THE ICFTU LABOUR CLAUSE PROPOSAL: A LEGAL AND POLITICAL CRITIQUE

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TABLE OF CONTENTS

1 Introduction

The legal framework to facilitate globalization is found in international trade agreements, particularly the WTO-GATT Agreements of 1994. These agreements have led to an increased supplanting of democratic rights.

Canada has experienced significant legal change in the environmental field, related to ten years of a free trade regime. These changes include a staggering rate of environmental de-regulation; the loss of the power to acquire nationally preferred health and environmental standards; an end to the slow forward movement of environmental protection that occurred over twenty-five years; and increasing attempts by the Canadian government to resort to secrecy in law making and to avoid public accountability regarding regulation making.[1]

Environmental law-making has been directly affected by the agreements regarding market access, resource management, technical barriers to trade, sanitary and phytosanitary standards, intellectual property, and the investment provisions of NAFTA.[2]

Citizens now have fewer environmental rights and protections, and less governmental accountability than was the case in the past.

Labour law has not been so directly affected by the free trade regime since free trade agreements do not include provisions regarding the writing of labour laws, with the exception of GATT Article XX regarding forced labour.[3] Labour health and safety standards are also affected by the Technical Barriers to Trade and Sanitary and Phytosanitary chapters, and the internationalization of risk assessment in standard-setting. The Investment provisions of NAFTA also engender impacts on labour policy.[4]

Otherwise, impacts on workers have been indirect, related to many factors including: the

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[1]Swenarchuk, Michelle, "Stomping on the Earth: Trade, Trade Law and Canada's Ecological Footprints," (forthcoming) 5 Buffalo Environmental Law Journal, Spring 1998.

[2]Ibid, and Swenarchuk, Michelle, "NAFTA: A Legal Analysis, in The Environmental Implications of Trade Agreements, Canadian Environmental Law Association, 1993.

[3]GATT Article XX: Measures which are applied in a non-discriminatory manner and are not " a disguised restriction on international trade" are permitted if: (b) necessary to protect human, animal or plant life or health; (e) relating to the products of prison labour; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

[4]The NAFTA labour side agreement is not a trade agreement, and its terms do not affect the NAFTA trade provisions.

economic restructuring that has occurred; globalized production, the globalized ideology of deregulation, and the relative strengths and weaknesses of labour and democratic movements in different countries.

During this decade, we have seen repeated references in trade negotiations to "labour and environment" as issues which should be dealt with by particular clauses in the agreements, without a recognition that the trade and investment patterns facilitated by the agreement affect both subjects. This approach, during the NAFTA negotiations, resulted in side agreements outside the trade regime, and with no effective impact on the resulting trade or regulatory structure. It also produced the non-binding wording regarding not lowering environmental standards to attract investment [5] that has been ineffective to prevent environmental deregulation even when explicitly for an "open for business" ideology such as that articulated by the Ontario government. [6]

In Canada, there have been debates amongst labour and social justice groups over the past ten years regarding whether the inclusion of a labour rights clause, or a broader social charter, in trade agreements would be an effective strategy to respond to "social dumping", the production and import of goods made cheaper due to lower cost labour in low standard countries. The clause would be enforced by trade restrictive measures. [7]

In December 1997, the International Confederation of Free Trade Unions, (ICFTU) published its proposal and rationale for a workers rights clause to be inserted in the WTO agreement.[8] This paper will examine the clause, the rationale advanced, and whether the campaign for its acceptance in international trade agreements is likely to enhance workers rights in the globalized world.

2. The ICFTU proposal and rationale

The ICFTU proposes that the following clause be inserted in the WTO and "similar

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[5]NAFTA Article 1114

[6]For details of environmental de-regulation in Ontario, see Environmental Commissioner of Ontario, Annual Report 1996; Keep the Doors Open to Better Environmental Decision Making, Toronto, April 1997; and Canadian Environmental Law Association, Intervenor, Vol. 22, No. 5 & 6.

[7]See, for example: Common Frontiers and the Latin American Working Group, "Social Charters: perspectives from the Americas", Toronto, 1996.

[8]International Confederation of Free Trade Unions, Fighting for Workers' Human Rights in the Global Economy, 1998, prepared by Bernie Russell. Quotations and page numbers in the following sections refer to this publication.

international agreements":

> The contracting parties agree to take steps to ensure the observance of the minimum labour standards specified by an advisory committee to be established by the WTO and the ILO, and including those on freedom of association and the right to collective bargaining, the minimum age for employment, discrimination, equal remuneration and forced labour. (p.18)

2.1 Trade Union Rights

On the subject of protection of trade union rights, the author reviews some of the most egregious labour abuses: persecution of trade unionists in Colombia; forced labour in China; exploitation of women workers in free trade zones. He then states that

> A workers' rights clause as suggested by the ICFTU would end this downward spiral in living and working conditions. (p.9)

The ICFTU is seeking "to ensure that globalization does result in gains for all workers."(p.9)

2.2 Child labour

Regarding child labour issues, (setting minimum age for employment), he reviews a number of the worst examples of exploitation of children, and then comments:

> The most effective way to protect children would be through a workers' rights clause that would punish these countries by removing that [short-term competitive advantage], making countries that tolerate abuse and exploitation of children "outcasts from the world trading system" (p.11)

He does acknowledge the need for increased international development assistance together with countries' individual efforts to stop child labour.

Given that child labour, according to an ICFTU report of 1996, exists in Latin America, Europe, North America, Africa, Asia, [9] and therefore includes most countries within the world trading system, it is difficult to see how countries tolerating it could be made "outcasts."

2.3 Ending Discrimination in Employment

[9] "No time to play:" child workers in the global economy: ICFTU, June 1996.

