner? But, does this restrain the Commission from including other elements in these agreements?

Whereas the EU is already one of the most open economies in the world in most sectors this does not mean that the EU should abstain from improving the conditions of such trade. One major issue in these negotiations should be to ensure the inclusion of social and environmental standards in trade deals – a controversial issue for many emerging and developing countries and consequently an extremely difficult issue to be dealt with (as experience shows) in a multilateral context, such as the WTO.

Social and environmental standards

Whereas the EU is encumbering its industry and services to abide by strict and increasingly demanding social, health and environmental standards, it would only seem fair to ask for a compatible level of compliance from its major trading partners, contributing to the progressive establishment of a minimum worldwide level playing field; the protection of

² European Commission Green Paper: 'Global Europe – Competing in the World', October 2006

absolute, universal values such as human and labour rights or environment and climate should not be treated as protectionism. In the absence of an international acceptance of such standards, the most obvious consequence of Europe's persistency would be an eventual 'leakage' of dangerous practices into less demanding and less organised societies. However, at the WTO level, progress along such issues has been extremely scarce, if any at all.

Another argument often put forward defends that such deals should be restricted to trade and not try to enclose other elements in the equation. These arguments have been put forth namely by both India and China, two of the emerging giants of international trade. However, the setting of a minimum of common rules is essential to prevent global competition from stimulating a 'race to the bottom' through the sacrifice of the most essential elements of human, social and environmental rights and values; furthermore, the comparative advantage of most of the emerging economies in pure cost terms is so strong that they would hardly risk being seriously damaged if such standards would be followed both by local producers and by delocalized European firms.

Apparently, some of the difficulties arising from the multilateral dimension of agreements in the WTO context could be more easily overcome when dealing with powerful trade partners on a bilateral basis. Is the European political will on such issues strong enough to resist the pressure from all those who see their introduction as disturbing elements in their short term ambition to maximize gains from deregulated trade?

Admitting that minimum standards would progressively gain room in trade negotiations, another question arises on how such standards will be implemented.

After the agreement comes implementation

The US Government has also expressed the opinion that FTAs provide for groundbreaking cooperation in promoting labour rights and environmental policy. The problem, however, is that even though most countries, including developing and emerging economies, may agree to sign up to internationally recognized rights (e.g. the ILO Conventions) or to the protection of the environment (e.g. Montreal Convention, Kyoto Protocol), signature does not necessarily mean enforcement. Non-compliance may be a consequence of a lack of institutional capacity to enforce and monitor the application of standards; other countries just plain ignore them so as to gain a preferential competitive edge for attracting foreign investment. Therefore, a second important question relates to how to enforce implementation.

At the moment, the EU claims to be pursuing its own strategy for promoting the respect of these standards via dialogue and an incentive-based approach and states that 'promoting social [and environmental] rights is a positive element in fostering the competitiveness of countries and not an impediment to the development competitive advantage'. It supports the principle that trade policy needs to be 'formulated both so that it supports environmental policies and action, and takes into account its potential impacts on the environment'. In pursuing this line of action, the EU has insisted that these issues, such as improving market access for environmental goods and services (although the concept requires further discussion) and clarifying the relationship between WTO rules and Multilateral Environmental Agreements (MEAs), are dealt with at WTO level. It has also

promised to undertake Trade Sustainability Impact Assessments (SIAs) before signing any FTA so as to identify the potential economic, social and environmental impacts of any given trade agreement. The European Parliament, and especially the European Socialist Group, has been asking the Commission to make sure trade negotiations at all levels strive to qualify international trade in terms of global social, environmental and human rights commitments and to lay down the principles and content of the envisaged social and environmental chapter of new FTAs and how to promote acceptance of such chapters with our trade partners. However, it must be recognised that, apart from political pressure, the European Parliament's power on trade affairs is, under the present institutional structure and before the ratification of the Lisbon Treaty, extremely feeble.

