

**Trade liberalization, labour law,  
and development:**

**Adelle Blackett A contextualization**

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Adelle Blackett A contextualization**

International Institute for Labour Studies  
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## Preface

This Discussion Paper forms part of a set of studies prepared in the framework of the IILS project “Labour law and decent work in low-income settings”, which is examining the effectiveness of labour law in protecting workers in the developing world.

A significant number of workers fall outside the scope of labour law either *de jure* or *de facto* throughout the world. Changing patterns of production and work, a weakening regulatory role of the national state over the socio-economic sphere and diminishing capacity of trade unions for collective representation have been identified as major challenges to the protective function of labour law today. Globalization, in its socio-economic, political and ideological dimensions, is considered as a key determinant of these challenges. The implications of these developments for labour law are the subject of a lively debate in the scholarly community.

The intention of the project is to contribute to this ongoing reflection from the perspective of developing countries. The above analysis appears to be relevant to their realities. However, in the developing world the limited scope and application of labour law is of course not new. The papers prepared in the framework of this project map and examine both the “old” and persistent factors and the more “recent” factors underlying the limited coverage and problems of compliance and enforcement in the South. They consider the legal, social, economic, political, ideological and cultural context in which labour law develops and operates in different regions of the developing world, taking into account global, regional, national and local dimensions. The papers also critically review some of the responses developed to enhance the application of labour law and broaden the scope of protection.

The present paper is one of six Discussion Papers which treat different aspects of this question.

The paper by Rachid Filali Meknassi: *L’effectivité du droit du travail et l’aspiration au travail décent dans les pays en développement: une grille d’analyse*, proposes an analytical framework for understanding the persistent reasons for workers’ limited access to legal protection in the developing world and examines the impact that globalization is having.

Three papers examine old and new challenges facing labour law as a tool to promote social goals from specific regional perspectives. They also look at the approaches developed to address these challenges. Moreover, special attention is given to the effectiveness of labour law in promoting one specific social goal, namely gender equality. These papers were prepared by Graciela Bensusán: *La efectividad de la legislación laboral en América Latina*, Colin Fenwick, Evance Kalula and Ingrid Landau: *Labour law: A Southern African perspective*, and Kamala Sankaran: *Labour laws in South Asia: The need for an inclusive approach*.

The paper by Jan Theron, Shane Godfrey and Margareet Visser: *Globalization, the impact of trade liberalization, and labour law: The case of South Africa* deepens the analysis of the impact of globalization from a more sociological perspective. It notably focuses on the relationship between trade liberalization and labour law and presents South Africa as a case study.

The present paper by Adelle Blackett: *Trade liberalization, labour law, and development: A contextualization* is a literature review that emphasizes institutional analyses of trade law, and explores some of the linkages with the development literature. The author contends that the development of trade law needs to be appreciated within its historical context to understand its intimate relationship with labour regulation in the North and labour commodification in the South. She adopts the perspective that from a legal / institutional perspective, the relationship

between trade liberalization and labour law was not established autonomously along free trade principles; rather, it was constructed by state action and embedded in social institutions in industrialized market economies of the North during the 1950s – early 1980s. The same was not generally true for many low income states in the South.

The author maintains that contemporary challenges to labour regulation in the South therefore warrant less deterministic analysis of the impact of trade regulation. The study considers labour regulatory experiences in Mexico (NAFTA), CARICOM, Mauritius, Cambodia and the Republic of Korea to argue that the relationship between trade liberalization and labour law must be understood as constantly re-constructed across governance levels and with a view to forms of distributive justice beyond national borders.

The author is grateful to Me. Sabaa Khan, an LL.M. candidate at Université de Montréal, for her excellent research assistance. She thanks Tzehainesh Teklè and participants at the International Institute for Labour Studies' workshop on "The effectiveness of labour law to promote social goals in low-income settings" (Geneva, 25-26 October 2006) for their helpful comments on a presentation linked to this paper.

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## Introduction

This literature review emphasizes institutional analyses of trade law, while engaging some of the development literature. It focuses in some senses on what the mainstream literature may be seen to neglect, but in doing so considers that from a legal / institutional perspective one appreciates that the relationship between trade liberalization and labour law is constructed, shaped, redirected by state action. It is not the autonomous market, but rather economic activity embedded in social institutions, institutions which were constructed with a hermetic vision of the scope for national public policy in industrialized market economies of the North. Not only must the development of trade law be appreciated within its historical context to understand its intimate relationship with labour regulation in the North and labour commodification in the South. The contemporary challenges to labour regulation in low income settings of the South are also ripe for a less deterministic analysis of the impact of trade regulation once contemporary regulatory action is considered broadly, and across governance levels. It is argued that the relationship between trade liberalization and labour law must be understood as constantly reconstructed across governance levels and with a view to forms of distributive justice beyond national borders.

### 1. The foundations of multilateral trade: Embedded liberalism and the convenience of colonialism

There is a familiar account of the construction of the international economic order, and the foundations of multilateral trade. It reminds us that hand in hand with the construction of the international economic order was a “double” movement: embedded liberalism policies that enshrined social citizenship rights, social welfare entitlements for the paradigmatic workers in the North in exchange for the progressive liberalization of the economy (Polanyi, 2001, pp. 79-80). Social policy remained domestic. As Ruggie (2003) argues, “national economies, engaged in external transactions, conducted at arms length [... could be] mediated at the border by tariffs and exchange rates, among other tools.”

An important piece of Polanyi’s account which is often overlooked was the importance of colonial exchange, not only the extraction of goods, but the commodification of the labour power of colonial peoples.<sup>1</sup> When liberal trade was negotiated in the Havana Conference and enshrined in the General Agreement on Tariffs and Trade in 1947, colonialism faced intellectual challenge, but remained very much alive. Although there were some developing countries present and able to negotiate some attention to the position of less developed regions (notably Brazil, Chile, China, Cuba, India, Lebanon and the Union of South Africa), most were still subsumed as part of the territories of the main contracting parties of the General Agreement on Tariffs and Trade (GATT).<sup>2</sup>

For many of the industrialized nation states of Europe entering the GATT at the end of World War II, colonial preferences enabled them to continue a pattern of exchange (or unidirectional trade) between its colonies and the metropolitan territories. Through the extraction of raw commodities – and through the commodification of the labour power of colonial peoples – these nations could afford to build up embedded liberal policies. Although exchange between

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<sup>1</sup> Polanyi’s account by contrast is replete with analyses of colonial exchange, the violent impact of the turn to a market economy on colonial peoples, by forcing them to sell their labour power. See in particular Polanyi, 2001, 171ff.

<sup>2</sup> Opened for signature Oct. 30, 1947, 55 U.N.T.S. 187.

colonial territories and the metropole were selectively open to the movement of (primarily) goods, borders for distributive justice in terms very literally of citizenship remained closed in the metropole. Preferences accorded to former colonies, which served to retain colonial trading patterns, were considered to be “an expression of modern imperialism.”<sup>3</sup>

The important exceptions are the basis for the liberal trade challenge and are at the core of the unsuccessful initiative to establish an International Trade Organization in Bretton Woods alongside the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF). The intellectual challenge came most vociferously from the United States, which was (for the most part) not a former colonial power but rather a former colony. Colonial preferences formed the basis of their insistence on non-discrimination principles, which are the cornerstone of the WTO system today<sup>4</sup>. Non-discrimination in trade was consonant with a US view that the least possible interference with the free market mechanisms should be promoted. Beyond this ideological consonance with the land of *laissez-faire* (England) was also the fact that the US had become post-1918 a major exporter of mass-produced industrial products. However, these products were vulnerable to tariff preferences and other trade barriers. The US realized that its competitive advantage would be lost were it not able to guarantee equal access to foreign markets. As US ambassador to the GATT Richard Gardner has convincingly argued, the US was “reluctant to play an Imperial role” (Gardner, 1956, p. 17) but challenged what was referred to as the “fiction of empire” which served to justify their “exclusion from extensive areas of the earth’s surface” (Culbertson, 1925, p. 192). It is no surprise, therefore, that Wilson’s third of his 14 Points coming out of WWII was explained as ensuring that “every nation remained free to determine its own economic policy EXCEPT in one particular, that its policy must be the same for all other nations, and not be compounded of hostile discriminations between one nation and another” (Gardner, 1956, p. 17).

The Havana Charter was a lengthily-negotiated<sup>5</sup> compromise document, between industrialized countries and developing countries. In particular, M’Rini notes that it did not explicitly contemplate how to reduce the divide between revenues of inhabitants of developing countries and industrialized nation states.<sup>6</sup> But this is hardly surprising. The logic of liberalizing access to markets was precisely to encourage a particular form of development, the industrialization of national economies<sup>7</sup> with a view to fostering deeper trade and as a result,

<sup>3</sup> See Culbertson, *International Economic Policies* (New York, 1925) at p. 192, as cited in Gardner, 1956, p. 18.

<sup>4</sup> The principles are also central to the law of international arbitration, for different historical reasons. See Anghie, 2004. Anghie argues that

[t]he ‘right to trade’ and the assessment of non-European government in terms of its recognition of the right to trade has been a continuous theme in the discipline. When companies such as the British East India company, exercising sovereign rights, administered the territories of non-European peoples, they established systems of law and governance that were directed at furthering the commercial relations that were the very *sine qua non* of their existence. Commerce and governance were not merely complementary but identical: a corporation exercised the power of government. The governance of non-European territories was assessed principally on the basis of whether it enabled Europeans to live and trade as they wished. Thus, according to Westlake, non-European states were uncivilized unless they could provide a system of government ‘under the protection of which... the former [Europeans] may carry on the complex life to which they have been accustomed in their homes’. If such government was lacking, Westlake argued, ‘government should be furnished’. Capitulation systems, protectorate arrangements and outright conquest could remedy the situation.

*Ibid.* p. 252.

<sup>5</sup> It was the culmination of three years of preparation and eighteen months of negotiation. See U.S. Department of State, Pub. No. 2411, *Proposals for Expansion of World Trade and Employment 8* (1945), cited in WTO, 1995. M’Rini notes the limited developing country participation at the preparatory level (Brazil, Chili, China, Cuba, India, Lebanon and the Union of South Africa alongside eleven industrialized countries), but the greater participation of Latin American, Middle Eastern and Asian countries at the Havana Conference. The U.S.S.R. declined to participate. See M’Rini, 2005, p. 26.

<sup>6</sup> *Ibid.* p. 27.

<sup>7</sup> See Article 1, Havana Charter.

reducing income inequality. A relationship between employment and trade policies was “widely appreciated”<sup>8</sup> in policy circles, and explicitly contemplated in the Havana Charter; indeed, even a “social clause” was envisaged in Chapter III.<sup>9</sup> The Havana Charter specifically embraced standards of living and ensured full employment and a large and steadily growing volume of real income.<sup>10</sup>

The latter principles were retained when multilateral trade was ushered in not through the Havana Charter and the ITO that it would have created, but rather through a self-executing agreement between “contracting parties”, the GATT, without a permanent secretariat or a clause on unfair labour conditions (Mc Rae, 1996, p. 178). In this sense, the world trading system has not inherited free trade in the strict economic terms. It was meant to foster greater trade liberalization, progressively, over time. The GATT initiative sought to prefer a rules-based system of multilateralism over pure power politics (Jackson, 1997, pp. 1-2). Yet McRae has noted that “unlike other international organizations which surrounded themselves with lawyers, lawyers were notably absent from GATT, indeed were often not welcome, and the role of law in dealing with the economic relations of States was controversial” (McRae, 1996, p. 13). The world trading system has progressively been “reconstructed” according to Gardner to favour world trade rather than preferential trade (Palmer, 1996).