The author states that the main culprits are in export-processing zones where 80% of the workers are women. He notes that most countries have signed the ILO convention on elimination of discrimination in employment, and most were represented at the United Nations Fourth World Women's Conference at Beijing in 1995. These actions indicate a "clear international commitment to ending the injustices inflicted on women."(p.12) A workers' clause would allow unionization by women and would make exploitation "no longer economically viable." (p.13)

This is a simplistic explanation of the complex and multifaceted forms of discrimination faced by women in employment, agricultural production, and non-employment contexts throughout the world. That the "main culprits" are export-processing zones is a dubious proposition, although certainly, extremes of exploitation of women occur in them. However, this type of production continues to increase,[10] and it most unlikely that an individual clause in a trade agreement will have as significant an impact on them as the author claims.

Further, the clause would not guarantee rights additional to those that now exist in industrialized countries including Canada with networks of employment and Human Rights laws. However, women still face multi-faceted discrimination in the workplace in these countries.

2.4 Forced labour and slavery

Russell reviews some of the worst examples of forced and slave labour: the Burmese government's forced labour of 160,000 people on railway and gas pipeline construction and bonded labour in Pakistan. He notes that a trade union complaint led to Burma's exclusion from the tariff preferences available under the EU's Generalized Scheme of Preferences in March 1997, and that a complaint is pending in relation to forced labour in Pakistan. He comments that "A workers rights clause would turn countries like Burma into outlaw states." (p.15)

This comment indicates a basic misunderstanding of trade agreements, which are not criminal statutes. Nor does the author provide any evidence regarding whether the EU GSP suspension has made a difference in forced labour practices in Burma. The trade unionists' complaint may well be useful as one of many international strategies against a repressive regime, but given the willingness of corporations and governments to trade with states like Burma, regardless of their labour practices, the suggestion that a workers' rights

[10] For example, the infamous maquiladora zone in Mexico has expanded since NAFTA was concluded in 1994, and now employs approximately 600,000 employees. Canadian companies in the automotive, electronics and textile industries continue to move into the zone, increasing in number from 9 in 1994 to 30 today. Employers cite the "huge cost advantages" as a reason for locating there. See, "More firms flock to Mexico", Toronto Globe and Mail, July 8, 1998.

clause will make them "outlaw states" is rather grandiose.

2.5 Human rights

The author argues that the moral case for a workers rights clause is strong, and adds:

> The international community already agrees that the global economy needs global regulation. That is the whole basis for the World Trade Organization; for international standard-setting; for laws banning the manufacture and sale of counterfeit and protecting intellectual copyright; and for the environmental initiatives following on from the Earth Summit. Many of the mechanisms set up to enforce these regulations are expensive for the companies to operate, and operate across the jurisdiction of nation-states."(p.15)

This is surprising perspective on the WTO from a trade union organization, especially one that claims to represent both Northern and Southern members. First, the rules that the WTO establishes bind governments, not corporations, and prevent them from effectively regulating corporate activities within national boundaries, including for socially desirable goals. The international standards-setting that occurs in bodies specified by the WTO agreements (Codex Alimentarius, International Standardization Organization) are frequently voluntarist in nature, rather than mandatory, and the subject of world wide criticism from citizen activists. Many of the environmental initiatives from the Earth Summit have few if any effective enforcement mechanisms. It is difficult to know what expensive regulations the writer is referring to or on what basis he is comparing these UN-related initiatives to the enforceable requirements of the WTO.

3. The ICFTU response to labour clause sceptics

The writer then attempts to refute the arguments allegedly raised against a workers rights clause. First, he addresses "the myth of an international minimum wage"(p.18) He underlines that all the clause would do is give workers the right to negotiate their own wages; it merely enables rights. He argues that low wages don't give an country a guaranteed competitive edge; that the "exact weight of labour costs...depends on productivity" (p.19) and then, that a workers rights clause will assist in moving developing countries to high productivity and high skills.

However, how exactly unionization rights would translate into high skills and high productivity in any country is not clear; nor does this perspective accord with the global trend , which sees many economies increasingly divided between a smaller number of high skill "knowledge-based" positions, and increasing numbers of low or no skilled positions.

Russell next tries to address issues of "developing countries versus industrialized countries" and "Developing countries v. Developing countries." To respond to this criticism

(impliedly, the opposition from many developing countries to a labour clause), he simply asserts the internationalism of the ICFTU, and its representation of workers in both North and South. He does not provide evidence, however, that the strategy of pursuit of a workers rights clause in trade agreements has been widely debated and supported by Southern members of the ICFTU.

He refers to some of the worst low wage labour situations (China, sub-Saharan Africa, Latin America) and then simply asserts, as regards developing countries competing with each other in the new economy, that without a workers clause, there will be a continued race to the bottom, presumably due to the large number of unorganized workers whose wages will remain low.

Then, in a blatant contradiction, he immediately asserts that:

> A workers' rights clause in (sic) not about labour costs; it's about labour rights (p.22)" and that developing countries would still have a comparative advantage due to their "abundant" labour supply, but governments won't be able to oppress workers to keep costs down. Developing countries have other advantages to offer such as the 250000 science graduates in India each year.

This is the kind of competition developing countries will have to offer in the information age. A workers' rights clause will give them the space to do that by easing the constant downward pressure on standards brought about by the present system. (p.23)

It is not immediately apparent how a workers' rights clause will translate into the resources and education infrastructure that will produce high-skill jobs in poor developing countries.

Next Russell argues that a labour rights clause will help bring the transnational corporations under the rule of law. "It will create an environment where countries can compete without fear, and where companies can invest for the long term." (p.23)

However, the labour clause, like other trade agreement terms, will apply to nations, not to individual corporations, and the enforcement mechanism proposed for the clause, trade restrictions, are applied against nations, not against specific companies. The clause would not bind individual corporations in any way. The wording of this section unfortunately obscures a major problem of the new trade regime; its success in regulating governments, while preventing regulation of corporations.

Presumably, the application of the clause to TNCs would occur, indirectly, if countries adopt new labour protections because of it. The need for this large intermediate step raises the same concern that dogs the ILO conventions, that is, whether countries can be expected to implement this clause, when they haven't complied with the conventions to

date.