To sum up, more and more consumers are expressing support and preference for companies and products that comply with environmental and social standards; however, 'what the consumer does not know, won't hurt him'; in other words, apart from agreeing and negotiating internationally (bilaterally) minimum standards, real monitoring of their implementation (by non-EU located companies that gain free access to the EU market), together with adequate consumer information will be absolutely essential.

Particularly at the moment when the EU is strongly engaging into new compromises to combat climate change, it is vital that such compromises, together with already achieved environmental and social targets are extended internationally, generating a win-win situation, not only on a quantitative-short term private basis but rather at the level of the whole society including a long-term qualitative and sustainability dimension. FTAs may be a unique opportunity to tackle the issue, before it can also be properly addressed at the multilateral level, providing the strong political will is there.



Labour Rights and International Trade

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In trade policy debates, social policy is generally considered a national responsibility. Still, there is a growing realization that so called 'behind the border issues' cannot be kept off the trade policy agenda indefinitely, because otherwise there might be a widespread backlash against globalization. Global liberal capitalism lacks legitimacy without governance of social aspects. The preference, however, is clearly to find ways for *national* policymakers to compensate those that stand to lose from open trade and the free flow of capital. Still, as a result of pressure from OECD labour movements and the global justice movement, one issue has been a constant since the 1980s: International social standards and core labour rights.

Social Standards, Labour Rights and International Trade Theories

Based on neoclassical economic thinking, opponents of an inclusion of enforceable protections for labour rights in trading regimes claim that social standards can be best improved by the economic growth an open trading regime provides, and that labour rights protections would only diminish the comparative advantage of developing and newly industrializing countries. They see the demand for labour rights protections as a protectionist ploy of OECD industrial unions. The benefits of international trade are so great, they believe, that potential losers can be compensated.

By itself, however, openness to trade neither automatically leads to economic growth nor secures an equitable distribution of the benefits. Effective institutions are keys for growth and distribution. In addition, losers of increased openness are not compensated, as the political balance of powers is not in their favour. Social standards are not improved in a 'trickle down' fashion.

Instead they are endangered by international competition. Institutionalist economists point to the preamble of the ILO's 1919 constitution: 'Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.' With borders increasingly open to goods, services, and capital – less so to labour – the danger of ruinous competition in terms of social standards is even more pronounced today, as many countries and companies strive to gain competitive advantages. Institutionalists argue that labour markets need protections for those without an exit option – the employees – because otherwise they will undercut each other and cause the market to fail in the end.

The danger of ruinous competition is especially pronounced between countries which base their comparative advantage on similar factor endowments, i.e. low labour costs. Moreover, relying on cheap labour may produce a specialization trap. An agreement on minimum social protections will force investments in productivity.

If labour rights protections are so beneficial for development, why are they not voluntarily enforced? In many countries authoritarian governments fear unions as centres of opposition. There is concern about whether the long-term advantages of high social standards can be realized in the short-term. The short-term advantage for any company or country willing to undercut social standards constitutes a collective action problem that can be solved by effective regulation. However, regulation cannot secure enforcement. States may simply not have the capacity. Effective enforcement is costly, especially if voluntary compliance is missing, e.g. if employers simply refuse to accept unions. A change in political culture may be necessary. In other words, regulation does by itself not end the struggle over social policies, especially when the power at the workplace is concerned.

Accordingly, there has been considerable excitement about Non-Governmental Organizations (NGOs), hailed by some observers as the precursors of a global civil society that could compensate for the loss of state regulatory capacity. NGOs have indeed been able to mobilize pressure concerning labour rights. They have pressured transnational enterprises (TNEs) to establish codes of conduct to guide their global activities with regard to employment practices, including, in many cases, their suppliers. The sustainability of these efforts, however, is ultimately dependent on codification and institutionalization. In other words, voluntarist activity can, for a time, put TNEs on the defensive and force them to at least pay some attention to labour rights, but the mobilization will wane. Ultimately, an institutional arrangement is called for which can legitimize and enable unions, NGOs and others to engage in collective action.

