



An Enforceable Social Clause

by Terry Collingsworth, General Counsel, International Labor Rights Fund

The recent Asian crash has provided economic policy-makers with a refresher course on a lesson learned by most of our depression-era grandparents through painful experience: Laissez-faire capitalism does not lead to broad-based economic development. With the meltdown in Russia, Japan in crisis, Central and South America hanging on the precipice, Africa as desperate as ever for economic assistance, and growing economic inequality in virtually every country, we are at a crucial moment in economic history.

The economist cabal is split over what action to take. Free market purists argue for no intervention—let the market discipline investors who thought the Asian mirage was real. The other faction, led by U.S. Treasury Secretary Robert Rubin, argues for International Monetary Fund (IMF)-led bailouts to restore investor confidence, or at least to subsidize some of their losses with public funds. Neither of these investor-oriented, trickle-down perspectives offers hope for the countless

millions of working poor who will lose (or suffer a reduction in) their meager incomes because of the global economic crisis. There is virtually no high-level policy discussion on the need to reevaluate the global trading system based on its clear failure to create sustainable economic growth in developing countries that have largely followed the neoliberal economic prescriptions.

Following the searing experience of the Great Depression and World War II and mindful of the threat of Soviet communist domination, the architects of the post-war order understood that delivering economic benefits to the poor was a necessary ingredient for an economic model that could counter the Soviet

challenge. Whatever the motivation, there was an express recognition that trade was not an end in itself—increased trade was to be the engine for bringing prosperity to the world's poor. For example, the

preamble to the original General Agreement on Tariffs and Trade (GATT), signed in 1947, stated: "Relations among countries in the field of trade and economic endeavor should be conducted with a view to raising standards of living and ensuring full employment." This central mission statement justifying the trading system has been forgotten.

Ironically, now that the global economy has become sufficiently integrated so that trade could truly be utilized as a tool for eradicating poverty in the developing world, the trading system has become the nearly exclusive domain of private capital. The new captains of the global economy view the goals of trade in entirely different terms from the drafters of the original GATT. To them, the new global economy offers a way to have the best of both worlds: products can be made with third world labor costs and sold for first world prices.

Nike, to take a well-known example, shifted its shoe and apparel production from Oregon to Korea, Indonesia, and Vietnam and then to China and Bangladesh, not to spread the benefits of development and raise living standards for the working poor, but to take advantage of the merciless competition for investment between developing countries that have been forced to undercut each other in the race to offer the world's lowest wages.

Promoting sustainable economic development is not an objective of Nike and its well-developed competitors. In fact, the global manufacturers that rely upon cheap labor in the third world have a clear conflict of interest with any developing country's development aspirations, which could raise the price of labor. The mobility of these companies as they search for ever cheaper sources of labor and abandon workers who had an expectation that they would eventually earn a living wage confirms this reality. Any development-oriented changes in the global economy must come from regulation of private investors rather than from a naïve hope or cynical assertion that these companies will regulate themselves. The health of the world's economy is dependant upon a revival of the concept that trade is a tool to increase prosperity for all participants in the global economy. An enforceable social clause that sets a global floor for labor rights in order to prevent downward competition for investment would revive the long-dormant GATT preamble.

Key Points

- The failure of sustainable economic growth to take hold in the developing world demonstrates that "free trade" is not delivering on its promise to bring prosperity to the world's poor.
- The new global economy forces developing countries to compete based on their willingness to offer the lowest possible wages to multinational firms, ensuring that the world's poorest workers remain poor.
- If a major goal of the trading regime is to eradicate poverty, this needs to be made explicit in the trading rules with an enforceable social clause that prevents the worst forms of worker exploitation and protects fundamental labor rights.

Labor rights advocates in the U.S. have been quite successful in legally mandating the link between labor rights and trade on a unilateral basis in U.S. law. A series of laws were passed that condition specific trade benefits on compliance with “internationally recognized worker rights.” Perhaps the best known and most utilized of these is the Generalized System of Preferences Act (GSP), which grants developing countries duty-free status on many exports to the U.S. in exchange for progress on worker rights. The premise of the law was that “trade, not aid” should be the basis for promoting sustainable economic development.