4. The proposed enforcement procedure for the ICFTU labour clause

The ICFTU proposes that the clause would be enforced by a WTO/ILO Advisory Body which would have authority to make periodic reviews of how countries are applying the principles in the clause, and to step in upon "well-justified" complaints. This part of the process, to be carried out by the ILO, would have the object of investigating whether, in a particular country, standards are being followed or whether changes in labour law and practice are necessary. If so, the ILO would recommend changes, offer technical assistance " and make additional resources available to help countries put things right." What resources these would be are not specified.

Countries found lacking would have 2 years to come into compliance. Then a second report would be done specifying whether standards were now being applied; or if not, whether progress toward implementation was being made; or, whether the country was refusing to co-operate with the ILO, and the standards were not still being met.

If progress was being made, the country would have two years to continue before another progress report would be done. If it still did not progress,

> the matter would then be referred to the WTO Council for consideration of possible trade measures. When it cames to deciding on the appropriate sanctions, the WTO should have a range of options which could be escalated over time if the government carries on offending. A first step might be to suspend the countries' right of access to the WTO's new binding rules for dispute resolution. (p. 26)

It is difficult to understand why an institution seeking an international consensus for an amendment to the WTO agreements would propose this option at any stage of the process, and particularly as a first step. The institution of binding dispute resolution through the WTO is widely seen as one of the most important achievements of the Uruguay Round negotiations, and compliance with trade panel decisions has been 100%, including by the US.[11] Regardless of the concerns amongst public interest activists that the trade regime is supplanting domestic law, to many countries, a regime whose decisions also bind the US is seen as an important gain. The "success" of the dispute panel process is widely lauded by governments.

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[11]Valerie Hughes, General Counsel, Trade Law Division, Department of Foreign Affairs and International Trade, Canada, at "Dispute Settlement and the Development of Recent International Trade Law: WTO Cases," a conference sponsored by the Centre for Trade Policy and Law, Carleton University, and the Department of Foreign Affairs and International Trade (Canada) Ottawa, March 20, 1998.

An equivalent proposal, in domestic law, would be to deprive those charged with criminal offences of any opportunity to defend themselves on the charges or on any other criminal charges ie. to suspend their access to the court system. Such a move would offend the fundamentals of any developed criminal law regime.

The suggestion that countries will be prepared to entertain depriving any WTO member of access to the dispute process contradicts the most fundamental legal and political underpinnings of the trade regime.

4.1 The ICFTU reliance on trade sanctions

The author then addresses, in summary fashion, some of the arguments raised against the use of trade sanctions for labour protection. In a section entitled "The aim is to help, rather than punish", he begins by asserting that "The step-by-step procedures we have outlined provide just the right blend of stick and carrot."(p.26) However, no "carrots" are seriously proposed.

Trade measures would be used only as a last resort; time for dialogue to solve problems is included; "a workers' rights clause would ease protectionist measures and strengthen free trade." (p.27) It would also serve to rein in unilateral measures.

How it would ease protectionist measures and rein in unilateral measures is not specified. Further,

> Although it would not end the need for labour market adjustments in the industrialized countries...such painful adjustments would be easier to justify against the background of a common set of core principles for the treatment of workers. (p.27)

However, it is difficult to agree that a worker in an industrialized country, unemployed as a result of movement of a plant to another, lower-standard country, will agree that her situation is justifiable because a labour clause exists in the WTO agreement.

Then,

> By guaranteeing fair trade, a workers' rights clause would protect free trade. (p.27)

This is a surprising rationale to see in a document from the ICFTU, whose members include such anti-free trade union centrals as the Canadian Labour Congress. The Congress has a history of committed and analytic opposition to free trade, beginning with the 1988 Canada-US Free Trade Agreement and NAFTA, and is currently active in the global campaign to stop the Multilateral Agreement on Investment. Another ICFTU member, the AFL-CIO in the United States has played a key role in opposing NAFTA and fast-track

authority for presidential negotiations of free trade treaties. One of its largest and most influential members, the United Steelworkers of America, has recently commenced a lawsuit challenging the constitutionality of NAFTA under US law.[12] It would be inconsistent with the established history of these key ICFTU members to be advocating a labour rights clause in order to protect free trade.

The author also rejects the argument that a labour clause would violate national sovereignty, claiming that in the modern globalized world, "national sovereignty is anyway something of a myth" (p.28) and that "Without a workers rights clause, we're all in danger of becoming banana republics." (p.28) Further, the clause "would restore sovereignty by allowing policy to be determined through negotiations -providing a counterweight to the enormous economic muscle of TNCs." It would be enforced by the WTO and ILO, organizations which proceed by consensus, and whose "legitimacy is unquestionable." (p.28) The clause "will give developing countries a powerful weapon with which to assert their economic independence against the invisible pressures of international trade and investment." (p.29)

This summary dismissal of national sovereignty issues fails to reflect the plethora of sovereignty-related conflicts that flow from the international trade regime, and the difficult strategic thinking that concerned citizens are pursuing around the globe to preserve national communities and values.

Further, the most powerful countries in the world, the US, Europe, and Japan which dominate the world trading system are in no danger of becoming “banana republics.” The sovereignty issue does not affect all countries in an identical manner.

Most glaring is the assumption that the WTO is an organization of unquestioned legitimacy, including to those concerned with issues of sovereignty. In Canada, concerns regarding national sovereignty have ranked high in criticism of free trade from the Canada-US Free Trade Agreement, to NAFTA, to the WTO agreements. In the US, public interest trade critics have consistently opposed the WTO's role in rendering impotent US environmental legislation, such as the Marine Mammals Protection Act, and The Clean Air Act. Sovereignty issues are amongst the greatest concerns articulated by Southern writers.