Some authors have pointed to the long-standing experience of self-governance of unions and employer associations in systems of industrial relations. There have been efforts to extend these corporatist arrangements globally, through the establishment of firm-level or sector-level inter-union institutions such as World Works Councils or so called International Framework Agreements (IFAs) between Global Union Federations, national unions and transnational enterprises (TNEs). However, the extension and effectiveness of these institutions is unlikely because the national industrial relations institutions that make them possible are eroding.

All theoretical perspectives offer important insights. The neoliberal perspective highlights the fact that there has to be economic growth before social standards can be improved and redistribution can take place. The neo-institutionalist perspective points out that development and growth have institutional foundations and that institutional designs can hinder or favour redistributive effects and equity and improve or worsen social standards. The neo-voluntarist argument reminds us that questions of institutional design are not decided by intellectuals at the drawing board but through political struggles. Neo-corporatism points out that mobilization is unlikely to be sustainable, and that there have to be institutions that allow for the legitimate participation of representative social organizations such as unions.

Empirical Developments and Important Actors

The WTO Debate on Labour Rights

The core ILO conventions have achieved the status of universally accepted human rights. However, at no time has the ILO been capable of securing their enforcement. Therefore, there have been several attempts to establish more enforceable multilateral labour rights provisions.

In 1948, the draft constitution of the stillborn International Trade Organization (ITO) included an explicit, albeit vague, linkage of trade and social standards in Chapter II, Art. 7. No such labour rights provision was included in the General Agreement on Tariffs and Trade (GATT), which merely extended to member states the right to discriminate against products made with prison labour in Article XX(e). Starting in 1953, the United States repeatedly proposed a labour rights provision for the GATT. Based on the international labour movement's and especially US industrial unions' renewed support of a labour rights provision in the GATT/WTO and other trade agreements, subsequent US administrations have been pressured by Congress to advocate labour rights protections in the WTO regime, but the proposal failed to attract support from developing and newly industrializing countries. Instead, the US started to introduce labour rights provisions in its trade legislation and bilateral trade agreements in the 1980s. The European Union, which has supported a working group on labour rights at the WTO and increased cooperation between the ILO and the WTO, followed suit in the 1990s, introducing labour rights provisions in its trade policy agenda.

The 1996 WTO ministerial conference in Singapore declined responsibility for the rights of the workers who produce goods for international trade. Instead, in their final declaration on December 13, 1996, the ministers referred primary responsibility to the ILO: 'We renew our commitment to the observance of internationally recognised core labour standards. The International Labour Organisation (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 trade and further trade liberalisation 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 developing countries, must in no way be put into question.' With little variation and progress, this position on the most contentious of the so called 'Singapore issues' was reiterated at subsequent WTO ministerial conferences. Cooperation between the WTO and ILO has improved somewhat, but without a mechanism for the enforcement of labour rights it remains largely informal and ineffective.

Beyond the WTO: Codes of Conduct and Labour Rights Provisions in Bilateral and Regional Trade Agreements

In an attempt to restart the debate after labour rights proposals failed at WTO ministerial conferences, civil society actors increased their efforts to push individual transnational enterprises to adopt so called codes of conduct, voluntarily binding the companies to different sets of labour rights. In the 1970s, there had been multilateral efforts to establish such codes of conducts by the ILO and the OECD but they never received serious support by companies or governments. The OECD Guidelines for Multinational

Enterprises were reformed and re-activated, but still lack enforcement mechanisms. At the UN, the Global Compact has been signed by many transnational enterprises (TNEs), but critics point out that it does not compel companies to change their business practices.