The GSP, and other laws linking trade benefits with the promotion of worker rights, could have served as an important model leading to a multilateral approach to social clauses in trade agreements. But the Reagan, Bush, and Clinton administrations have consistently used their discretionary authority to decline to enforce the worker rights provisions of these laws. Whether the reason was foreign policy considerations or buckling to pressure from a powerful U.S.-based company with off-shore production, the laws have never been enforced to any degree that would allow meaningful conclusions to be drawn regarding the economic effects of this approach to global regulation.

The U.S. government has also consistently failed to press for inclusion of an enforceable social clause in multilateral trade agreements. The North American Free Trade Agreement (NAFTA) includes a politically expedient side agreement on labor rights—President Clinton’s bone to progressives—but the primary remedy for violations of the most important labor rights is a “consultation” between the concerned governments. In extreme cases involving health and safety violations, the government that failed to effectively enforce its laws may be “sanctioned,” but the sanctions can then be refunded and used to improve enforcement efforts. Under no circumstances may workers harmed by serious violations of labor laws obtain direct relief; likewise, under no circumstances may a company that repeatedly violates the rights of workers suffer any penalty. In sharp contrast, U.S. negotiators insisted upon and were successful in obtaining very strict protection in NAFTA for intellectual property rights, which include the possibility of criminal penalties for violations.

Likewise, while the Uruguay Round of GATT produced a comprehensive set of trading rules that protect property rights and create new regulations regarding

intellectual property, it was absolutely silent on labor standards and other social issues. At the first ministerial-level meeting of the World Trade Organization (WTO) in December 1996, the body created to oversee the world trading system pointedly refused to even discuss adding a social clause to the comprehensive trading rules. The matter was referred to the International Labor Organization (ILO), which promotes compliance with its substantive conventions but lacks any means to enforce its standards.

The present direction taken by U.S. negotiators for the Free Trade Area of the Americas (FTAA) does not bode well for a significant change in direction. The U.S. has accepted the limitation that social issues will not be addressed in a formal negotiating group and can only be discussed within a consultative committee on civil society, which can forward only nonbinding recommendations to governmental negotiating groups.

While proclaiming its inability to gather the necessary support from other countries to achieve an enforceable social clause, the U.S. government is bargaining hard for new and effective standards for the protection of intellectual property rights. This U.S. focus reflects an issue of prioritization. Key policymakers are generally recruited from businesses and institutions that are beneficiaries of the current economic system. For example, the major voice on economic policy direction within the Clinton administration, Treasury Secretary Rubin, formed his world-view while working as a partner at Goldman Sachs, and the U.S. Trade Representative,

Charlene Barshefsky, was formerly an international trade lawyer representing multinational companies at Steptoe and Johnson, a large Washington, DC, law firm. The current global economic crisis may force a reevaluation of the direction of U.S. policy and require input beyond what would be good for U.S. corporate interests alone.

Key Problems

- Successive U.S. administrations have failed to adequately enforce U.S. laws designed to serve as models for linking trade benefits to compliance with “internationally recognized worker rights.”
 - The Clinton administration has pursued trade agreements like NAFTA and the Uruguay Round of GATT that promote trade and protect property but do not include an enforceable social clause.
 - U.S. policymakers are captives of business interests and ignore calls from trade unions, human rights groups, and development organizations to promote sustainable economic development through trade policy.
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The U.S., as the largest single consumer in the global market, could immediately change the tenor of trade by fully implementing the worker rights provisions in the GSP and other related laws. This would signal that Washington is now serious about social issues as they relate to trade. To counter the inevitable charges of protectionism and unilateralism, the U.S. should clarify that it supports the inclusion of an enforceable social clause in all multilateral trade agreements. This will inevitably be a slow and difficult process, and success