Similarly, the author dismisses the argument that a workers' rights clause would threaten national cultures, stating that it is the TNCs that are undermining national cultures, and that over 100 states have ratified at least six of the seven ILO conventions concerning basic rights. This does provide evidence, as he asserts, that these rights are not seen as "Western values" worldwide, and that although this argument is made by some governments of

[12]The Steelworkers are arguing that NAFTA is a treaty pursuant to US constitutional law, and therefore should not have been implemented without a two-thirds vote of approval in the Senate. See Toronto Globe and Mail, July 11, 1998.

developing countries, Southern unions and citizens have other views. That many countries have ratified but not implemented the conventions, however, indicates the limits of their acceptability within the ILO membership. The issue of impacts on national sovereignty from the current regime of international trade agreements is multi-faceted and complex, and a labour rights clause clearly raises concerns regarding national authority over labour policy in many countries.[13]

5. The ICFTU campaign for workers rights in international trade agreements

The author briefly summarizes the various stages of international processes and laws in which workers rights and wider social rights have been considered. This includes the 1946-1948 discussions of an International Trade Organization which referred to labour rights and confirmed the rights of each member state to "take whatever action may be appropriate and feasible to eliminate ... (unfair labour).. conditions within its territory." (quoted at p. 32) The ITO also strongly confirmed "In all matters relating to labour standards that may be referred to the Organization....it shall consult and co-operate with the International Labour Organization." (quoted at p 32.) The ILO was clearly the international body that would have responsibility for labour matters pertaining to trade.

The author then refers to the GATT, with its Article XX (e) reference to goods produced by prison labour to the conclusion of the Uruguay Round negotiations, and the Marrakesh agreement of 1994. He reports that at the Marrakesh meeting, a labour rights clause was discussed, with about 30 governments indicating some willingness to discuss a clause, and 22 governments opposed. These numbers suggest that approximately 80 members of the WTO did not speak on the issue.[14]

The author then describes the WTO in rather laudatory terms as "...a rules-based organization...dedicated to maintaining a system of rules for open, fair and undistorted competition" (p.34) a perspective not shared by most citizen critics. He proposes that it implement a labour rights clause through its Trade Policy Review Mechanism, by which it monitors national trade policies.

Referring to other indices of international concern for social issues he reviews the wide ranging social rights to which governments made commitments at the Copenhagen UN Social Summit (wider than a labour rights clause). Again, he fails to address that problem that these commitments were made without enforcement commitments, and little international implementation has followed. He concludes that a workers' rights clause is the

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[13] See, for example, Raghaven, Chakravarti, "Barking Up the Wrong Tree: Trade and Social Clause Links" in Third World Economics, No. 129, January 16-31, 1996.

[14] The meeting ended with the establishment of a Committee on Trade and Environment at the WTO, but no process or committee for discussing labour rights.

key to having them enforced without addressing why governments that have not enforced these agreements to date would sign a labour rights clause with enforcement provisions.

He also refers to the Generalized System of Preferences of both the US and European Union, which provide tariff reductions on some products imported from developing countries, if the countries incorporate internationally recognized worker rights domestically. Failure to provide the rights leads to suspension from GSP advantages. Currently, the US has suspended from its GSP Brunei, Liberia, Maldives, Mauritania, Sudan, and Syria, and the EU has suspended Burma. (p.41) As of January 1998, the EU provides that countries can apply for "special incentive arrangements in the form of additional preferences" if they have implemented ILO standards for freedom of association and collective bargaining. (quoted at p 42)

6. An evaluation of potential effectiveness of the proposed ICFTU labour clause

A basic question arising from the ICFTU proposal is whether the clause and enforcement approach provide an effective strategy for enhancing labour rights in the globalized economy. A fundamental problem with the proposal is its failure to address the non-enforcement of well-meaning conventions and UN conference statements to date by the same players, national governments, that are expected to embrace the WTO-based clause and trade sanctions as an enforcement mechanism.

Since the clause is to be enforced by the WTO and ILO jointly, it is instructive to look at current decisions and trends at each institution as they affect unions and workers rights (the ILO) and citizens rights to establish environmental and health standards (the WTO.)

6.1 Current Trends at the International Labour Organization[15]

The International Labour Organization (ILO) was established in 1919 with the explicit function of protecting workers' interests and is a tripartite organization, unlike other United Nations organizations. Member countries' delegations to its annual conference consist of two government representatives, one employer representative, and one worker representative. The ILO's functions include setting international labour standards through conventions, providing technical assistance to member states regarding labour legislation, and investigating complaints of governmental denial of labour rights.

[15]The discussion of current ILO treatment of the tourism sector and Private Employment Agencies Convention relies on "Globalization: Some Implications and Strategies for Women", prepared for the National Action Committee on the Status of Women (Canada), June 1998, by Marjorie Griffin Cohen, Laurell Ritchie, Michelle Swenarchuk, and Leah Vosko.

After the Second World War, the ILO's mandate was expanded to include wider objectives related to economic security and social justice, including full employment, social security, medical care, child welfare and maternity protection.

However, commentators have noted a shift in the role of the ILO since the late 1980s, including increased business lobbying within the ILO, the development of a deregulation agenda, and moves toward standards that promote corporate competitiveness and self-regulation. Four recent activities within the ILO provide insight into whether it is likely to provide the type of enforcement assistance, in a labour rights clause, that the ICFTU is proposing. The activities are the discussions pertaining to adoption of a new convention on Private Employment Agencies (No. 181) in June 1997; the tripartite discussions in May 1997 pertaining to new technologies and the tourism sector; and the discussions in June 1998 regarding a strengthened convention on the worst forms of child labour; and the "solemn declaration" approach to compliance.

6.1.1 The Private Employment Agencies

In June 1997, the ILO adopted a new international labour convention on Private Employment Agencies (No. 181) replacing the existing convention entitled Fee-Charging Employment Agencies, Revised (No. 96). Although the ILO has historically taken a strong stand on private employment agents and agencies, promoting public employment services instead, the new convention is "a step backwards for workers[16]", since

> Although it still prohibits agencies from charging direct fees and requires protections for migrant workers, it has abandoned the bulk of existing regulations and, for the first time, legitimizes private for-profit employment agencies (temporary help agencies, staff-leasing firms, job shops, etc.)... New standards guaranteeing private employment agencies a role in the labour market were substituted for earlier measures. [17]

The changes in the Convention may undermine free national public employment services, where they exist, and provide an opening for the problems associated with private employment agencies. Notable in the process of changing the convention was the increased and "louder voice"[18] of the employers group within the ILO, and the lack of preparedness of labour representatives for the employer demands, leading to little success in containing them.