Recently, there seems to be a lack of public pressure to enforce the myriad of 'voluntary' codes of conduct. Perhaps the famed anti-sweatshop movement is already past its peak. Moreover, civil society pressure was never enough to affect more than a small number of producers of brand name consumer goods. Some observers have also detected a 'monitoring fatigue' of factory managers in developing countries because of the multiple labour rights schemes by Western TNEs. On the other hand, several unions and Global Union Federations (GUFs) have been able to negotiate so called International Framework Agreements (IFAs) with TNEs. IFAs essentially are contractual codes of conduct, but most IFAs have been concluded with relatively labour-friendly European companies, while more adversarial US, Japanese and Korean TNEs have not been supportive. Also, GUFs lack the resources to enforce IFAs down the production chain to cover suppliers and subcontractors.

Still, there has been some progress. A growing number of trade agreements include references to human and labour rights, some in 'soft' ways ('affirming', 'recognizing', or 'declaring'), some with 'harder' conditions, including possible trade sanctions for non-enforcement of national labour law. However, it remains to be seen whether references to general human rights in European Union agreements can be translated into progress for specific labour rights or standards, which are mentioned in far fewer agreements, mostly in those of the US. Also, some developing country governments now see labour rights as a bargaining chip in bilateral negotiations, trading commitments to progress in this area for concessions in other areas. This may be a viable strategy, as the EU (and to a certain extent the US) stress that social and labour standards have to be raised 'without protectionism.'

There has also been progress on international labour rights at the World Bank. There is a growing consensus that core labour rights may be beneficial to development, because respect for them results in a more equal distribution of income. Freedom of association remains controversial, however. And while the World Bank now officially supports the promotion of all core labour rights, its operational policy remains mostly tantamount to 'de facto recommendation to violate' these same standards. Often, loan conditions appear to work in the opposite direction because they constitute recommendations to reduce wage levels or increase labour market flexibility. Unions have pushed the World Bank and other international agencies for consistency in terms of the promotion of labour rights.

However, while a growing number of developing and newly industrialized countries are expressing concern about capital flight to China, often based on low social standards and thus cheaper labour, the accession of China to the WTO gives it a de facto veto over any progress. A way forward may start within the economic debate. The traditional dichotomy of free trade vs. protectionism, which has structured the economic and political debate, seems increasingly anachronistic in a world of open borders. The debate needs to focus on the question of whether a globalizing labour market needs global regulation. Contrary to the assumptions of those promoting regulatory competition, the market cannot be the mechanism to determine the extent of its own regulation – this remains a political question.

Labour Standards and the EU-India Free Trade Agreement

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This brief contribution addresses the ongoing efforts to include labour rights provisions in the EU-India free trade agreement (FTA). First, using a comparative perspective, it provides a brief background to the American experience of including labour rights provision in trade agreements. Second, it outlines some issues that proponents of trade and labour linkage with India should understand about India's deeply rooted opposition. Finally, it offers a few thoughts on how one might proceed in the Indian context.

Trade and Labour Linkage in US Bilateral Agreements

The history of the inclusion of labour rights provisions in trade agreements in the United States is a short but controversial one. The first American experiment with trade and labour linkage began with NAFTA in 1994, and all new bilateral trade agreements are, under US law, required to contain labour rights provisions as outlined in US trade legislation. The basic model for bilateral agreements, until a recent modification agreed to by Congress and the President and that is described below, has generally been as follows. First, the parties agree to "strive to ensure" that the core labour rights contained in the International Labour Organization's (ILO) Fundamental Declaration of Principles and Rights at Work are incorporated into domestic labour law, and that "a party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction in a manner affecting trade between the parties".³ If a party fails to enforce its labour laws, it can be subject to dispute settlement provisions, although the labour rights dispute settlement procedures and remedies have, by and large, been arguably weaker than those for the commercial aspects of the agreements.⁴ A second element of the trade agreements, albeit one which has received less notoriety, is a requirement that the President "establish consultative mechanisms among parties to trade agreements to strengthen the capacity to promote respect for core labour standards." Thus in most agreements, there is a provision for cooperation between the parties, and in others, such as in CAFTA, for capacity building. In conjunction with these cooperation and capacity building provisions, a division of the United States Department of Labour, the International Labour Affairs Bureau (ILAB), has instituted a number of technical capacity building programmes in trading partner countries.