Key Recommendations

- The U.S. government should begin enforcing existing laws like the GSP in order to develop a credible record for an alternative vision of economic development.
- Washington should lead by example and use its considerable economic leverage to elevate social issues in all trade negotiations—rather than simply using them as a bargaining chip to get further concessions toward protecting property rights..
- Trade unions, human rights organizations, and other interested parties must unite nationally and globally around a concrete proposal for an enforceable social clause.

will depend in large part upon U.S. resolve. Trading partners were certain that there would be no U.S. agreement on NAFTA or GATT without solid protection for intellectual property and other commercial interests; this level of resolve must now be expressed and acted upon with respect to social issues.

Success in developing an enforceable social clause depends upon a lot more than U.S. government acceptance, however. Natural allies in the labor, human rights, and environmental communities remain divided on what should be covered by a social clause. Further, there has been very little concrete action

taken to develop a workable enforcement process. Multinational firms, in fierce competition with one another for market share, managed to cooperate in their mutual interest to develop global trading rules to protect property and investment. The very diverse interests that seek an alternative economic model must likewise cooperate to ensure the adoption and implementation of a social clause.

In deciding what should be covered by a substantive social clause, the approach most likely to lead to acceptance is agreement on the most fundamental rights that should be enforceable immediately and the subsequent identification of any number of additional standards to be phased in over time. There is an emerging consensus on which labor issues must be included in a social clause. The most widely accepted version is proposed by the International Confederation of Free Trade Unions (ICFTU), the international body of national trade union federations.

The ICFTU defines its social clause based on key conventions of the ILO that have been ratified by most countries of the world: the right to associate (ILO Convention No. 87); the right to organize and bargain collectively (ILO Convention No. 98); equal employment opportunity and nondiscrimination (ILO Convention Nos. 100 and 111); prohibition of forced labor (ILO Convention Nos. 29 and 105); and prohibition of child labor (ILO Convention No.138). These

labor rights could be supplemented at an appropriate time with additional provisions relating to specific conditions of employment and wages. Environmental issues could be prioritized in a similar way to achieve a more comprehensive social clause.

The conventional debate rages over whether the WTO or the ILO is best suited to enforce social issues, but this either/or approach is unnecessary. Every possible venue should be used to promote compliance with the social clause. Since trade is the catalyst for the global economy, it should be the primary vehicle for enforcing social norms.

One possibility for comprehensive enforcement would be to simply require compliance with the social clause as a condition to participation in any given trade agreement. This is the approach taken unilaterally by the GSP, which provides a strong incentive for compliance by offering tariff forgiveness on a wide range of goods. If extended to multilateral agreements, this approach would offer whatever benefits are attributable to a given trade agreement as the reward for compliance with the social clause.

A modified version of this approach would be to allow provisional membership in a trade agreement subject to a very specific plan to participate in a process to harmonize law and practice upwardly to be consistent with the social clause. A further principle of harmonization is that countries that lack the resources and capacity to improve the enforcement of labor laws must be provided with direct assistance to support these activities and to offset the costs of compliance.

But these enforcement approaches put the burden on individual countries to meet the standards of the social clause. Comprehensive compliance is likely to occur only if private companies are also held accountable for failing to comply with the standards. As a condition to operating in more than one country covered under a trade agreement, companies should agree to be bound by the terms of the social clause (as well as local laws) and to submit to information audits to confirm their compliance. This approach, which is utilized with respect to existing laws by the Overseas Private Investment Corporation, an agency of the U.S. government that provides financing and insurance to companies investing in developing countries, acknowledges appropriately that employers, not countries, violate the laws. Should a company be found in violation of the social clause, remedies could range from monetary penalties to loss of market access to revoking the right to transport across national boundaries any products made in violation of the social clause.

The key goal is to begin a discussion that will lead to a concrete proposal to replace the current “free market” trading system, which protects only property rights, with a system that gives life to the GATT preamble and explicitly recognizes that a major goal of trade should be to improve living standards and conditions of work for the workers of the world.

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