The key political compromise inherent to managed trade operated within a rules-based framework that stressed non-discrimination principles such as most favoured nation status and national treatment, that preferred tariffs rather than quantitative restrictions (quotas), and that promoted transparency (part of the justification for tariffs over quotas). But the optimistic account of the reality of the system was that it moved progressively, inexorably forward along the bicycle theory: According to Jagdish Bhagwati, the GATT mechanism and series of negotiated rounds require you to keep pedaling, or you will fall off (Bhagwati, 1988).<sup>11</sup>

While pedaling, developing countries are increasingly challenging whether the direction of liberalization leads to the promised results, as enshrined in the decade-old World Trade Organization. In addition to the GATT objectives, the preamble to the Marrakech Agreement considers “sustainable development”<sup>12</sup> one of the underlying goals of world trade. Yet the existing trade bargain calls the ability to accomplish those aims into question. This is starkly witnessed in the current Doha Development Round of negotiations, considered by Director General Pascal Lamy to be imperiled. According to the Sunday Telegraph, Lamy argued “[i]n a stinging rebuke to Western leaders ... [that] the global trading system ‘disfavours developing countries’ and that some existing rules are ‘remnants of colonialism’” (Halligan, 2006).

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<sup>8</sup> Gardner, 1956, pp. 104-106.

<sup>9</sup> The Havana Charter proclaimed that

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

US Department of State, Pub. No. 3117, 1948. See also Hansson, 1983.

<sup>10</sup> See GATT, preamble. See also Blackett, 1999, 31 Colum. Hm. Rts. L. Rev. 1, pp. 5-8.

<sup>11</sup> See also Wolf, 2004, p. 55 noting how nation states voluntarily abide by panel decisions on “complex issues relating to tariffs, schedules, procedures, matters to which the general public does not usually direct its attention.”

<sup>12</sup> Preamble, Marrakesh Agreement Establishing the World Trade Organization.

## 2. The inherent tension between trade liberalization, labour law and the role of the contemporary state in post-colonial developing economies

Multilateral managed trade and “free trade” are subject to essentially the same justification in that they reduce most obstacles to the movement of goods and capital. The inability to provide a liberal régime for the movement of persons is a key example, however, of the distinction between managed trade liberalization, and “free” trade. It is of particular importance to developing countries, whose traditional commodity exports (raw goods) are situated in the most distorted sectors, and who face a further myriad of constraints when its often abundant factor of production, its human labour supply, is restricted from moving as well or forced to move clandestinely under desperate, dangerous, and indecent conditions.<sup>13</sup> The movement of persons is an often overlooked element of the discussion, whose significance is underscored by Bernard Hoekman and Alan Winter.<sup>14</sup> It does not mean that simply because the movement of persons is liberalized, people will in fact migrate.<sup>15</sup> Rather, it means that analyses of the impact of trade liberalization on employment and the regulation of labour need to consider those workers who may fall beyond the purview of citizenship-oriented policies, yet whose labour force activity (formal or informal) tends to service the often low-skilled export economy.<sup>16</sup> This topic is of particular concern to developing countries, from which workers tend to migrate.

Another recently addressed distinction between managed trade and free trade that is of significant interest to developing countries was the GATT’s Multi Fibre Agreement (MFA). It first entered into force in 1974 as a “temporary” measure but was repeatedly renegotiated to ensure quota-based restrictions on trade to wool, cotton, and synthetic fibres on entry to countries like the EU, Canada, Norway and the United States. In addition to falling short of the transparency principle, the MFA contravenes the GATT’s most favoured nation principle and in particular discrimination against developing countries, against whom the quotas were applied almost exclusively by the time the fourth renegotiated MFN finally expired in 1994 (Kyvik Nordas, 2004, p. 13). The Uruguay Round Agreement on Textiles and Clothing (ATC) was a transitory regime, which phased out<sup>17</sup> the conditions of GATT’s Multi Fibre Agreement for Canada, the EU, Norway and the United States,<sup>18</sup> and was itself terminated on 1 January 2005.<sup>19</sup> Currently, textiles and clothing are integrated into the main multilateral trading framework.

The persistent contemporary challenge to multilateral trade – to renegotiate to reduce protectionist policies put in place by industrialized countries to safeguard their own markets – still remains. Since the successful negotiation of the comprehensive Uruguay Round agreement as a single undertaking that imposed strict disciplines on developing countries including in a

<sup>13</sup> As Polanyi poignantly observed about the raw implications of the “commodity character of labor,” “It is not for the commodity to decide where it should be offered for sale, to what purpose it should be used, at what price it should be allowed to change hands, and in what manner it should be consumed or destroyed.” See Polanyi, 2001, p. 185.

<sup>14</sup> See discussion of Hoekman & Winter’s work, *infra*. Hoekman & Winter (2005) add that the topic has not been studied sufficiently. For an assessment of the movement of persons within the confines of existing multilateral and regional trade arrangements, see Mattoo & Carzaniga, eds., 2003.

<sup>15</sup> The limited movement of persons as recognized and regulated in the EU is an example that most people do not migrate. Arguably redistributive factors to build weaker economies were a significant factor.

<sup>16</sup> In the case of migrant domestic workers, their reproductive labour subsidizes the formal economy activity of often “higher-skilled” workers.

<sup>17</sup> It has been noted that the phase out by stages was rather slow, with a tendency by states to integrate products for which quota utilization had in any event already been rather low, and to make extensive use of safeguard measures (Kyvik Nordas, 2004, pp. 14-15).

<sup>18</sup> Eleven other countries decided to apply GATT 1994 rules directly to integrate their clothing and textile sectors (Kyvik Nordas, p. 15).

<sup>19</sup> Art. 9, WTO Agreement on Textiles and Clothing, Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization.

range of new trade issues, industrialized market economies have themselves come under significant criticism for retaining trade policies that allow significant subsidization of their own markets. Certainly, the contradiction is flagrant. It is seen most starkly in market access for developing countries' agricultural products.<sup>20</sup> Agricultural protectionism, although not a straightforward "win-lose" situation from a North South perspective, is a strong reminder that while developing countries are often dependent on volatile prices in single commodity trade, industrialized countries heavily subsidize the production and export of their agricultural products. In so doing, industrial economies preserve a standard of living for their agricultural producers (their "citizens", at least)<sup>21</sup> that respects what economist Max Corden argues is the "conservative social welfare function".

The income-maintenance justification for preserving citizens' standards of livings – even when it entails maintaining trade tariffs for more than a temporary period – resides in the view that it is "unfair" to allow real incomes to be reduced significantly without unavoidable or particularly compelling justification, although Corden has argued instead for forms of adjustment assistance.<sup>22</sup> Indeed, Corden acknowledges that some protectionist policies introduced in response to the conservative social welfare function had a trade diversionary, and redistributive function that privileged regions in the North over those in the South.<sup>23</sup>

An analogous but distinct analysis would consider that state labour deregulation is a form of subsidy, which is quite the opposite to a neoclassical trade theoretical approach that would view labour standards like most other forms of policy activity that is not a spur to trade as a form of trade distortion.<sup>24</sup> An analysis of subsidies in this context encapsulates the concern that full economic liberalization could lead to dramatic decreases in the standard of living of workers in the North.<sup>25</sup>

While in the post WWII period into the 1980s, policies linked to embedded liberalism ensured that industrialized countries could provide social welfare systems including labour regulatory mechanisms that offered protection to the worker-citizen, the case has not been the same for developing countries. Rather, for developing countries, the "privilege of cushioning the adverse domestic effects of market exposure"<sup>26</sup> was never theirs. As Ruggie observes, "[t]he majority lack the resources, institutional capacity, international support and, in some instances, the political interest on the part of their ruling elites."<sup>27</sup> And of course, the embedded liberalism model in industrialized market economies is deeply challenged by the globalization of production chains, technological innovations and financial markets (Supiot, 2001).

Economic analyses like that of Bernard Hoekman and Alan Winter suggest that despite obvious deficits in the existing literature<sup>28</sup>, the following conclusions hold. First, they illustrate that "greater trade with developing countries will adversely affect the low wage workers in

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<sup>20</sup> Some commentators question the significance of this dimension and point to its multidirectional character. They note that even non-agricultural market access (NAMA) remains challenged. Only recently has one developing country, Brazil, decided that it will extend full duty and quota free market access to 32 LDCs to its economy. See "Brasil dará isenção de tarifas às 50 nações mais pobres do mundo," *Valor economico*, 1 December 2006. See also Bridges Weekly Trade News Digest, Vol. 10, No. 41, available at <http://www.ictsd.org/weekly/archive.htm>.

<sup>21</sup> The working conditions of migrant agricultural labourers in countries of the North fall far short of this standard, and are drawn upon to ensure trade competitiveness. See Blackett, Sep. 2007.

<sup>22</sup> See Corden, 1997, pp. 74-77. Note also that Corden has recently argued that the protectionist case against "social dumping" by LDCs is at odds with the humanitarian case. See Corden and Vousden, 2001.

<sup>23</sup> *Ibid.*, pp. 78-79.

<sup>24</sup> For a synthesis of the literature on this topic, see Blackett, 1991, pp. 52-56.

<sup>25</sup> This kind of concern does not displace, however, the scepticism on the basis of data suggesting that instead, developing countries remain net importers, even of labour intensive goods. See Ghosh, 2003, p. 3.

<sup>26</sup> See Ruggie, 2003.

<sup>27</sup> *Ibid.*

<sup>28</sup> They note an overwhelming focus on trade in goods despite the importance of services, and a failure to analyse the movement of persons sufficiently. See also the recently released joint study of the ILO and the WTO secretariat 2007.

industrialized nations by ‘effectively’ expanding the stock of unskilled labor, thus lowering wages” (Hoekman and Winters, 2005). Second, they observe that “unskilled labor has seen its relative remuneration fall generally. Moreover, the skill premium has risen in *both* developing and OECD countries — rising inequality between the skilled and unskilled is a global phenomenon.” In other words, labour market segmentation occurs across borders, and across the North-South divide to capture what may be referred to as the South in the North.<sup>29</sup> This segmentation is intimately related to trade liberalization.

The gendered dimensions of this segmentation, particularly as it touches the informal economy, are further reminders that export-led industrialization and accompanying regulatory choices are not neutral: workers’ identity and status matters.<sup>30</sup> As Hildegunn Kyvik Nordas observes in her World Trade Organization discussion paper on the textile industry post ATC, models of liberalization, notably in the clothing sector, that tend to assume full employment overlook the experience from many of the low income countries that established export-oriented clothing firms: they “mobilized labour that was previously not in the labour force, first and foremost women.” Economist Jayoti Ghosh reaffirms this experience with respect to the South Asian context: trade related employment may have a differential and dynamic impact not only on women’s levels of employment vis à vis men, but also on the nature and quality of employment that they occupy, and on where they may be required to work:

in the space of less than one generation, massive shifts of women’s labour into the paid workforce, especially in export-oriented employment, and then the subsequent ejection of older women and even younger counterparts, into more fragile and insecure forms of employment, or even back to unpaid housework. Women have moved — voluntarily or forcibly — in search of work across countries and regions, more than ever before.<sup>31</sup>

Guy Standing (1991, p. 20) adds that with this profound mobilization of labour supply, which includes migrants and children, there has tended to be “only a limited development of a skilled labour force.” Several of the case studies discussed in the regional snapshots below, notably in the case of the Republic of Korea and Mauritius, underscore the point that an analysis of trade and employment must consequently engage in gender and ethnic disaggregation to identify how different categories of workers are affected by trade policy, employment, and labour laws.