In May 2007, a bipartisan group of congressmen reached an agreement with the President, called "The New Trade Policy for America," that future FTAs, starting with the recently signed US – Peru and US Korea agreements, would *require* that the parties adopt ILO core labour rights into their domestic law, and that all aspects of the labour rights provisions be subject to the same dispute settlement procedures.

³ See, e.g., Central American-Dominican Republic United States Free Trade Agreement (CAFTA), Art. 16.2(1)(a). This basic framework is codified in the Trade Promotion Authority Act (2002), which requires the President to negotiate labour rights provisions into FTAs.

⁴ These dispute settlement provisions, until recently, have generally, with one notable exception in the U.S. Jordan FTA in 2000, been different than those used for other provisions of the agreements.

The Indian Context

The US is not currently negotiating an FTA with India, but if it were, there would be some hard negotiating over its labour rights provisions. India is perhaps the most adamant opponent of the inclusion of labour rights provisions in trade agreements of perhaps any country in the world. If the EU is to successfully include some form of labour provision in its FTA with India, it will have to carefully consider a number of issues. These include: 1) what labour issues in India is the EU interested in addressing in the India context; 2) what is the basis of India's opposition to trade and labour linkage; and 3) given questions 1 and 2, what will be the optimal way forward in the process of addressing labour issues in trade agreements?

Given the broad based and pervasive opposition to workers' rights provisions, a logical first step in crafting a labour rights provision is to think about what issues are relevant. A good starting point is the set of core labour rights as defined by the ILO in its Declaration of Fundamental Principles and Rights at Work, which is already the baseline in the EU GSP regime, and the basis of the current US bilateral trade regime.⁵ Of the eight fundamental conventions, India has ratified the four relating to discrimination, and forced labour, and has not ratified the four conventions relating to freedom of association and child labour.

The primary imports from India to the E.U. are agricultural exports, chemicals, and garments and textiles, and services. A good starting point for the EU, then, would be to undertake a study that would analyse the labour issues that exist in these respective industries. In all likelihood, the predominant problems will be found to be child labour and, to an extent, bonded labour, particularly in the agricultural sector; as well as problems with working conditions and rights to freedom of association and collective bargaining in some industries.

In considering how to craft a labour rights provision, it is vitally important to understand the context and roots of India's opposition to the inclusion of labour rights language in trade agreements.⁶ India has been perhaps the leading opponent of linking trade and labour issues, particularly in the WTO. India's opposition is not just at the governmental level, but is pervasive across civil society, including trade unions, and the public, although one recent poll conducted by the Chicago Council of Global Affairs suggests that a slight majority of Indians actually support the inclusion of minimum labour standards in trade agreements.⁷ The justifications underlying this opposition can be described as economic, political, and structural/institutional.

First, India is highly wary of what it perceives will be the economic impact of a labour rights clause, and fears that the use of trade sanctions will reduce trade levels and, as a result, trade related employment. India also assumes that trade-linked labour provisions are, in the words of an Indian official involved in the trade negotiations, "a backdoor entry for issues which the west has cooked up as a protectionist measure."⁸

⁵ There are of course many more labour rights that are vitally important to workers, but these core rights were in fact identified at least in part of the context of the trade and labour debate, and are justified as being the least destructive of comparative labour advantage.

⁶ For a more thorough treatment from which much of this section is drawn, see Kevin Kolben, *The New Politics of Linkage: India's Opposition to the Workers' Rights Clause*, 7 IND. J. GLOBAL L. STUD. 225 (2006).

⁷ Chicago Council of Global Affairs, World Public Opinion 2007.

⁸ Interview with Indian Trade Official in New Delhi, India, March 13, 2008.