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[16] Op. cit. p.12.

[17] Op. cit. p.13.

[18] Op. cit. p.13.

6.12 The Tourism Sector Case

A similar shift has occurred in ILO considerations of the tourism sector, which is anticipated to become the world's largest employer sector by 2005. As NAC reports:

> Organized labour had been campaigning for governments to sign on to a 1991 ILO Convention covering working conditions in the sector but, by 1997, only 6 countries had ratified the Convention. Canada was <u>not</u> among them.
>
> At the May 1997 Tripartite Technical Meeting On The Effects of New Technologies on Employment & Working Condition in the Hotel, Catering and Tourism Sector workers' representatives were prepped for the radical tactics, including walkouts, which employers had been using of late to bring ILO sessions to a dead halt. They were cautioned that employers would do anything to make the sessions short and unworkable, and that it would be a struggle to get ratification of ILO Conventions moved to the front burner. What no one properly anticipated was the sophisticated, two-pronged attack that became evident from the first day of business.

At the same time as employers did the "expected", that is they opposed any mandate role for labour in the introduction of new technologies in the workplace, a prerogative they held to be solely management's, the employers also came out fighting for new ILO standards that would enshrine:

- team-based work organization
- "best practice menus" and "firm specific" standards (self-regulation)
- "multi-skilling" (multi-tasking)
- competency-based training standards (undermines seniority, service-based pay)
- "flex time" arrangements (more part-time, split shift and overtime work).

As anticipated, employers wanted to defeat the labour standard-setting role of the ILO (reflecting) the deregulation agenda and, in particular, to ensure that no further countries ratified Convention 172, working Conditions in Hotels, Restaurants & Similar Establishments. Worker representatives were caught off guard however when employers presented their own resolutions on ILO standards - setting the terms for debate and paving the way for their re-regulation agenda.

6.13 Current child labour discussions at the ILO

Since 1996 the ILO has attempted to improve its standards relating to three of the worst types of child labour abuses: those pertaining to sexual exploitation of children, slavery or bonded labour conditions, and child labour in hazardous conditions. Given the appalling examples of exploitation of children in such conditions, and the widespread revulsion at

their treatment, it could be assumed that this is an issue on which agreement for improved protections should be amongst the least difficult to achieve. Further, meaningful enforcement of this element of "core labour "standards should also be achievable.

The result of discussions to date, as concluded at the International Labour Conference, 86th Session, 1998 in Geneva in June of this year do not indicate that significant progress has been achieved. The "Proposed Conclusions" of the meeting, which will be further discussed at another conference suggest that a new convention supplemented by a Recommendation should be adopted by the ILO, to supplement the Convention and Recommendation concerning Minimum Age for Admission to Employment, 1973, considered to be the fundamental instruments for child labour.[19]

First, it is notable that the language throughout the convention is "should", not "shall", regarding any obligations to be undertaken by a signatory nation to the convention, so that even for ratifying nations, the requirements are non-binding.

First, the Preamble of the convention "should" refers to various other legal instruments regarding protection of children. (Art. 3-7) The fundamental obligation under the convention shall be:

> 8. Each Member which ratifies the Convention should take measures to secure the prohibition and immediate elimination of the worst forms of child labour.

The "worst forms of child labour" have been expanded to include use of children in the drug trade. Countries are to identify examples of hazardous work for children (Article 11); monitor the application of laws aimed at the prohibition and immediate elimination of the worst forms of child labour (Article 12); design and implement programmes of action for eliminating the worst forms of child labour (Article 13); and "provide... assistance for their removal from work, rehabilitation and social integration through, inter alia, access to free basic education.." (Article 14(b))

The "Implementation" sections of the proposed convention provide that members should: compile detailed statistical data on child labour and violations of national provisions (Articles 19 and 20); communicate the information to the ILO (Article 21); designate national monitoring mechanisms, after consultation with unions, employers, and other groups (Article 22); ensure cooperation between relevant agencies; and cooperate with international efforts to eliminate the worst forms of child labour "in so far as it is compatible with national law" by appropriate criminalization of the worst child labour practices and by prosecutions (Articles 25 and 26). Other measures to be employed

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[19] "Proposed Conclusions" to the 86th Session, International Labour Conference, Geneva, June 1998. References are to the numbers of Articles in the proposed new convention.

include: public information, including to public officials; training for law enforcement officers; domestic prosecution of nationals engaged in these practices outside their home country; and protection form reprisals to those exposing violations of the Convention (Article 29).

The final article refers to the need for international cooperation and assistance among Members including "mobilizing resources for national or international programmes." as well as legal and technical assistance and information exchange. (Article 30) No specific mobilization of resources occurred in the negotiation of the proposed convention.

With regard to effective enforcement of the Convention, it is notable that the negotiating text for the conference had a number of provisions that would have promoted stricter and swifter action.

Article 23 would have provided that criminal penalties be applied at least for repeated violations of national laws regarding immediate suppression of any type of work or activity involving dangerous work for children. The proposed Article 24 would have included remedies for immediate suppression of extreme forms of child labour, including compensation to the children affected, and closing down offending establishments. These enforcement strategies did not survive the negotiation process and are not included in the proposed convention.

It appears unlikely that the proposed convention will lead to much change in problems of child labour, nor did the ILO members indicate a willingness for increased enforcement of convention statements.

6.14 The solemn declaration approach[20]

On June 18, 1998, ILO members adopted a declaration allowing a regular assessment of countries' compliance with four core labour standards: freedom of association and effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour, and the elimination of discrimination in employment.

Under the declaration, countries are obligated as ILO members to respect and promote the goals and objectives of ILO conventions, not the conventions themselves. The ILO will collect information which could be used to focus attention on countries with the worst labour rights records.

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[20]Reported in Inside US Trade, July 17, 1998.