Trade liberalization is promoted as a pragmatic means by which to increase standards of living in developing countries over time. The premise is that global welfare will increase, and will be redistributed by individual states. It does not explicitly contemplate reducing the standards of living of citizens in the North, nor does it require states in the North to aid development in the South. The adjustments necessary in the North to foster greater welfare enhancement in the South — namely the liberalization of sectors over which a comparative advantage is likely, namely agriculture and textile trade — are forestalled as protectionist measures are kept in place in those sectors. Yet as Eddy Lee (2005) has insisted, there is a “fallacy of composition” effect inherent in simultaneous trade liberalization by all developing countries: “without higher growth and greater market access [notably to industrialized country

<sup>29</sup> This notion is drawn upon by the author to capture the fact that the South and the North are not hermetically sealed; arguably, neither can their labour law systems be hermetically sealed from these impacts. But, the labour law systems can replicate the segmentation, through the growing informalization of work in these sector. See Blackett, 2007.

<sup>30</sup> See Standing and Tokman, eds., 1991, p. 20 (noting that “[e]ven more than with import-substitution, this development strategy has relied on low-cost female labour.”). See also Trebilcock, in Davidov and Langille, eds., 2006, pp. 66-67 commenting on the extent of the informal economy and its gendered dimension.

<sup>31</sup> Ghosh, 2003, p. 1. Ghosh notes the more recent trend of more educated women in the IT-enabled service sectors crossing borders. She notes: “While such female migration is still a very small part of the total, it is pointing to a different tendency with different implications both for work patterns and for gender relations in both sending and receiving countries.” p. 9.

markets, on issues for example like agriculture] trade liberalization runs the risk of becoming a zero-sum game that continues to marginalize many low-income countries.” Not surprisingly, the joint ILO-WTO report of 2007 concludes generally from the existing literature that “the employment effects of trade have differed significantly across countries” (p. 6).

If we acknowledge, therefore, that the trade framework against which we model labour law’s effects is a rules-based system of managed trade, it is the nature of the bargain that determines employment levels, wage inequality and other employment patterns, and labour law. From the labour regulatory perspective, a key insight is that labour market regulation is not an inherent distortion to the free functioning of the market nor is re/deregulation or competition by low labour cost states necessarily a form of social dumping or unfair subsidization. In other words, the empirical analyses capture employment effects of asymmetrical liberalization that favours industrialized market economies. This paper argues that the normative ideal of trade liberalization should actually lead to quite a different outcome: fostering distributive justice across state borders.

Labour regulatory choices, like broader public policy decisions reflected in the negotiated trade agreements, have an impact on trade’s redistributive character, and that impact operates beyond national borders. It is true that celebrated studies by the OECD have argued on the basis of abstraction that there is no economic basis for fears that trade liberalization poses a threat to core labour standards.<sup>32</sup> Eddy Lee demonstrates in his recent working paper that the value of broad generalization of the link between trade liberalization and employment is undermined in light of sharply contrasting employment effects between countries, and suggests that country-specific and contingent factors are important.<sup>33</sup> Trade and labour law analyst Kevin Banks further reminds us of the perils of economic abstraction, including that it tends to assume that regulatory standards will not have offsetting economic advantages for business either directly or as an inextricable element of a larger social, political or regulatory environment.<sup>34</sup>

Constructively, Hall and Soskice 2001, contend that states may draw on their comparative institutional advantage – which plays a significant role in firms’ decisions on where to locate and invest – to enhance their ability to benefit from trade policies. Hall and Soskice (p. v) classify states as either liberal market economies (USA, UK, Australia, Canada, New Zealand, Ireland) or coordinated market economies (Germany, Japan, Switzerland, the Netherlands, Belgium, Sweden, Norway, Denmark, Finland, Austria). Those classifications have impacts on the nature and effects of firm location decisions and forms of innovation and change. Their premise is that “nations may derive comparative advantages from their institutional infrastructure.” On the basis of this, they argue that

[i]nstead of the monolithic movement toward deregulation that many expect from globalization, our analysis predicts a bifurcated response marked by widespread deregulation in liberal market economies and limited movement in coordinated market economies. This is precisely the pattern of policy across the OECD in recent decades (pp. 58-59).

<sup>32</sup> Rather, the OECD studies (1996, 2000) maintain that association rights can be seen to have enhanced. But see Canadian economist Morley Gunderson, 2005, who counselled to the task force overseeing the reform of the federal labour laws in Canada that “the possibility that higher standards can spur productivity and competitiveness is based on shaky grounds, both theoretically and empirically.” See also Sandra Polaski, 2006, arguing that poor countries shown to gain from trade liberalization when full employment was assumed actually experienced smaller gains or actual losses when “more realistic” employment assumptions were made, and arguing for an ex post analysis of the impact of trade policy changes on employment that considers the question of net employment effects on an entire labour market in a given country.

<sup>33</sup> See Lee, 2005. This nuanced analysis is reaffirmed in the recent joint ILO-WTO study of trade and employment, which Lee co-authored.

<sup>34</sup> See Banks, 2006 in the unravelling of the Canada-US auto industry, one of the significant cost benefits on the Canadian side has been the state provision of health benefits – in other words, this is not one of the costs of labour borne directly by employer packages – and this has a real impact on wages.

In other words, globalization has regulatory impacts, but they are not necessarily unidirectional, nor are they independent of labour (or trade) policies across undifferentiated terrain. Moreover a range of institutions – including informal ones – have an important impact on firm choices.

Bob Hepple draws compellingly on Hall and Soskice's account to argue that labour laws can be a source of comparative institutional advantage.<sup>35</sup> Hepple argues that Hall and Soskice's analysis helps to explain why "contrary to many predictions – globalisation has not in fact led to across the board deregulation of labour laws or weakening of collective representation of workers" (p. 253). Hepple is careful to recall that labour laws are but "one element of a wider political economy that includes industrial relations, corporate governance, vocational education and training, and interfirm relations." He argues from economic theory that some forms of labour laws actually impose no competitive disadvantage but rather add to competitive advantage because they are dynamic and improve skills and productivity. Yet he recognizes that labour laws that are "redistributive" labour laws may tempt employers to relocate (pp. 255-256). Not surprisingly, those labour laws likely to be dynamic are also likely to be redistributive. Hepple cites minimum wage laws which spur employers to invest in skilled workforces and technological innovation, or family friendly laws that make women's labour market access possible. In industrialized market economies of both the liberal and coordinated variety, the reactions may themselves be different. But from his analysis of political models, he arrives at the view that regulatory diversity and competition should be understood "not so much as a conflict between state systems of labour law, but as a strategic or political process between different legal orders both within and beyond the state" (p. 268). While his analysis looks beyond state law from a pluralist perspective which acknowledges that labour law encompasses a variety of rule-making actors including the workers and employers themselves, he recognizes the following crucial lesson for states:

high labour standards and investment in vocational education and training can lead to higher productivity, are good for business and in practice attract investment. [...] [S]tates should concentrate on their comparative strengths for particular kinds of trade and not attempt to impose convergence through unilateral actions (p. 269).

He adds, tellingly, that "[i]t is particularly ironic that some developed countries now seek to impose on developing countries standards which they once themselves persistently violated on the path to development" (ibid.).

It should be underscored that Hall and Soskice explicitly limit their analysis to selected developed countries and exclude from the scope even OECD member states, the Republic of Korea and Mexico from the typology.<sup>36</sup> Indeed, they argue that many low income developed countries tend to have economies that would engender more ambiguous classifications than the two that they identify.<sup>37</sup> An unanswered question in the light of often fragile institutional arrangements and the sometimes controversial if not questionable bases on which firms are attracted to invest in low income settings, is whether the significant pools of low-skilled labour in those developing countries may rightly or wrongly be perceived as the primary basis of

<sup>35</sup> For a compelling application that considers the comparative advantages of labour laws, see Hepple, 2005.

<sup>36</sup> Hall and Soskice, 2001, are careful to qualify their analysis: "Although many of the developed nations can be classified as liberal or coordinated market economies, the point of this analysis is not simply to identify these two types but to outline an approach that can be used to compare many kinds of economies", p. 33.

<sup>37</sup> Mediterranean countries like France, Greece, Italy, Portugal, Spain and Turkey are placed by Hall & Soskice in a more ambiguous position, as they "show some signs of institutional clustering as well, indicating that they may constitute another type of capitalism, sometimes described as 'Mediterranean', marked by a large agrarian sector and recent histories of extensive state intervention that have left them with specific kinds of capacities for non-market coordination in the sphere of corporate finance but more liberal arrangements in the sphere of labor relations." *Ibid.* p. 21.

comparative advantage, as some examples in Part III suggest.

That the source of comparative advantage may reside in the existence of low waged workers raises two important considerations for any extension of the analysis of comparative institutional advantage to labour law in low income settings. First, institutional analyses admit that both the local context and the trade regulatory context affect whether a downward spiral will take place; they admit a link. In the process, they suggest that it is important to ensure the existence of a normative baseline below which regulatory competition is considered inadmissible. In this sense, rights become a form of prior claim or entitlement to the redistributive purposes of labour law.<sup>38</sup> Fundamental principles and rights at work provide a decent work core upon which reflections about establishing an “equilibrium line” may begin.<sup>39</sup>

Second, the analyses serve as a reminder of the importance of considering adjustment costs to offset the temporary impacts of the trade dislocations that may nonetheless occur, not only in industrialized countries but as between developing countries as well. In this regard, Corden’s preference for “adjustment assistance [...] to encourage rather than to slow up change, and at the same time to provide some compensation for the industries or factors of production concerned” is one that bears closer attention in contemporary analyses of trade and employment.

Not only do commentators in this tradition caution against looking at the relationship between international economic institutions and labour policy in a manner that separates them from the contexts in which they are embedded.<sup>40</sup> They recognize that much of the mainstream literature assumes that labour regulatory choices in developing countries are made without significant input by citizens, in response to capital alone.<sup>41</sup> This approach tends to decontextualize analyses of legislative change from the historical development of modern labour law. Progressive labour laws in developing countries were generally hard won concessions that accompanied political independence; the move away from forced labour schemes to enfranchisement in the workplace was a corollary to the move from colonial governance to political independence. Citizenship at work was understood to mirror broader political citizenship. Although this idealized dualism is profoundly challenged both in the workplace and political reality of many developing countries, it remains that governments pay a significant political premium should they decide to reduce labour protections. The decisions are not taken lightly; and have destabilized liberalizing regimes across Asia, Africa and Latin America.

It is not benign, therefore, that literature emanating from international financial institutions recasts formal sector workers as vested interest groups or societal elites collecting unrealistically high rents that stifle employment promotion thereby dividing workers into the haves and the have nots (World Bank, 2005). The characterizations challenge the vision of labour regulation that couples it with the entitlements of citizenship. It provides a moral ground for re-regulating to remove barriers to economic liberalization.

Logically, low visibility practices to reduce the effectiveness of labour laws are encouraged. Consider for example the World Bank’s current methodological advice to states seeking labour market flexibility: they should re-regulate the apprenticeship contract to introduce lower wages, rather than reducing the minimum wage, as apprenticeship contracts enable labour market flexibility without immediately arousing the ire of trade unions.<sup>42</sup> A more familiar low visibility

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<sup>38</sup> See Hepple, 2005, p. 264.

<sup>39</sup> See Blackett, 2002 and 2003. See also Moreau, 2006, arguing for a vision of fundamental social rights that draws inspiration from comparative constitutional principles as well as EU law and the ILO Declaration on Fundamental Principles and Rights at Work (1998); Moreau considers fundamental social rights to be a necessary counterbalance to unconstrained economic power.

<sup>40</sup> Lee, 2005, p. 87.

<sup>41</sup> According to Banks (2006), analytical abstractions may tend to assume that the state responds exclusively to the preferences of capital and not to other constituencies such as voters, bureaucracies or interest groups.

<sup>42</sup> See <http://www.doingbusiness.org/methodologysurveys/employingworkers.aspx>. The report comments favourably

strategy to labour law practitioners is governmental “neglect” of labour regulation, through the phenomenon of underenforcement of labour laws. Labour inspectors for example might simply not be permitted to attend at export-oriented factories (which in any event are regulated in various countries by trade or foreign affairs ministries, NOT labour ministries), or their numbers and resources might be so reduced that they could not possibly accomplish much even were they to try.