These concerns about protectionism are deeply rooted in a historical memory of colonial economic rule and domination. Critics often note, for example, that while the first Indian factories legislation, the Factories Act of 1881, was ostensibly enacted by the British in order to protect working children and women in Indian factories, a major motivation for the legislation was in fact the protection of British mill interests.⁹

Second, India has traditionally had political concerns about the linkage of trade and labour rights. Specifically, sovereignty is an extremely sensitive issue in the Indian political context across a broad spectrum of issues, and labour conditionality in trade agreements is often perceived as an infringement upon the regulatory sovereignty of the country. In other words, conditionality is viewed as an external imposition of laws and governance that should remain within the domain of the Indian state. To illustrate, one commentator in a prominent Indian newspaper described protesters in Seattle in 1999 that were demanding social protections in the WTO as “a new breed of self-righteous imperialists bearing a new White Man’s Burden.”¹⁰ Indeed, the EU has already witnessed a WTO challenge from India to the conditionality provisions of its GSP regime, reflecting India’s general opposition to such schemes.¹¹

Third, opposition in India to the workers’ rights clause has been justified on structural and institutional grounds. One argument suggests that labour issues are best left to the ILO, and not to the realm of economic agreements. Opponents of linkage are also particularly sceptical of the use of sanctions, which they view as a poor means of enforcing labour rights because they are a blunt tool: they potentially punish the country, or entire industries, rather than targeting specific labour rights violators. Another argument put forth by Indian opponents of linkage, but who are supportive of labour rights in general, is that a trade-based labour rights regime would potentially only target a very small proportion of the labour force – and one in which conditions are not necessarily the worst. 92% of Indian workers, by some estimates, occupy what is known as the “informal sector,” meaning that they by and large are small scale and/or do not come under the protection of Indian labour legislation.

What To Do?

India presents a challenging situation for those constituencies of the EU that would like to mainstream labour rights protections in the EU’s trade agreements. There is a very low likelihood that the Indian government will agree to a US style labour rights provision in its FTAs that has sanctions or that mandates legal change. One possible way forward is to focus on the development of labour projects that utilise non-sanctions oriented incentives. For example, it might be possible to make it a condition of the trade agreement that the parties agree to institute and fund a variety of projects that engage private as well as public actors to improve labour conditions and respect for labour rights in specific industries through monitoring and transparency initiatives. One example of this is the ILO’s Better Work Programme, which is attempting to utilise monitoring and public dissemination of factory conditions as a means to improve working conditions.¹² The Indian government has

⁹ I have argued that the motivations behind this legislation were more complex than this, but the protectionist motivation is what is most prevalent in the Indian historical memory.

¹⁰ Swaminathan S. Anklesaria Aiyar, *India’s Comparative Advantage in Agitators*, TIMES OF INDIA, Dec. 19, 1999.

¹¹ Although India’s complaint only raised the issue of drug trafficking provisions, it had originally challenged all aspects of the GSP regime, including labour rights, before amending it.

¹² See ILO, Better Work Programme, available at <http://www.betterwork.org>.

also recently encouraged India's Export Promotion Councils to institute a monitoring and training programme for its members, partly as a response to the pressure put on it by international stakeholders who have been concerned about child and bonded labour in supply chains. These kinds of initiatives might, in fact, be the best means forward. Perhaps participation and support of such programmes could be linked, as in the EU's GSP programme, to a tariff incentives system based on an agreed upon implementation standard; but this, too, would certainly garner a great deal of resistance from the Indian government.

EU-Korea Free Trade Agreement

In support of sustainable agreements that protect workers

Joël Decaillon

European Trade Union Confederation (ETUC), Confederal Secretary

The EU is today at a crossroads as regards all of its political and economic actions. The issue is how to create the conditions for normal, healthy and undistorted competition that guarantees the sustainability of our planet. If, as the Commission claims, it is a question of redefining all multilateral and bilateral agreements or trade defence instruments, then the EU should make its values the real point of reference for all states, i.e. the rejection of social and environmental dumping and the respect of fundamental rights. The agreement with Korea is a good example of this tendency.