How the declaration will be implemented has not been decided, but according to one ILO official, it will be used to determine the priorities of the ILO in terms of action plans for technical cooperation designed to help countries adhere to fundamental labour rights. The declaration passed with 273 votes and 43 abstentions. The ILO described the declaration as a means to address the "social consequences of the globalization of the economy."

Although greater details of the declaration are unavailable at this time, a number of questions arise from this approach. Undoubtedly it can be useful to publicize nations' failures to provide citizens' rights, and the ILO reports may do that, if results are actually publicized. It is unclear how the ILO will measure compliance with goals and objectives of conventions, rather than with the conventions themselves.[21] However, publicity is not a new strategy, and adoption of the declaration approach does not suggest that ILO members will be more likely to move to a role for the ILO in the explicit trade-linked enforcement strategy proposed by the ICFTU.

6.2 Conclusions regarding the ILO role in enforcing labour standards

The ICFTU proposal for a WTO labour clause includes a joint ILO-WTO mechanism to enforce it, using a process that would ultimately be based on trade sanctions. Clearly, the ICFTU assumes that strong enforcement measures for a labour clause would be promoted by at least the ILO element of that mechanism. However, the four examples cited above must cause doubts that such a commitment would actually be provided by the ILO. Its conventions to date suffer from the familiar problem of all UN-related international instruments, the lack of mechanisms for enforcement, and current trends show no progress toward greater enforceability. In fact, with regard to the tourism sector and private employment agency instruments, setbacks in workers' rights are occurring at the ILO.

As NAC concluded:

> Unfamiliar with the shifting terrain at the ILO, some (labour unions and social justice organizations) assume a labour-friendly or at least neutral ILO as a policing body for workers' rights if and when such rights are codified. Clearly, new developments and an uncertain balance of power at the ILO suggest we need to rethink our interventions and strategies.[22]

With regard to child labour, it is notable that the core labour conventions have not been

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[21] In Canada, government moves to replace mandatory regulatory obligations with mere compliance with the goals and objectives of regulations were part of a sweeping de-regulatory strategy. See, Swenarchuk, Michelle: The Regulatory Efficiency Act - Bill C-62, Canadian Environmental Law Association, 1995.

[22] Ibid. p.14.

universally ratified, even in their current non-enforceable state.[23] This does not necessarily mean that non-ratifying countries have no standards regarding child labour. Canada and the US have not ratified them, but do have relevant standards. They also have children in the labour force, according to an ILO study.

However, even if many countries had ratified these non-binding ILO conventions, doubts would remain regarding whether they would be willing to adopt a WTO policing role, and trade sanctions to enforce them. That these ILO labour standards have not been widely ratified raises even more serious doubts.

The combination of low rates of ratification, even of child labour conventions, the retreat to "solemn declarations" and the current trends in the ILO summarized above suggest that the ICFTU is mistaken in its assumption of support from the ILO for a trade-sanctions approach to labour standards enforcement.

6.3 The WTO as a potential enforcer of labour standards

The ICFTU proposal would transform the WTO into an enforcer of labour standards world-side. To evaluate whether it would be likely to enforce them in a socially desirable manner, it is instructive to consider its treatment to date of two other areas of public interest standards, those pertaining to environmental protection and health. They are particularly instructive, since an "environmental and health clause" has existed in the GATT since 1948 and could have been the basis of reconciling domestic, environmental, health, and sovereignty concerns. Further, the use of trade sanctions for environmental purposes has been explicitly mandated in a number of multilateral environmental agreements (MEAs), and discussions regarding those sanctions and WTO compatibility are also instructive.

6.3.1 WTO jurisprudence on Article XX: General Exception

Article XX provides a general exemption from the other disciplines of the WTO-GATT regime, including national treatment and most favoured nation principles. It "permits"

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[23]The relevant child labour Conventions are No. 5, Minimum Age (Industry), 1919, 49 ratifying countries; No. 59 (Minimum Age (Industry) Rev'd. 1937, 20 ratifiers; No. 123 Minimum Age (Underground Work), 1965, 32 ratifiers; No. 138 Minimum Age, 1973, 49 ratifiers. Forced labour conventions include No. 29 Forced Labour, 1930, 139 ratifiers; No. 105 Abolition of Forced Labour, 1957, 116 ratifiers. Selected country ratifications include: US - 105 only; Canada: 105 only; UK - 5, 29,105; Switzerland 5, 123, 29, 105; France - 138, 29, 105; Japan - 5, 29, 105; India-5, 123,29; Brazil-5, 29, 105; China-59; Bangladesh 59,29,105; Pakistan 59, 29, 105. Source: ILO, Child Labour Targeting the Intolerable, Report VI(1) 1996 for the International Labour Conference, 86th Session, 1998.

countries to maintain standards deemed necessary for protection of "human, animal or plant life or health" and for "conservation of exhaustible resources" This article was included in the Canada-US Free Trade Agreement and NAFTA, and jurisprudence under the three agreements is relevant.

With the implementation of the expanded trade law regime following the establishment of the WTO, an increased number of trade disputes have arisen in which environmental or health standards have been in issue.[24] In every case, the domestic standard that was at issue has been found incompatible with GATT or the FTA leading to a requirement that it be rescinded.

It is important to understand that the GATT could have accommodated environmental and health concerns from the beginning, given the wording of Article XX. However, every case has gone against national standards, leading to the systematic elimination of governmental options previously thought to be available under the article. Regarding the environmental and health concerns, there is a difference of perspective between Northern and Southern activists who co-operate on many issues. Southern writers emphasize that Northern health and environmental regulations may be used as non-tariff barriers with the effect of keeping southern products out of industrialized countries. Some emphasize the rules-based approach to standard-setting established with the WTO Agreements on Sanitary and Phytosanitary Standards and Technical Barriers to Trade, and their requirements for risk assessment and science-based standards justification, and that Southern countries were enticed to agree to the Uruguay Round agreements with the assurance that the WTO system would provide a reliable rules-based approach to standards that would be to the advantage of Southern countries.