It is with this contextualized analysis both of international trade law, and of the regulatory challenges facing labour law (primarily enforcement-related) that this paper offers a literature review of five examples of developing countries of varying income levels and varying degrees of export-oriented growth: one from Latin America (Mexico-NAALC), one from the Caribbean (CARICOM), one from Africa (Mauritius) and two from Asia (Cambodia and Republic of Korea). It focuses specifically on contexts that have active governance strategies, at national, regional, or international levels, to address the relationship between trade liberalization and labour law. The development strategies vary, as do the trade impacts. The attention placed on democratic values and the construction and scope (gender, migration) of redistributive social welfare systems also varies. Finally, the international engagement and attention varies. Through a study of these cases, the constant is that the relationship between trade liberalization and labour law must be assessed with attention to the context in which they are embedded.

### 3. The terrain of developing country labour law reform

#### a. Mexico (NAFTA)

Mexico is a member of the North American Free Trade Agreement (NAFTA), and its side accord, the North American Agreement on Labour Cooperation (NAALC). Much has been and continues to be written about the NAALC, describing in legalistic detail its coverage and largely underutilized provisions.<sup>43</sup> The most relevant dimension for the purpose of this study is that it focuses not on establishing a new layer of labour principles, but rather on the enforcement of local labour laws. Under the NAALC, the failure to enforce a member state’s labour laws is itself a violation of the NAALC, and exposes member States to remedial action.<sup>44</sup>

As noted in Part 2 of this paper, labour law specialists point in particular to the risk associated with the low visibility avoidance strategy prevalent with respect to export oriented industry; it is understood, tacitly, that labour laws will not be enforced, notably in EPZs.<sup>45</sup> The EPZ sector in Mexico is characterized by a predominantly female labour force<sup>46</sup> whose wage conditions and conditions of employment warrant nuanced analysis:

While there is some evidence that women workers in maquiladora cities, particularly in the North, are better protected and better paid than those in non-maquiladora cities in the interior, two provisos are in order. First, women employees in the maquiladora sectors (now not just confined to the Northern border states) only have entitlements to a limited and declining range of non-wage benefits, and have little or no access to gender-specific support such as childcare provision or maternity leave .... Second, the incorporation of women workers in the export sectors has spurred neither the design of women-friendly social policies, nor the extension of existing employment-

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that 30 countries have introduced apprenticeship wages.

<sup>43</sup> A definitive monograph on the NAALC is Lance Compa in Blanpain (ed.), 2001. For a brief overview of the institutional mechanisms of the NAALC, and a summary of the disputes brought before it, see Blackett, 2002.

<sup>44</sup> NAALC, Arts. 22 & 23.

<sup>45</sup> See Kagan, 2005, p. 74; DeHart, 2006, p. 661.

<sup>46</sup> Kagan, p. 163.

related benefits to this new category of industrial workers. On the contrary they chronicle a steady decline in the mandatory protection of formal sector workers in Mexico as state enterprises were privatized, large scale retrenchments were implemented and domestic enterprises were squeezed by trade liberalization which exposed them to competition from cheaper imports (Razari and Pearson (eds.), 2004, pp. 16-17).

One critical example of the potential and limits of the NAALC's focus on enforcement is with respect to discrimination on the basis of pregnancy, more specifically pregnancy testing upon employment. A fundamental principle and right at work, freedom from discrimination is part of the decent work core. Yet testing during the 1990s of the female workforce in Mexico's *maquiladoras* was commonplace, and was widely believed to have been adopted to circumvent Mexican labour law which grants six weeks of paid maternity leave prior to delivery and six weeks after delivery, with full reinstatement afterward.<sup>47</sup> Employers such as Zenith Electronics Corporation and General Motors went beyond admitting that they engaged in pregnancy testing. They argued that Mexican law implicitly condoned pregnancy testing, because it excluded women who had not acquired sufficient tenure in the state social security system from obtaining maternity benefits (DeHart, 2006, p. 659). The practice of pregnancy testing remained unsanctioned by state regulatory actors. The NAALC's mechanisms to redress under-enforcement were called upon to address this problem, but failed.

The NAALC mechanism innovates to address the under-enforcement dilemma in two ways. First, it liberalizes the ability to investigate complaints of non-compliance with labour standards. It does not restrict the right to bring investigations to labour inspectors. Rather, any individual or group may file a submission. This has resulted in the formation of transnational coalitions able to frame<sup>48</sup> workers rights violations in ways that reflect the concerns of local actors while drawing in a broad international coalition of support through the spotlight effect.

In the matter of pregnancy discrimination in the *maquiladora* industry in Mexico, one of the most powerful trans-national human rights NGOs, New York-based Human Rights Watch, which privileges civil and political rights, argued that pregnancy testing violated women's rights to non-discrimination and privacy.<sup>49</sup> Hertel observes that when Mexican activists joined the HRW campaign, they "moved beyond this frame" to include broader state positive obligations to ensure that pregnant workers received "the 'social guarantees' of health care and economic benefits."<sup>50</sup>

Second, NAALC does not require that a complaint be filed. Rather, and despite the fact that the language of "complaint" has been regularly used in discussions of the NAALC, a submission is sufficient.

In the pregnancy discrimination matter, this allowed Human Rights Watch (HRW) to submit an initial report in 1996, urging the government of Mexico to enforce its own domestic labour law more effectively. It subsequently filed a complaint, on 16 May 1997, co-filed with the US-based International Labor Rights Fund and the Asociación Nacional de Abogados Democráticos (National Democratic Lawyers Association) of Mexico.<sup>51</sup>

<sup>47</sup> *Ibid.* p. 164. Kagan also discusses the justifications proffered by employers in favour of pregnancy testing. *Ibid.* p. 165.

<sup>48</sup> See Hertel, 2006. Hertel emphasizes the ways in which less powerful actors in transnational coalitions can affect the framing of contestations.

<sup>49</sup> *Ibid.* p. 271.

<sup>50</sup> *Ibid.* Hertel adds that "[b]oth HRW staff and representatives of Mexican NGOs... consider other problems more important than pregnancy screening, including adequate wages, housing, safe transit to and from work, access to water, and school access for their children. The workers view these issues from a positive rights perspective – as societal entitlements" (p. 272).

<sup>51</sup> US National Administrative Office (NAO) Submission No. 9701 (gender discrimination).

There are many legitimately severe critiques of the NAALC. The procedures are seen to be excessively lengthy and cumbersome. Some would argue that they have been constructed so as never to really be applied in full. Unions and civil society groups have largely abandoned using the NAALC mechanisms.

In the pregnancy discrimination case, the intergovernmental review process was lengthy, complex, and arguably of limited effectiveness. It took six months for the Mexican and U.S. governments to organize a public hearing on pregnancy testing.<sup>52</sup> Its Public Report of Review was issued on 12 January 1998, recommending ministerial level consultations to ascertain the extent of the protections against pregnancy-based gender discrimination under Mexico's laws. A Ministerial Consultations Implementation Agreement was signed on 21 October 1998, through which the governments agreed to conduct outreach sessions to educate workers along the Mexico-US border region, and to coordinate a conference. A conference was held on 1-2 March 1999, in Yucatán, Mexico, in which protective laws in the three NAALC member countries were discussed. Not surprisingly, Mexico affirmed at that conference that federal labour law prohibits gender and pregnancy based employment discrimination. Outreach sessions took place to educate workers about their rights both in 1999 and in 2000.<sup>53</sup> But as Kagan reports, "under pressure from the Mexican government, the US NAO failed to enforce any sort of labor standard, citing 'differing opinions within the Government of Mexico on the constitutionality and legality of the practice'" (Kagan, 2005, p. 172).

Parallel to these processes, Mexican feminists instead persuaded the Mexico City Commission of Human Rights to take up a campaign that explicitly denounced pregnancy testing, and pushed for a range of gender-sensitive policy reforms at the national level. Over 100 cases of prehire pregnancy discrimination and five cases of firing for pregnancy were filed with the Tribunal on Reconciling Maternity and Work, hosted on 22 October 1998 in Mexico City.<sup>54</sup> This action was combined with a high profile campaign and nationwide survey in which between 6000 and 7000 Mexicans signed a proposal calling for an end to pregnancy testing.<sup>55</sup> Some groups of workers, notably Mexico's national teachers union, were able to negotiate prohibitions to pregnancy screening.<sup>56</sup> And crucially, in 2003, Mexico's Congress passed a Federal Law to Prevent and Eliminate Discrimination,<sup>57</sup> including a new administrative agency charged with implementation, the National Council for the Prevention of Discrimination (CONAPRED).<sup>58</sup> The scope of the law is federal employers; some argue that it is more limited still to the government itself.<sup>59</sup> Enforcement in the export-oriented workforce at the origin of the NAALC submission seems remote from this new initiative.

HRW ended its campaign in mid-1999, reportedly out of frustration; Hertel (2006, pp. 275-276) further reports a level of frustration amongst local activists that the international campaign was not more effectively linked to – and framed in terms of – the local activist campaign. Hertel

<sup>52</sup> The US NAO accepted the submission for review on 14 July 1997, and conducted a public hearing in Brownsville, Texas on 19 November 1997.

<sup>53</sup> US Department of Labor Website Update on U.S. NAO submission No. 9701.

<sup>54</sup> Arbitration and Reconciliation Tribunals have original jurisdiction over labour rights complaints, which may be brought by workers to a tripartite committee. Representativeness of workers is none the less contested. For a discussion see International Federation for Human Rights, 2006.

<sup>55</sup> See Hertel, 2006, pp. 274-275.

<sup>56</sup> *Ibid.* p. 275.

<sup>57</sup> Decreto por el que se expide la Ley Federal para Prevenir y Eliminar la Discriminación, Diario oficial de la Federación, 11 de junio de 2003 (Mexico). See also discussion in DeHart, 2006, pp. 669-670, 681-684 (noting that the constitutionality of the law is itself in question as the Human Rights Commission is argued to have exclusive legislative authority over federal human rights questions so the delegation to CONAPRED is also challenged).

<sup>58</sup> See DeHart, 2006, pp. 667-668 (DeHart emphasizes the fact that the CONAPRED is a decentralized, relatively autonomous organ with its own juridical nature, and, crucially, its own budget (albeit too limited, according to CONAPRED)).

<sup>59</sup> *Ibid.* pp. 670-671.

notes that according to government representatives, workers, and activists, the pregnancy screening continues, but on a more covert level (*ibid.*, p. 275).

The NAALC mechanisms illustrate therefore that measures can be put into place at a transnational level that result in serious attention to the under-enforcement of labour laws within an export-oriented sector. However, transnational initiatives bring their own challenges, including equitable representation of tripartite stakeholders in framing their own concerns, all the while marshalling international attention and support. The mechanisms also, obviously, have to be designed in a manner that ensures that they themselves will be enforced. Despite the protective framework, the enforcement issue remains critical to the relationship between trade liberalization and labour law.

## **b. CARICOM<sup>60</sup>**

CARICOM member states are typically small island states with open economies. Many have relatively high standards of living, and are not generally classified as LDCs.<sup>61</sup> Yet their size prevents them from drawing on economies of scale that would facilitate competitive trade policies. What CARICOM member states count upon is their ability to draw upon proactive, sensible policies<sup>62</sup> at different governance levels to mitigate the impact of adverse liberalization consequences, and reap the gains of deepened trade liberalization.