And yet American and Korean trade unions have just denounced the free trade agreement (FTA) between the United States and Korea (Korus FTA). Today, as is the case with negotiations on the EU free trade agreement, privileging a financial type of economic model systematically leads to the rights of investors being considered to be more important than workers' rights, public services or the environment.

Blindly developing this model intensifies restructuring and weakens labour standards, particularly in Korea, but also in the United States and in the European Union, where there are higher levels of social dumping.

We are told that these agreements would strengthen economic development and that this would be shared and would create jobs, but nothing could be further from the truth. In fact, although today we can see from the report on the Lisbon Strategy that there are fewer unemployed in Europe, there are now more poorly-paid workers instead.

That is why we support the European Parliament's position, namely that FTAs must be accompanied by partnership and cooperation agreements (PCAs). The binding legal nature of the sustainable development elements of PCAs must also be made explicit in the FTA.

The EU's negotiating mandate for each of the new generation of PCAs should already include references to sustainable development. However, it should be made more ambitious by taking into account the following aspects:

Firm and unambiguous commitments by both parties to ratify and apply in practice the ILO's core labour standards and other key components of decent work.

- Clarification that the chapter on sustainable development contains the same standard provisions as other provisions in the FTA, so that these stipulations are treated the same

way as other clauses in the body of the agreement when disputes need to be settled. There needs to be provision for fines that are high enough to be dissuasive. The income from these fines should be used to improve social standards and working conditions in the sectors and areas that give rise to the problems concerned.

- Regular progress reports by both parties on the implementation of the commitments made within the framework of the agreement.
- Commitments by both parties to respect the OECD guidelines on multinational companies and the ILO tripartite declaration on multinational companies and social policy, and not to undermine labour standards in order to attract foreign investment. This commitment should extend to all the parties of the territories in order to ensure that the agreement does not lead to an increase in production in industrial free-trade zones.
- The provision for sustainability impact assessments (SIAs) and measures to be taken based on their findings. The SIAs should examine all relevant aspects of the social and economic impact of agreements, including access to quality public services and recourse to different policies to achieve industrial development.
- Governments should also be invited to act on the basis of official presentations by social partners. A binding mechanism should be put in place that enables approved workers' and employers' organisations included in an FTA to call for intervention. Complaints should be treated within a defined period of time as part of a permanent monitoring and revision process.
- Complaints concerning social problems should be examined by qualified experts who are fully independent. Their recommendations should be made as part of a clearly defined process enabling problems to be dealt with rapidly.
- A Trade and Sustainable Development Forum that would allow workers' and employers' organisations to be consulted should be set up and should meet at least twice a year.
- Technical and development aid should be provided within the framework of the FTA, including trade incentives.
- In addition to core labour standards, other important ILO conventions relating to decent work should be incorporated into the agreement. This should include the 'Priority Conventions' laid down by the ILO Administrative Tribunal in its decision in 1993 (on employment policy, labour inspection and tripartite consultation), other conventions supported by the ILO (on occupational health and safety, social security, protection of maternity rights, and workers' representatives, for example) and other key ILO instruments (on promoting cooperatives, development of human resources and industrial relations, as well as occupational health and safety).
- Strict clauses on respecting multilateral agreements on the environment and on human rights conventions are extremely important for the social dimension of sustainable development and should also be included in this chapter. The list of international instruments covered in the 'GSP Plus' arrangements could serve as a guide.

The EU must defend its values beyond its borders, otherwise it will end up being the agent of unfair and brutal globalisation for which workers from all countries will end up paying the price. This is not the kind of globalisation we want and nor do the citizens of Europe. What we want is solidarity. At a time when we are seeking the support of our citizens for a stronger, more dynamic Europe, it is crucial that the EU continues to play its role in the development of social progress.



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