Northern activists emphasize the problems inherent in what passes for risk assessment, the power of corporate lobbyists over government regulators, and the limitations of so-called science-based standard-setting. They also emphasize the loss of potential influence for local public interest groups seeking to improve local and national standards, given the dominance of trade law in domestic discussions, and the removal of standard-setting to remote, international standard-setting bodies including the International Standardization Organization and the Codex Alimentarius Commission, promoted by the GATT. They also note the undermining of environmental and health standards by an increased willingness to rely on corporate "voluntary initiatives" for environmental protection, a trend also discernable internationally, in promotion of "Codes of Conduct" for corporations, and the movement of the ISO into public policy areas where it has not

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[24] In the Matter of Canada's Landing Requirement for Pacific Cost Salmon and Herring, 1989; US Restrictions on Imports of Tuna, GATT doc. DS21/R; Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, GATT Doc. 375/200; US Standards for Reformulated and Conventional Gasoline WT/DS2/AB/R 1996 and WT/DS2/R/1996; EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada, WTO WT/DS48/R/Can. And WT/DS48/AB/R/1998.

previously worked, and for which it is ill equipped.

In summary, the WTO dispute record on its "environment and health clause" is negative, as regards protection of the environment and human health and demonstrates the wide gap in legitimate perspectives between Southern and Northern citizens on these issues, and the impact of the trade regime on them.

6.3.2 WTO treatment of trade sanctions pursuant to Multilateral Environmental Agreements (MEAs)

The Marrakesh Agreement of April 1994 established a Committee on Trade and Environment (CTE) to discuss problems between environmental policy and the new trade regime. The CTE members met between 1994 and the Singapore WTO Ministerial meeting of December 1996, and continue to meet, with few concrete results. Amongst the agenda items for the committee was the question of whether trade sanctions taken pursuant to multilateral environmental agreements could be accommodated within the WTO regime, despite apparent conflict with the provisions of the WTO agreements.[25]

MEAs, like ILO conventions, represent an international consensus rendered into law on the subject matter at issue, at least amongst those countries that have signed them, and cannot be said to be instruments of unilateralist protectionism. From the perspective of environmentalists, this issue should have generated the least debate in the CTE. A number of legal options were proposed by some Northern countries for accommodating trade sanctions pursuant to MEAs . These included: a general agreed interpretation of Article XX by WTO members providing authorization for the use of trade restrictions under MEAs, regardless of conflicts between their provisions and member's WTO rights; a case-by-case approach to allow WTO members to consider exemptions in order to permit trade restrictions under MEAs in individual cases; or an amendment to the wording of Article XX.
Specifically, the EU proposed that measures taken under specific provisions of an MEA "shall be presumed to be necessary for the achievement of the environmental objectives of the MEA..." or alternatively '"necessary for the protection of the environment..." To achieve such protection, the MEA should be open to participation from all countries concerned with its environmental objectives, and should reflect, through adequate participation, the interests of all parties concerned.

Developing countries responded with discussions of other issues of concern to them including that MEAs do not usually bind all countries, so that a WTO member could find

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[25]Sources include WTO Trade and Environment reports; Raghaven, Charkravarti, " The EU proposal on Environmental Treaties is Trade Restrictive" in Third World Economics, No. 132; Shahin, Magda, "Trade and Environment in the WTO: Achievements and Future Prospects", in Third World Economics, No. 156, 1997; and personal discussions with WTO delegate- participants in the CTE discussions.

its trade rights affected by a trade restriction under an MEA to which it did not adhere. Further, to the extent that MEAs cover process and productions methods (PPMs) for environmental purposes, they would extend the concept of extra-territoriality, imposing standards of one country on another, a result that is broadly opposed in the South. MEAs should be open to all countries to join, but local environmental issues should be addressed by the country concerned, not by external countries, using the mechanism of MEAs. Any trade measures to be contemplated under MEAs with broad membership should be compatible with the GATT.

The Canadian government took the position that no change is required in Article XX, and that any waivers on trade measures should be on a case-by-case basis.

At the WTO Ministerial meeting in Singapore, a "Joint NGO Statement on Issues and Proposals for the WTO Ministerial Conference" stated, regarding MEAs:

> para.53: Whilst we oppose "green protectionism", on the other hand the trade regime and WTO should respect decisions of MEAs that are broad-based in membership and with adequate regional representation. Countries should not prevent or weaken needed and legitimate environmental measures in MEAs on the pretext that this may be against "free trade" and WTO principles.[26]

To date, the attempts to accommodate trade restrictions pursuant to multilateral environmental agreements within the WTO regime are at an impasse, and no accommodation has been reached. This impasse should provide an important signal to the ICFTU and other groups whose strategy for protecting labour rights is to have a labour clause enforceable by trade restrictions. If the WTO members are not willing to accept trade restrictions already agreed to by international processes in MEAs, it is most unlikely that they will agree to accept a labour clause and initiate trade restrictions to enforce it.

6.3.3 Secrecy of WTO processes

One issue for which the trade regime has been consistently criticized throughout this decade is the secrecy of its negotiations and dispute resolution processes. Although there are various initiatives underway to increase transparency at the WTO, the current practice is to maintain confidentiality on ministerial deliberations, negotiations, and dispute panel processes. The ICFTU labour clause proposal does not address this problem. If the ICFTU assumes that its enforcement process would be an open and participatory one, its assumption is probably mistaken, and it could well find labour issues dealt with in secret discussions, as are environmental and health disputes to date. Certainly, there is no reason

[26]Reprinted in Third World Economics, No. 152, Jan. 1-31, 1997, pp.27-34.

to expect any transparency in labour processes until there is greater transparency regarding all other processes.

6.3.4 The concern regarding US unilateralism

An issue which pervades discussion of both labour and environmental clauses in the WTO agreements is the repeated use by the United States of its trade powers, including "Super 301" to unilaterally enforce its trade policy world-wide. Governments and NGOs from developing countries and some Northern countries readily admit to an over-riding concern that the US will use a labour clause for protectionist and blatantly punitive purposes. In its blanket dismissal of the argument that a workers rights clause could be used for protectionist purposes, the ICFTU fails to consider this central role of US trade policy and the intimidating effect it has on WTO discussions of both environmental and labour policies.