For CARICOM member states, the impact of the WTO's EC-Bananas Reports<sup>63</sup> on Belize, Jamaica, and several eastern Caribbean countries (the Windward Islands) is but one of the most palpable examples of economic devastation by trade liberalization and submission to the trade machinery, that is the WTO Dispute Resolution System. In a series of decisions, the WTO's DSB found that the non-reciprocal trading arrangement that allowed preferential entry of bananas of former colonies of primarily the United Kingdom and France into the EU over the generally less costly "dollar bananas" produced primarily by US multinational corporations based in countries like Colombia and Guatemala and producing under more "competitive", but questionable, conditions, were not GATT or GATS compliant. A litany of labour disputes and environmental concerns has plagued the banana industry in the concerned Latin American countries for generations.

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<sup>60</sup> For a summary of the institutional structure and social institutions relevant to trade in the CARICOM, see Blackett, 2002b, pp. 932-941.

<sup>61</sup> Most tend to obtain high rankings according to UN Human Development Rankings, which incorporate Amartya Sen's capabilities analysis into determining human development indicators. Barbados tends to rank first among developing countries. For a discussion, see Levitt, 2005, p. 370.

<sup>62</sup> Caribbean Trade and Adjustment Group, 2001.

<sup>63</sup> GATT Panel Report on EEC—Member States Import Regimes for Bananas DS32/R (1993); GATT Panel Report on 'EEC—Import Regime for Bananas' DS38/R (1994); European Communities – Regime for the Importation, Sale & Distribution of Bananas (Complaint by the United States) (1997) Report of the Panel, WTO Doc. WT/DS27/R/USA (1997); European Communities – Regime for the Importation, Sale & Distribution of Bananas (Complaint by Guatemala) Report of the Panel, WTO Doc. WT/DS27/R/GTM (1997); European Communities – Regime for the Importation, Sale & Distribution of Bananas, Appellate Body Report, WTO Doc. WT/DS27/AB/R (1997); European Communities – Regime for the Importation, Sale & Distribution of Bananas – Recourse to Article 21.5 by the European Communities, Report of the Panel, WTO Doc. WT/DS27/RW/EEC (1999); European-Communities – Regime for the Importation, Sale & Distribution of Bananas – Recourse to Article 21.5 by Ecuador, WTO Doc. WT/DW27/RW/ECU (1999); WTO European Communities – Regime for the Importation, Sale & Distribution of Bananas – Recourse to Arbitration by the European Communities Under Articles 22.6 of the DSU, Decision by the Arbitrators, WTO Doc. WT/DS27/ARB (1999); European Communities – Regime for the Importation, Sale & Distribution of Bananas – Recourse to Arbitration by the European Communities Under Articles 22.6 of the DSU, Decision by the Arbitrators, WTO Doc. WT/DS27/ARB/ECU (2000). The longstanding dispute is ongoing still, with a new request for consultations by Ecuador on 16 Nov. 2006 and joined by Colombia on 30 Nov. 2006 on the new EU bananas regime, WTO Doc. WT/DS27/65/Rev.1 (2006). Recent reports indicate that Ecuador has now requested the creation of yet another dispute resolution panel on this matter. See ICTSD, "European Union Banana Rules to Face Another WTO Challenge", Canadian Press, 26 February 2007 (not yet listed on the WTO website).

The result of the decisions has been to cripple the economies of certain small nation states in the Caribbean that depended almost exclusively on the trade preferences to ensure exports of their higher priced bananas. Since 1993 when a new quota system was introduced to accommodate the entry into an enlarged EU that included a unified Germany, a progressive decline in exports from the CARICOM banana-exporting states has been noted, with a 50 per cent export decline in the largest producer, St. Lucia. The forecast is that the industry will simply not survive because wages are too high. The only exception, however, is the Central American CARICOM member state, Belize, and the explanation offered by the Caribbean Trade and Adjustment Group (2001, p. 16) is telling:

Belize is an exception, however. With some restructuring and strengthening of alternative direct marketing arrangements, its non-unionized industry, largely dependent on Central American migrant labor, is considered internationally competitive, and capable of substantial expansion.

The link is therefore starkly established from a CARICOM policy perspective, between labour costs and trade competitiveness. Yet this link is not at the level of abstract theorization; it is constructed on the basis of the exclusions of the managed trade system.

Liberal trade restricts from its mandate the conditions under which the bananas were produced, unless an assertion can be made that as a result, they are not a “like product”. It warrants noting that the “losers” are the countries that have strong democratic traditions and relatively robust labour standards. It renders irrelevant the history of colonial plantation labour conditions, and the significance of the development of trade unionism in this sector<sup>64</sup> to the construction of decent work. No regard is to be given to the “free labour of a Caribbean peasantry born of struggle against the plantation system, and fortified by the will to assert the economic independence of family and community by small-scale food production and small business” (Levitt, 2005, p. 57).

Arguably the cost of the bananas in the affected Caribbean countries reflects a more legitimate valuation of the product, one which seeks to factor in the social costs. Some of the “winners”, on the other hand, face a litany of complaints about the conditions under which their “dollar bananas” are produced, and have had histories of undemocratic practices linked in part to US multinationals in the banana trade (Legrand, 1998).

No other mechanisms are embedded in multilateral liberal trade to ensure that the adjustment toward greater liberalization is compensated, a point that was lamented by Jagdish Bhagwati, who considered it a failure of governance that the IMF and World Bank did not step in and respond with adjustment measures for Caribbean states to ease the pain of this decision:

I must also deplore the inability of the leadership at the World Trade Organization, International Monetary Fund and World Bank to come up with a compensation and adjustment programme that would, at a small fraction of their resources, adequately help the small banana exporters at risk from the WTO Panel, Appellate Court and Arbitration decisions dismantling the EU regime. Nothing in the doctrine of free trade requires that we ride rough-shod, at breakneck speed and with reckless regard, over the economies of the small and poor nations (Bhagwati, 2000, p. 203).

These matters have been addressed separately, and with limited scope, by the EU through its more recent EU-ACP Cotonou Partnership Agreement<sup>65</sup>, which entails the continuation of preferences through 2007. During the preparatory period, partnership agreements are to be signed (that is, bilateral trade agreements, notably between the EU and other regions). After that

<sup>64</sup> For a brief discussion of the plantocracy under colonialism and the significance of the rise of trade unionism, see Goolsarran, 2005. For a discussion of four models of the plantation economy, see generally Levitt, 2005.

<sup>65</sup> Signed June 2000.

preparatory period, quota and duty free access to the commodities (including bananas) of LDCs is permitted. In its forward-looking strategizing, Caribbean states wish also to promote greater capitalization of the Caribbean Development Bank as a vehicle through which restructuring from trade liberalization can be accomplished.<sup>66</sup>

Yet the CARICOM has also indicated its ability to respond through the use of transnational public policy to shape the direction of its labour laws in response to liberalizing pressures. One could be forgiven for imagining that these micro-states, faced with adverse trade decisions and NAFTA diverting manufacturing away from its region in favour of Mexico, would be swiftly legislating away their labour legislation to ensure greater competitiveness in the liberalized market. But rather, on the basis of a recent reported example, quite the opposite happened. According to a report submitted pursuant to the ILO's Tripartite Declaration on Multinational Enterprises, in the hotel and tourism sector, a major North American investor intimated that it would relocate to a neighbouring island if the labour relations practice of voluntary trade union recognition were applied to its enterprise.<sup>67</sup> The investor came from the Wagner Act tradition, in which certification, mediated by quasi-judicial bodies, was required for a union to represent workers. Management hostility toward unionization, and the virtual contest approach to a unionization drive, invariably accompanied by a proliferation of unfair labour practices and lengthy litigation, are all reasons which partially account for low unionization levels in the U.S. in particular, and to a more limited extent in Canada. In the English-speaking Caribbean, however, the British tradition of voluntary recognition was followed. The clash of industrial relations cultures came to the fore when a powerful foreign employer in the tourism industry essentially refused to follow local tradition, and resisted unionization initiatives. Caribbean nation states recognized quickly that to compete on the basis of labour regulatory systems would set into place pressures favouring a race to the bottom. In the particular example in question, the Ministers of Labour met within the CARICOM framework, and came to an agreement that the prospective investor and employer would be unwelcome within the territory of any CARICOM member State, should it seek to transfer its operations. Under those conditions, the employer ultimately decided to stay within the initial island, and accept the unionization initiative (ILO, 2001). An ensuing labour law harmonization project provided a way for Caribbean countries to work through principles that were central to their industrial relations systems, arrive at agreement on broad approaches, but leave room for individual member States to adopt the legislation as they see fit and to account for local conditions, and to render explicit local labour relations practices for an increasingly diversified set of investors.

### **c. Mauritius**

Mauritius has historically emphasized social development alongside economic development, by constructing a viable redistributive social welfare system.<sup>68</sup> Economically, since the 1970s, when the booming sugar industry had reached optimal levels, the Mauritian state developed and progressively expanded a policy to promote export processing zone led growth through a mix of facilitative labour law reforms focusing on dismissal and overtime provisions, as well as fiscal incentives,<sup>69</sup> which fostered a boom in the clothing sector.<sup>70</sup> Yet Mauritian export production was not located in an enclave-type of EPZ as is common in many other countries. Rather, it is widely dispersed throughout the island, and comprises 50 per cent local

<sup>66</sup> Report of the Caribbean Trade and Adjustment Group, 2001, p. 5. Kari Levitt argues that the Caribbean Development Bank was initially proposed as an instrument to offset potential "polarisation effects" that could result from early regional free trade initiatives. See Levitt, 2005, p. 351.

<sup>67</sup> For a discussion of voluntarism as it applies in the Caribbean, see Goolsarran, 2005.

<sup>68</sup> See Bunwaree, 2004, p. 164.

<sup>69</sup> *Ibid.* p. 164.

<sup>70</sup> *Ibid.* p. 182.

capital from wealth accumulated through the then-profitable sugar sector.<sup>71</sup>

Yet structurally, Mauritius is an ethnically plural society, which has translated into a labour market that is heavily segmented along racial and gender lines. Bunwaree describes the labour force as follows:

The Franco-Mauritians remain the country's wealthiest group and have invested in the manufacturing sector and tourism; they are followed by the Chinese dominating this sector, though there are wealthy Muslim textile and grain traders as well. At the bottom of the socio-economic scale are the Hindu plantation workers, Muslims working in low-paid jobs within the informal sector and Black Creole factory workers, dockers and fishermen. Women continue to be over-represented in low-skilled, low-status and low-paid jobs. Some 38.7 per cent of women of working age are considered to be economically active whilst male participation rate is approximately 78.7 per cent. The highest proportion of women's employment is in the EPZ. However the sex-based occupational segregation in Mauritius is striking.<sup>72</sup>

In part as a way to manage the racial/ethnic volatility of Mauritian society, and in part out of a belief that social progress must accompany economic progress, universal social protections were promoted and largely remain in place – free healthcare, education, universal old age pensions and some social aid – and were understood to be the basis upon which the strong economic growth was built, and were funded heavily through taxation on sugar exports.<sup>73</sup> However, the social policies have not been class or gender neutral. First, a parallel private sector in health and education tend to offer better quality and are available only to the wealthy. Second, “family choices” may favour the education of boys over girls in difficult economic times. Third, legislation itself may contain biases, for example the Occupational Health and Safety Act, which contained biases against injuries prevalent amongst women, like repetitive strain injury.<sup>74</sup> Mauritius also faces pressure from the World Bank to cut public expenditure for social protection, by focusing only on poverty reduction.<sup>75</sup> And of course, while women entered the paid labour force, the reproductive labour continued to fall into the hands of other women in the often nearby extended family structure (Razavi and Pearson, 2004, p. 179).

In part because of its mix of social and economic policies, Mauritius has been one of the few African nation states to have experienced significant export-oriented growth. It benefited from the four Lomé Conventions and the current Cotonou Agreement<sup>76</sup>, through which it could avoid the quota restrictions of the MFA and the ATC. Mauritius has also been eligible for the US's African Growth and Opportunity Act (AGOA) since 2 October 2000; it was granted eligibility for apparel benefits under AGOA on 18 January 2001.<sup>77</sup> But with the expiry of the

<sup>71</sup> *Ibid.* pp. 164-165. Razavi considers this policy one of taking the work to the workers, rather than workers to the work, “which facilitated women's employment in export processing.” *Ibid.* p. 178.

<sup>72</sup> *Ibid.* p. 175. Razavi notes as well that “the ethnic distribution of the EPZ labour force reflects the ethnic distribution in the country.” (*Ibid.* p. 178)

<sup>73</sup> *Ibid.* pp. 166-167.

<sup>74</sup> *Ibid.* pp. 168-170.

<sup>75</sup> *Ibid.* p. 172. For a critique of poverty reduction strategies, see Rittich, 2002, p. 277 arguing that “[t]he displacement of egalitarian social provisioning by programs to target poverty carries a number of risks, some of which arise because the character and degree of poverty is notoriously contestable. Even determining the poverty line poses numerous conceptual and normative problems, as it may be defined absolutely, relatively, or subjectively.”

<sup>76</sup> EU-ACP Cooperation Agreement, signed 23rd of June 2000, in force as of April 2003, revised on 23 February 2005 (L 287 (28/10/2005)). Available at [http://ec.europa.eu/development/body/cotonou/agreement/agr01\\_en.htm](http://ec.europa.eu/development/body/cotonou/agreement/agr01_en.htm).

<sup>77</sup> US Trade and Development Act 2000, Title I. Although AGOA contains a requirement familiar to recent US bilateral arrangements recognizing at Section 104(a)(1)(f) “the right to protection of internationally recognized worker rights, including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health” there is no incentives-based compliance system that would be comparable to that in place in Cambodia. For a brief discussion of AGOA and other

ATC on 31 December 2004, preferential access to the US market is significantly eroded, with African markets taking a particular hit.<sup>78</sup> The WTO has expressed serious concern for “[t]he unbalanced distribution of the benefits of the liberalization in this sector” arguing that “post-ATC adjustments are fundamental to addressing and reinvigorating production and competitiveness in the LDCs and other small and vulnerable economies” (WTO, 2004, paras. 6 and 7). Currently, Mauritius is one of the examples of a state that is struggling to remain competitive (ILO, 2005, p. 30). Chinese agreements with the EU and the US to stabilize growth rate of Chinese exports to the EU and the US, and that included Chinese agreement to apply export taxes to many of its exports (Jones, 2006), may offer some predictability to other exporters like Mauritius, but are far from resolving their state of crisis.

With increased economic crisis, but starting since the mid-1980s, Mauritius has become another country where Mauritian women have been displaced from export-oriented production, “not because male workers are being recruited into skill-intensive production processes, but rather because industrialists are hiring migrant female labour”<sup>79</sup> – women from China, Bangladesh, India, Sri Lanka and Madagascar, who live in dormitories near the factories, far away from their own families (Bunwaree, 2004, p. 189) – “in order to sidestep the alleged shortcomings of the local labour force, such as its high levels of absenteeism and low productivity.”<sup>80</sup> It should be noted though, that when in 1984 Mauritian male wages were “liberalized” through an abolition of the male minimum wage in EPZs (but not for Mauritian women), male employment grew more rapidly than female employment. One understands from this move that the female minimum wage had been significantly lower (63 per cent - 76 per cent depending on age and experience) than the male minimum wage (Razavi and Pearson, 2004, p. 180). Yet according to Bunwaree, over time men had better options in other sectors, so the real threat and actual job loss for Mauritian women came from the entry of female migrant workers through the late 1990s (*ibid.*, pp. 182-183). So by promoting the use of migrant labour, Mauritius (temporarily) sidestepped the dislocation of its export sector to other lower cost locations, but created other conflicts (*ibid.*, pp. 188-189). And with growing economic retrenchment has come the exclusion of former factory workers from both contributory and non-contributory pension schemes (*ibid.*, p. 184). Not surprisingly, resentment toward migrant workers “who are perceived to have taken jobs rightly belonging to Mauritian women” (*ibid.*, p. 185) runs high.

Bunwaree reports contractual abuses that result in migrant women workers earning significantly less than expected and significant disenchantment by these women with their conditions of work and protests and spontaneous strike action after two Chinese women died, one of pneumonia the other of a brain haemorrhage in 2002 (*ibid.*, p. 186). The Mauritian government currently reports that it has taken steps to regulate the employment of migrant workers, claiming to vet all contracts of employment for compliance with labour legislation for approval by the Ministry of Labour and Industrial Relations through a recently-established Special Migrant Workers Unit. That Unit is also responsible for carrying out inspections at workplaces to ensure contract compliance. It has prepared regulations to set norms for dormitories under the Occupational Safety, Health and Welfare Act, which as of December 2006 were soon to be enacted (Republic of Mauritius, 2007). It has also set up a coordination committee on migrant workers within the Ministry of Labour and Industrial Relations to “monitor the conditions of employment, living conditions, social problems and other requirements of migrant workers” (*ibid.*). But the effectiveness of these enforcement efforts

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US bilateral arrangements, see Granger and Siroën, 2006.

<sup>78</sup> See Kyvak Nordas’ projection, 2004, note 27 at 30 (cautioning that projected declines may underestimate a number of factors beyond relative price that could have an impact on market share).

<sup>79</sup> See Razavi & Pearson, 2004, p. 17. See also Bunwaree, 2004, pp. 173-175.

<sup>80</sup> See Razavi and Pearson, 2004, p. 18; *Ibid.* pp. 175, 189.

remains in question.<sup>81</sup> Recent reports suggest a worsening situation for migrant workers.

The Mauritian experience is therefore a further example of the tension between trade liberalization, labour law, and migration. Mauritius has indeed “managed remarkably well to fight off the erosion of its relatively generous welfare state, which continues to act as a bulwark against social dislocation and impoverishment, especially at a time when the export industry is shedding workers in large numbers.”<sup>82</sup> However, the decent work aspiration is not extended to migrant women workers, around whom there is growing social tension, abuse and expulsion. Migrant women workers fall outside of the state’s social welfare web.<sup>83</sup>

#### d. Cambodia

The export-oriented garment industry in Cambodia has been fast-growing since the end of the civil war in 1991 (Hall, 2000, p. 119). The promise of export-led growth is starkly significant in a country able to produce more than enough rice to feed itself, but with such an unequal distribution of wealth that the rural poor cannot afford to purchase it (ibid., p. 128). The Cambodian government has vigorously encouraged investment, including through fiscal benefits to foreign investors.<sup>84</sup> The investors come chiefly from Southeast Asian countries, notably China,<sup>85</sup> countries that faced a garment export quota to the US and the EU under the now expired Agreement on Textiles and Clothing.<sup>86</sup> In this regard, Cambodia became an indirect beneficiary of the export quotas under the MFA. The result was a rapid, significant shift away from agricultural and domestic activities toward a relatively modern manufacturing economy, driven by primarily young, rural women moving to Phnom Penh to work in garment factories.<sup>87</sup> Yet worker discontentment with working conditions led to frequent demonstrations, strikes, and action by sympathetic US labour groups to seek a review of claims of abuses in Cambodian apparel factories in June 1998 (Polaski, 2006a).

Labour law is also part of the export oriented equation. In 1997, Cambodia adopted a free-market oriented Labour Code, replacing a 1992 Labour Code that was responsive to international pressure during its transition.<sup>88</sup> While the 1997 Code benefited from some labour law reform commentary from the ILO, it was not subjected to tripartite dialogue due to an insufficient formation of such collectivities in 1994 when consultations took place. In July 2001, when it became clear that enterprise-level organizing was taking place (rather than at the professional level as foreseen in the legislation), another ILO consultation took place, and two legislative decrees (*prakas*) were promulgated in November 2001 (Bronstein, 2004, pp. 242-243). Freedom of association for Khmer citizens is also constitutionally protected (Falkus and Frost, 2002);

<sup>81</sup> See Bunwaree, 2004, p. 187.

<sup>82</sup> See Razavi & Pearson, 2004, p. 19.

<sup>83</sup> Consider instead that the EPZ Labour Welfare Fund provides “Welfare programmes” of “benefit” to migrant workers, notably “free transport for outings, social grants in case of need, cultural and leisure programme on Migrants Day.” See Republic of Mauritius, para. 12.

<sup>84</sup> Hall, 2000, p. 127. See Falkus & Frost, 2002, pp. 6-7. See also the US-Cambodia Agreement on Trade Relations and Intellectual Property Rights Protection, signed in Washington DC on 4 October 1996, available at [http://tcc.export.gov/Trade\\_Agreements/](http://tcc.export.gov/Trade_Agreements/).

<sup>85</sup> Hall, 2000, p. 130, notes that the majority of foreign investors and factory owners are Chinese or of Chinese heritage. He adds that “it is the ethnic Chinese, with their access to financing, comparatively high level of education, and willingness to provide mutual support, who are rapidly coming to dominate business and finance. While Khmer women are hired to be the bulk of the workforce in factories, office and management positions are almost exclusively staffed by foreign or local Chinese.” See also Falkus & Frost, 2002, p. 8 for detailed country of origin data. Falkus & Frost offer a helpful discussion of women’s participation rates in other sectors of the economy (note 135).

<sup>86</sup> See Hall, 2000, p. 128.

<sup>87</sup> *Ibid.* p. 133. The ILO reports that women currently represent 92.4 per cent of the factory workforce. See Seventeenth Synthesis Report on Working Conditions in Cambodia’s Garment Sector, 31 October, 2006. Available at [http://www.betterfactories.org/content/documents/1/17th%20Synthesis%20Report%20\(en\).pdf2](http://www.betterfactories.org/content/documents/1/17th%20Synthesis%20Report%20(en).pdf2).

<sup>88</sup> See Hall, 2000, pp. 125-127. Arturo Bronstein (2004) notes that this code was largely based on the 1972 code, of French inspiration.

however, there is hardly a tradition of collective bargaining in Cambodia and its free exercise remains significantly compromised.<sup>89</sup>

Once again, a critical concern remains the lack of enforcement of labour law.<sup>90</sup> A “culture of impunity” enabled by heavily critiqued blanket legislative protections for civil servants “poses a serious obstacle to developing the rule of law in Cambodia.”<sup>91</sup> The Bureau of Labour Inspection within the Ministry of Labour is considered to face high levels of corruption.<sup>92</sup> The Ministry lacks resources for systematic, thorough inspections. Chronically insufficient resources cultivate and sometimes legitimate pervasive, endemic corruption.<sup>93</sup> According to the Report of the Secretary General of the UN on human rights in Cambodia, although there were officially 100 labour inspectors in Cambodia in 1998, only twelve actually carried out inspections (UN, 1998).

On 20 January 1999, the United States entered into a 3-year bilateral trade agreement with Cambodia, which was extended for an additional three years through to the end of the MFA’s application, on 31 December 2004. To gain political acceptance of this accord, the US conditioned preferential access of Cambodian exports to the US market on continuous improvement of working conditions in the garment sector. The US committed to expand Cambodia’s quota for textile and apparel exports to the US market by 14 per cent (subsequently increased to 18 per cent) if working conditions in the Cambodian textile and apparel sector were found to be in substantial compliance with local Cambodian law and internationally recognized core standards (Elliott and Freeman, 2003, p. 117).