Even within the US, the use of trade restrictions is controversial with both NGOs and industry.

According to a 1997 report by the National Association of Manufacturers in the US, between 1993 and 1996, the US took unilateral measures 61 times against 35 countries, representing 42 percent of the world's population and $790 billion worth of export markets. In only "a handful" of cases could "an arguable claim" be made that the sanctions changed the behaviour of the government in question, according to the association.[27]

Although the ICFTU writer claims that its proposed clause would "rein in ...unilateral measures.."(p.27), it offers no evidence to support the claim, and does not offer any explanation of how US unilateralism could be limited by its clause, nor is there reason to believe that it would be constrained.

6.3.5 WTO agreements are a package

Enthusiastic environmentalists, including this writer, supportive of amendments to Article XX of the GATT, for environmental protection, were cautioned by some sympathetic and seasoned WTO officials and diplomats that the WTO agreements are a package (as is a collective agreement). Amendments in any one agreement or article would undoubtedly unleash demands for compensating compromises elsewhere. The ICFTU writer has failed to consider what compromises might be required in the negotiation process to insert a labour

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[27]"NAM CALLS FOR STRINGENT CONDITIONS ON USE OF UNILATERAL SANCTIONS," in Inside US Trade, March 7, 1997.

clause.

7. Conclusion

The ILO exists to provide leadership, standard-setting, and assistance to its member countries in order to promote workers rights. However, its conventions suffer from lack of ratification and implementation.

Despite the disclaimers contained in the ICFTU position paper, it is impossible to escape the conclusion that its proposal for a labour clause (more limited than a social charter) is a punitive strategy to enforce labour conventions for which, to date, political will for implementation has been lacking. Nor does it demonstrate that such punitive measures will have a positive effect. In enumerating the countries which have been deprived of US GSP advantages the ICFTU offers no evidence that these events have actually improved labour rights in those countries. The list (Brunei, Liberia, Maldines, Mauritania, Sudon, Syria) does tend to substantiate arguments that a labour rights clause, would be used against some of the weakest and most impoverished countries in the world.

The ICFTU does not include any developed strategy for "carrots" ie. significant programmes that could assist countries to implement improved labour rights. International agreements to promote significant changes in policies normally address the need for capacity building, technological and economic transfers to southern countries to promote change. Examples include funds established for implementation of the Montreal Protocol on Ozone-Depleting Substances, and the Convention on Biological Diversity. Though far from adequate, these funds reflect a recognition that an over-riding need in the south is for poverty alleviation and development, and that punitive measures to promote policy change are unjust and likely to be ineffective.

Non-governmental organizations, such as Free the Children, working on issues such as child labour also recognize the need for programmes of compensation and rehabilitation for the children affected, should banning of child labour occur.

Other approaches to promotion of international labour rights reflect this broader perspective. On May 25, 1998, the EU announced that it will reduce or eliminate tariffs worth US $880 million on imports from developing countries which agree to comply with certain labour and environmental norms. Regarding labour, the incentives will be available for compliance with ILO conventions on child labour, the right to organize, and the right to collective bargaining. For environmental goals, they will be available to countries following the processing standards outlined by the Tropical Timber Organization.[28]

[28]Institute for Agriculture and Trade Policy, Bridges Weekly Trade News Digest, Vol.2, No. 1

Southerners also underscore the limitations of a labour (or social) clause approach to deal with the global impacts on employment associated with de-regulated trade. As Vandana Shiva writes::

> ...even as social clauses are being discussed, thousands and millions of workers are losing their jobs and the entire work force is becoming a new reserve of part-time insecure workers competing with each other to push wages downwards....Social clauses would do nothing to provide job security ...but divert energies of Northern trade unions - from dealing directly with this crisis of work domestically and make them focus on conditions in the Third World. And instead of strengthening the movement to deal with unemployment crisis and job loss through enforcing social accountability on corporations and governments, social clauses make bed-fellows of Northern trade unions and their corporations to jointly police and undermine social movements in the South. Thus the argument that environmental and social clauses will create a mechanism for controlling transnational corporations (TNCs) which are the main beneficiaries of 'free trade' is flawed. Globalization is centred on the merging information-technology industries, for whom the TRIPS agreement is crucial to ensure market monopolies. And IPRS are the mechanism to prevent biological and information free reproduction. Both these technologies are labour-displacing.[29]

Further, Shiva enumerates, social clauses divert attention from the crisis of work and unemployment to "labour standards"; they do not challenge the logic of free trade; do not stop processes in the South causing Third World poverty - debt, constant reduction in commodity prices and terms of trade, and policies of the Bretton Woods institutions. They don't addresses the devaluation and structural adjustment programmes that reduce wages in the South.

With respect to the WTO, J. John of the Centre for Education and Communication, New Delhi, India, comments:

> GATT negotiations and the formation of the World Trade Organisation were not intended to change this unequal structure of global economy. On the contrary they have strengthened the grip of TNCs and governments of the industrialised countries, over the millions of poor in the world. WTO has assured freer trade, but is the same institution that engenders systematic rights violations. It is a pity that trade unions and humanitarian groups in the North, who advocate WTO-labour

[29]Shiva, Vandana, "Social environment clauses - A "political diversion", in Third World Economics, No. 118, pp.8 - 9.

standard linkage, have overlooked these fundamental contradictions.[30]

These perspectives, clearly articulated by southern writers and shared by others, provide a reminder of the conceptual limitations of pursuit of a labour clause in trade agreements. They underline that the lack of labour rights in the globalized economy is a more fundamental and complex problem than could be alleviated by an occasional case-by-case endeavour, even in the unlikely event that a labour clause on the ICFTU model could be negotiated.

The struggle to protect citizen rights in the globalized world, including labour and social rights, is not likely to be enhanced by the pursuit of the ICFTU labour clause.

[30] John, J, "Social Clause as Ideology," in Third World Resurgence, No. 76, Dec. 1996, pp.30-32, at p.31.