There are reports that the spotlight effect has had some impact, despite persisting repression, to enable some union activities to continue, as in the case of U-Kong workers in January 1999 on the eve of a visit by a US trade delegation (Hall, 2000, p. 142). But Cambodia failed to achieve “substantial compliance” according to a December 1999 report by US officials, although some progress was noted (Hall, 2000, p. 142). Consequently, a 5 per cent quota increase was offered if Cambodia allowed the ILO to monitor all of the export-oriented factories, through unannounced factory visits.<sup>94</sup> Yet Elliott and Freeman report that the ILO was itself an initially reluctant monitor. Only when the US offered financing for a parallel programme of technical assistance and training for the Cambodian labour ministry did the ILO itself agree to participate.<sup>95</sup>

The ILO has currently produced 17 synthesis reports.<sup>96</sup> Frequent violations consisted in incorrect wage payments and involuntary or excessive overtime, although monitors also noted violations of freedom of association principles (ILO, 2006, pp. 6-14). The ILO inspectors make

<sup>89</sup> Falkus and Frost, 2002, pp. 135-144 (chronicling restrictive provisions in the 1997 Labour Code on the exercise of freedom of association and collective bargaining rights, and severe, partial governmental actions to prevent unionization or to favour government supporters, including police violence). Hall (2000, pp. 152-166) further reports egregious violations of other basic conditions of employment.

<sup>90</sup> Hall, 2000.

<sup>91</sup> Hall, 2000, pp. 123-124.

<sup>92</sup> *Ibid.* p. 126.

<sup>93</sup> See *ibid.* p. 126 (noting that the inspectorate lacked resources even to buy gasoline for its vehicles). Hall (pp. 170-171) adds that civil servants, including judges, earn salaries as low as US\$12 per month, which are below starvation levels, so it is unreasonable to expect that they would systematically resist bribes. He calls for them to receive a living wage.

<sup>94</sup> Factories must register in order to be submitted to monitoring. However, only registered companies are eligible to bid for or export-oriented quotas. See Falkus & Frost, pp. 62-63. The fact that the initiative includes all exporting garment factories is considered by the ILO to be a key reason for its success. The Better Factories Programme reports that “[i]t is transparent, credible to international buyers making sourcing decisions, and meets the needs and interests of workers and the industry. See “About Better Factories”, at p. 2 of 3, available at <http://www.betterfactories.org/> (accessed 21 October 2006).

<sup>95</sup> See Elliott & Freeman, 2003, p. 117. See also Polaski, 2006a, pp. 5-6 (noting the debate that was provoked in the ILO bureaucracy and Governing Body).

<sup>96</sup> The 17th Report is dated 31 October 2006 and was rendered public on the Better Factories website on 30 November 2006.

recommendations, and verify follow-up and compliance over time.<sup>97</sup> The monitors have no formal enforcement powers. The ILO project director has also reported “monitoring fatigue” particularly as some factories are submitted to multiple codes as required by some buyers.<sup>98</sup> Despite this, it is noteworthy that when the World Bank Group’s Foreign Investment Advisory Service conducted a survey among apparel buyers in 2004, the conclusion was that buyers “rated Cambodia’s labor standards higher than those of regional competitors, and [...] would continue to purchase garments from Cambodia if credible monitoring by the ILO were to continue” (Polaski, 2006a, p. 14). For Sandra Polaski, the ILO monitoring and reporting system acts as a form of “reputation risk insurance to global apparel retailers” (ibid., p. 15)<sup>99</sup> despite the real problems that continue to exist.

The initial 5 per cent quota expansion was granted in May 2000, and a further 4 per cent was granted in September 2000 as further improvements in workers’ rights were noted. Although the total 9 per cent was extended into 2001, the remaining 5 per cent of the promised 14 per cent was withheld as incentive for continuous improvement (Elliott and Freeman, 2003, p. 117). Elliott and Freeman hasten to add that the 14 per cent increase was worth approximately \$50 million per year, “far in excess of the costs to the Cambodians of improving standards.”<sup>100</sup> The prospective nature of the increase was seen as a key aspect of the positive incentives for continuous improvement inherent to the programme (Polaski, 2006a, p. 29).

Cambodia, which applied to become a WTO member in late 1994, became the 148th member of the WTO on 13 October 2004. Cambodia is the second least developed country to join the WTO through the full working party negotiation process.<sup>101</sup> US exports to Cambodia have reportedly increased significantly to nearly US\$70 million in 2005, leading to the signing of a Trade and Investment Framework Agreement with the United States.<sup>102</sup> The ILO reports that despite the expiry of the Multi-Fiber Arrangement (MFA) on 1 January 2005, the Cambodian export garment industry through 30 April 2006 has faced an 11 per cent growth in employment, with constant wages.<sup>103</sup> The Better Factories programme, staffed almost exclusively by Cambodian nationals,<sup>104</sup> emphasizes capacity building and is expected to be “self-supporting” by 1 January 2009.<sup>105</sup>

While Elliott and Freeman report on industry opposition in the US as well as the opposition in some developing countries to the Cambodia conditioning of trade and labour standards, they ask whether the experience may enable Cambodia to garner a reputation as a niche market post-

<sup>97</sup> See Elliott & Freeman, 2003, p. 118 (commenting on reports through end 2002).

<sup>98</sup> *Ibid.* p. 119.

<sup>99</sup> However, Polaski could also envisage the monitoring and oversight role in the hands of private sector actors, including self-regulating bodies. See Polaski, 2006a, p. 33.

<sup>100</sup> Elliott & Freeman. See also “About Better Factories”, at p. 3 of 3 (reporting that the cost of the monitoring is modest, less than US\$3 a year per worker, or US\$2800 per factory, although factories that take part in training programs contribute further to the cost. Financing is now broadened, and includes the US Department of Labor, USAID, the Agence Française de Développement, the Cambodian Government, the Garment Manufacturers Association of Cambodia, and international buyers).

<sup>101</sup> For a discussion of the history of Cambodia’s accession to the WTO, see WTO, Accessions, available at [http://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_cambodge\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_cambodge_e.htm)

<sup>102</sup> Trade and Investment Framework Agreement between the Government of the United States of America and the Royal Government of Cambodia, Washington DC, 14 July 2006. See also Office of the USTR, “United States, Cambodia Sign Trade and Investment Framework Agreement”, 14 July 2006.

<sup>103</sup> Wages were reported to be at \$72US per month, above the minimum wage of \$45US per month, which represents a 6 per cent decrease in real wages when adjusted for inflation. See Cambodian garment industry: One year later, available at <http://www.betterfactories.org>.

<sup>104</sup> It has a team of eleven (11) monitors. See Eleventh Synthesis Report on the Working Conditions in Cambodia’s Garment Sector, available at [www.betterfactories.org/ilo](http://www.betterfactories.org/ilo).

<sup>105</sup> “About Better Factories”, at p. 3 of 3. See also Polaski, 2006a, p. 25 (commenting on the surprisingly cost-effective nature of the program). Polaski also points out that the project, which previously enabled buyers and retailers to benefit from the reputational insurance without assuming the premium has been reformulated so that the buyers contribute somewhat to sustaining the project. *Ibid.* p. 27.

MFA to ensure export markets (Elliott and Freeman, 2003, pp. 117-119). This hints at the kind of consideration that is central to comparative institutional advantage. It is telling, though, that the model may have broader applications. The ILO agreed on 21 August 2006 to collaborate with the International Financial Corporation, the private arm of the World Bank, to build on the Better Factories Cambodia programme to create a global portal and global tools for labour standards monitoring and remediation systems in global supply chains. Attention will be placed on extending the monitoring Information Management System, including for public labour inspection.<sup>106</sup>

### e. Republic of Korea

Korean labour legislation in the post-war period was a replica of Japanese labour laws (Park and Lee, 1995, p. 31), which initially mimicked the US notion of at-will employment, but soon rejected it in favour of lifetime employment (Kitt, 2003, p. 537). Kitt describes the implicit labour “bargain” that fueled the Republic of Korea’s export-led (but import substitution based) industrialization (Standing, 1991, p. 19) from the 1960s into the 1980s:

By strategically utilizing Korea’s most abundant natural resources, plentiful and inexpensive human capital, new industries were able to produce and export goods at prices cheaper than those offered by foreign competitors. Under the banner ‘develop now, share later’, General Park pursued restrictive new labor laws that furthered the competitive edge of Korean businesses at the expense of workers’ rights. These new laws curtailed unions and their activities to discourage unwanted wage hikes and labor disputes, as well as to prevent political derailment of government policies and a feared radicalization of its workers by North Korean spies. In return for these sacrifices of long hours, low pay, and limited rights of collective action, Korean workers received what had already become an institutionalized part of the Japanese labor system — the implicit benefit of life-time employment security.<sup>107</sup>

Despite a policy of life-time employment security, Hyoungh Cho et al. (2004, p. 37) note that “contrary to the common belief that all Korean males had life-long jobs, only about two-thirds of male workers had regular contracts.” Moreover, most employed women “faced considerable insecurity and instability regarding employment and income” (ibid.) Women predominated in temporary and daily work. In light industries, young rural women were recruited, but with increased educational opportunities women gained employment over time in a wider but limited range of occupations, and grew continuously until the Asian Financial Crisis in 1997 (ibid., pp. 35-38).

The Korean model was fundamentally developmentalist, with strong state intervention in investment linking it to the banking sector and the chaebol, which were large, diversified businesses that secured domestic production and export strategy (ibid., pp. 31-32). While the developmentalist state heavily emphasized social policies, notably education, housing and health, Hyoungh Cho et al. note that “social protection afforded through state provided social welfare schemes and through social insurance initiatives... was greatly limited until the later 1980s... leaving corporate welfare, ‘market’ provision and household provision to plug the gap” (ibid., pp. 46-47).

Unrest of the “Spring of Seoul”<sup>108</sup> from both workers and student groups led to “even more

<sup>106</sup> See Press Release, “IFC and ILO team up to improve working conditions in global supply chains”, available at <http://www.betterfactories.org>.

<sup>107</sup> Kitt, 2003. Chaebol subsidized social security by maintaining this lifelong employment despite economic downturns, through government credit. See Root, 2003, p. 588. For a close chronicling of the “development dictatorship” in the 1960s and 1970s, see Park & Lee, 1995, pp. 31- 32, and 34.

<sup>108</sup> There were over 400 labour disputes, ending in a military coup in May 1980, and the start of the Fifth Republic. See Park & Lee, 1995, pp. 32-33.

depressed labor rights than in the 1970s”, and a significant growth of the underground union movement and activism by students who linked these causes to democratization, grew throughout the 1980s.<sup>109</sup> Facing the risk of embarrassment during the 1988 Seoul Summer Olympic Games, the government introduced significant democratic reforms, including free elections in June 1987, and after a wave of strikes,<sup>110</sup> amendments to the labour laws to allow the formation of unions, limit government interference in labour mediation and arbitration, and to enforce a minimum wage.<sup>111</sup> Yet lifetime employment remained until the Korean Supreme Court began to dismantle it (Kitt, 2003). With the early signs of economic slowdown that preceded the Asian financial crisis, Korea moved to reform lifelong employment (*ibid.*).

The Republic of Korea had also come under criticism for ongoing labour relations violations, which were brought to international attention during admission proceedings to the OECD. The Republic of Korea joined the ILO on 9 December 1991 and in 1995 was brought before the ILO’s Freedom of Association Committee (Case No. 1865) on allegations of repression and imprisonment of trade unionists, notably in the public sector and the construction sector. International pressure prior to admission to the OECD led to significant scrutiny of the Republic of Korea’s labour law and labour relations practices. To be admitted, Korean authorities had to commit to “reform existing laws on industrial relations in line with internationally accepted standards, including those concerning basic rights such as freedom of association and collective bargaining.”<sup>112</sup> This was lauded as a victory for those who wished to see membership in organizations of economic liberalization linked to an acceptance of a labour/human rights core. Yet the results, in concrete terms, have hardly been unidirectional.

It is true that in May 1996, the Republic of Korea established a Presidential Commission on Industrial Relations Reform (PCIR) (Lee, 2002, pp. 226-227). However, the resulting law – which codified the Supreme Court’s 1989 blow to lifelong employment – was passed in secret, “in the early morning hours of December 26, 1996.”<sup>113</sup> Naturally, the amendments to the Labour Standards Act were deeply controversial, and culminated in a costly, nationwide strike lasting from December 1996 to March 1997 (Lee, 2002, p. 227). Further revisions resulted, but subsequent events overshadowed them. The Asian Financial Crisis at the end of 1997 resulted in the “humiliation” (Kitt, 2003) of needing IMF assistance (OECD, 2000), and the IMF led changes – carried through a Tripartite Commission on Fair Burden Sharing – entailed labour flexibility devices, focusing on dismissal provisions.<sup>114</sup>

Within the OECD framework, through pressure by the Trade Union Advisory Council (TUAC) and a number of OECD member states, the OECD Council instructed the Committee for Employment, Labour and Social Affairs to “monitor closely the progress made on labour reforms in the light of [the Republic of Korea’s accession] commitment.”<sup>115</sup> The OECD conducted a labour market review on the Republic of Korea in 2000 calling for the Republic of Korea to act to consolidate “social sustainability” of its development process, including through “[f]urther action to consolidate the industrial relations system, reform labour law, and to improve the coverage and effectiveness of labour market and social safety-net policies” (OECD, 2000, p. 2). The OECD considered it to be necessary to create “a less confrontational and more consensual system of industrial relations if the Korean economy and society is to modernize and prosper”

<sup>109</sup> *Ibid.* p. 33.

<sup>110</sup> See Cheol-Soo Lee, 2002, who adds that the number of strikes skyrocketed to 3749 in 1987 alone.

<sup>111</sup> See Kitt, 2003. The minimum wage legislation is argued to have reduced the gender wage differential to a limited degree. See Cho et al., 2004, pp. 38-39.

<sup>112</sup> See OECD Policy Brief, 2000, at p. 3, available at <http://www.oecd.org>. See also ICFTU/TUAC/ GUFs Joint Mission to Korea, available at <http://www.tuac.org>.

<sup>113</sup> See Kitt, 2003. Opposition party members were absent, and there was no parliamentary debate. *Ibid.*

<sup>114</sup> Kitt (2003) emphasizes the complications and limited effectiveness of the legislation, particularly in light of frequent wildcat strikes and other resistances.

<sup>115</sup> See OECD 2000 Policy Brief, p. 4. See also ICFTU/TUAC/GUFs Joint Mission to Korea, 2006.

(*ibid.*, p. 3). It cites areas that are considered to be in conflict with internationally accepted standards, including “trade union pluralism, third-party intervention in collective bargaining, the right to organize of public servants and teachers, the right to strike in the public sector, trade union membership of dismissed or unemployed workers and the payment by companies of their full-time trade union officials” (*ibid.*, p. 4) as well as “arrest and imprisonment of trade union activists for activities *that would be regarded as pursuit of legitimate trade union goals in other Member countries.*”<sup>116</sup>

The Korean government published in 2004 a roadmap for industrial relations reform. Tripartite discussions continued into 2006, although significant repression of civil servants and construction industry workers continues to be reported.<sup>117</sup> Consequently, the close monitoring continues, and ten years after the Republic of Korea’s accession to the OECD, the ICFTU/TUAC/GUF participated in a joint mission on 24 – 26 August 2006, on the invitation of two Korean affiliates, prior to the 14<sup>th</sup> ILO Asian Regional Meeting to be held in Busan, Republic of Korea.<sup>118</sup> ILO Freedom of Association Case No. 1865 continues.

It should be noted that the OECD itself recommends as a policy priority that the Republic of Korea “reverse the growing proportion of non-regular workers in the labour force, which creates equity and efficiency concerns, [...] the conditions on collective dismissals be relaxed and that the social safety net, particularly employment insurance, be further developed” (OECD, 2006, p. 38). Meanwhile, the ICFTU/TUAC/GUF has urged the international labour movement to renew international solidarity and focus on the Korean situation” (ICFTU, 2006). While the linkage with OECD mechanisms may be suggested to have created a forum through which concerns about labour violations can be raised, and while some steps “in the desired direction” (OECD, 2000, p. 4) have been noted by the OECD in respect of labour law reform, the challenge to the respect of fundamental principles and rights at work remains alive in a country that has increased its level of development alongside a model that considers democratization inherent in labour rights to be secondary.

#### 4. Toward global embedded liberalism

The chosen examples are all reminders that the relationship between trade liberalization and labour law is embedded in both local and transnational regulatory contexts. It starts from the premise that multilateral and regional trade institutions are not natural or pre-determined; rather they should be understood to be political, economic and social constructs. The examples offer the opportunity to recast the trade liberalization and labour law discussion in terms not of a vision of a naturally occurring market in which equilibrium prices are set without distortions. Globalization should not be viewed deterministically;<sup>119</sup> it can be resisted and indeed re-constructed.

The nature of the constructs also matters. The multilateral trade agreements have sealed distributive concerns out of the bargain. They assumed the distributive justice questions, including as concerns labour law, to be domestic concerns. As trade law specialist Don McRae (2005) has commented on this analysis of distributive justice beyond borders

if distributive justice is to be viewed on a global scale, the issue is not just balancing the increased price to consumers against the protection of a job market within each country. The protection of the job market of developed

<sup>116</sup> *Ibid.* at 4. Emphasis added.

<sup>117</sup> See ICFTU/TUAC/GUF’s Joint Mission to Korea, 2006.

<sup>118</sup> *Ibid.*

<sup>119</sup> For a discussion, see Blackett, 1998.

countries may have to be measured against the loss of job opportunities in developing countries.

Attention to the relationship between trade and labour law reminds us that the exclusion frames trade in a way that prevents transborder mitigation of the adverse impacts on labour beyond borders. The examples of Mauritius and the Mexican border region offer further reminders that migration and the gendered nature of work have also been sealed out of the trade and labour law bargain. By focusing on “employment” rather than work,<sup>120</sup> and by emphasizing production within states rather than the citizenship (literally and figuratively) of workers who undertake the production, analyses that correlate trade and employment overlook labour law’s exclusions.

The fact that distributive concerns have been sealed out of most analyses<sup>121</sup> leads to the kind of consequences modeled by Lee and experienced by CARICOM member states in the wake of adverse trade liberalization decisions. As Bhagwati argues, there is no reason why international mechanisms should not be marshaled to prevent adverse impacts to employment – and the ensuing tendency to favour production in non-unionized, lower waged, migrant labour zones – that face the current CARICOM in the production of bananas. The Cambodian case study provides a counter-example, in that it reflects how attention by a major industrialized trading partner to combining accrued market access with continuous improvement in the effectiveness of local labour law can enable a state to garner comparative institutional advantage. Both examples – which entail a mix of national, bilateral, and international responses – hint at the importance of recognizing a distributive dimension in trade relationships, and addressing it through more careful attention to why adjustment assistance is needed, and how it can be accomplished.<sup>122</sup>

However, McRae (2005) suggests that the Consultative Board on the future of the WTO – of which Bhagwati himself was a member – was reluctant to accept the logical consequences of the institution’s own fervent support for trade law’s non-discrimination principles. He notes that

while it recommended that there be increased funding for trade policy related adjustment assistance for developing countries, it did not recommend that developed countries show more willingness to undertake adjustment themselves rather than so readily resort to safeguard measures or to other trade remedies in the face of developing country imports.

It is the position of this paper that in pragmatic discussions of how to enable governments to address the labour regulatory implications of trade liberalization policies, increased funding for trade policy related adjustment assistance for developing countries would be a significant start, and an acknowledgement of the distributive justice considerations beyond borders, at different governance levels. In other words, it is not necessary to assume that individual states should be the (only, or main) source of their own adjustment<sup>123</sup>: bilateral, regional, and international action can be targeted, in the ways illustrated in the case studies above.

<sup>120</sup> See Standing, 1991, p. 242. The relationship between women’s work and their structural position in the informal export-oriented economy facilitates this dichotomization and the neglected trade impacts.

<sup>121</sup> The joint ILO-WTO study more optimistically argues that the relationship between global economic integration and redistributive policies is “increasingly recognized”, although “there is so far no agreement on how to design appropriate redistribution policies” as incentive structures are potentially affected by redistributive transfer (ILO-WTO, 2007, pp. 8, 73 – 76. See also Maur, 2006 (observing that “studies of trade liberalization have tended to set aside issues related to adjustment by focusing on the question of whether trade liberalization would bring net costs or gains in the long term at country level).

<sup>122</sup> See ILO & WTO, 2007, pp. 2, 76, 79. See also Maur, 2006, p. 3ff, who identifies efficiency, political economy, equity, and international cooperation justifications for adjustment to be undertaken.

<sup>123</sup> Maur’s caution that “one should look at the government sector with care” (2006, p. 6) is noted, although it is argued that the regulatory state in developing countries should be analyzed with attention to its complexity and how other actors – including internationally – can buttress rather than undermine state capacity. See Blackett, 2004.

Targeted technical assistance by international institutions to provide adjustment assistance is one way that this relationship may be considered, as in the Better Factories Cambodia example and its recent extension to other countries.<sup>124</sup> Ruggie (2003) elucidates the potential role of a range of social processes and movements in the process of embedding global markets “within shared social values and institutional practices,” despite the absence of global governmental structures to foster the common good. Hepple offers an institutional account, which stresses that “it is within [a] dynamic relationship between multivalent legal orders that the ability of labour law to contribute to social justice within the global market will be determined” (Hepple, 2005, p. 275). Both emphasize the significant difficulty associated with these strategies, but Ruggie reminds readers that the original embedded liberalism compromise was itself the result of a long and hard battle (Ruggie, 2003, p. 27).

It is further contended that from a broader distributive justice perspective, regional spaces may themselves provide a particularly fertile governance level to challenge a flattened, uni-directional vision of globalization. The regional reaffirms national choices, mediates international rules, and makes the spaces of distributive justice seem tangible. A picture of the impact of trade on labour law is constructed from the bottom up, one country and one region at a time. It is also an approach that may resist a problematic tendency to obscure the distributive effects of the design of markets to focus exclusively on redistributive effects afterward (Rittich, 2002, p. 282). Rather, attention to regional construction offers an opportunity to fuse attention to the nexus between the economic, the political, and the social. Both the globalization rhetoric that forecasts the disappearance of the nation-state, and the paradoxical state-centred focus of multilateral trade are decentred when regionalism is considered.

Regionalism provides an opportunity to re-consider and re-construct the spaces through which liberalization is mediated, and to argue for redistributions (like considerations of the costs of adjustments to trade) beyond national borders. The European Union’s willingness to put in place mechanisms to promote economic development in low income members on accession (notably Spain and Portugal) is an historical precedent. Regions provide the moral justification for treating one’s “neighbours”<sup>125</sup> differently, and provide a manageable, incremental scale for action. They allow member states to move beyond the act of sameness reflected in signing and ratifying an international agreement, to consider how a member state may be enabled to meet the terms and objectives of the trade liberalization agreement, which in the case of multilateral trade includes “raising standards of living, ensuring full employment and a large and steadily growing volume of real income” in addition to “the objective sustainable development.”<sup>126</sup> They are a reminder that trade relationships, and their contours, are constructed, and the constructs themselves may be marshaled to promote a mutually enhancing relationship between trade liberalization and labour law.

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<sup>124</sup> Given the scope of this literature review, I have refrained from a critique of the limited effectiveness of monitoring to shift labour regulation away from a management self-governance ideology that analogizes workers’ rights with other “accounting” features, toward a framework emphasizing citizenship at work. For details, see Blackett, 2001. However, these framing considerations need to be addressed within the ILO’s engagement as an independent monitor in Cambodia.

<sup>125</sup> One notes that regional and bilateral agreements do not necessarily rely on “proximity” as the basis for regional arrangements, but a “neighbourly” relationship is created. Yet regionalism brings its own non-discrimination challenges. See e.g. Hudec & Southwick, 1999.

<sup>126</sup> See Preamble, Marrakesh Agreement Establishing the World Trade Organization.

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