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Lance A. Compa

Cornell University ILR School, lac24@cornell.edu

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International Trade and Social Welfare: The New Agenda (Remarks)

Abstract

This document is a transcript of Professor Lance Compa's remarks at the January 7, 1995 meeting of the Section on International Law of the American Association of Law Schools.

[Excerpt] The fact that the International Law Section put this topic on its agenda at this annual meeting is an indication that the "linkage" between labor rights and international trade is an idea whose time has come. I don't want to overstate its novelty. There's a certain cycle to this dynamic, and in fact the post-World War II period and the early years of the GATT saw a flurry of interest and activity on the "social clause" issue, but it fell away under pressures of the Cold War, the decolonization movement, and simply because it was less of an issue during the three post-war decades of sustained economic growth of the United States and the rest of the industrialized world.

Now, with international competitiveness such a paramount concern, issues of labor rights and trade have again come to the front burner of policy concerns. Indeed, if you do a database search under international labor rights, labor standards, trade and worker rights, and so on, you'll find many excellent contributions to the literature on this subject, most of it just in the past couple of years.

Keywords

trade, labor rights, workers, labor movement, labor standards

Comments

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IV. REMARKS OF LANCE COMPA

Good morning. As Fred indicated, I direct a group called International Labor Rights Advocates, which is a legal project of the International Labor Rights Education and Research Fund. The Labor Rights Fund is a Washington, D.C.-based nongovernmental organization that does what the name suggests: conducts research and education and, in the case of the Advocates project, legal work on behalf of workers,

trade unions, and related human rights and grass roots activist organizations in the United States and abroad.

International Labor Rights Advocates is a network of lawyers, law teachers, law students and other professionals who undertake specific legal analysis, advice and advocacy on labor rights cases and issues. For example, we've had Advocates teams represent workers and unions in the first cases that arose under the NAFTA labor-side agreement. We've done legal research and analysis for Nicaraguan unions in connection with demands for anti-labor reforms by the World Bank. We've done amicus briefs in cases in United States courts where international labor solidarity efforts by unions have been challenged by employers as unlawful secondary boycotts. These are just examples; it would take my entire allotted time to go through all the projects we're engaged in.

Most of the Labor Rights Fund's work involves the "linkage" between labor rights and international trade. The Fund was formed in the mid-1980s by a coalition of union, human rights, religious, academic and Washington "think-tank" types, and also, I should add, some businesspeople with a social conscience.

Let me take just a moment to acknowledge Bob Drinan's presence here today.²⁸ Father Drinan was a founder of the International Labor Rights Fund and still serves on its board of directors. He was a champion of workers' rights while in Congress and still does important work in this area. I hope Bob can weigh in on the discussion we'll have later.

The members of this group were concerned about two things above all: the trade-distorting effects of worker exploitation in many areas of the world, and the narrow policy response in the United States labor movement, which consisted mainly of "Buy American" campaigns and smashing up Japanese cars at Labor Day rallies.

We worked with sympathetic members of Congress to develop "labor rights amendments" in various trade programs authorized under United States law, like the clause in the Generalized System of Preferences that condition eligibility for the program's benefits on a country's fair treatment of workers. Tom gave an excellent summary of the various labor rights amendments in different United States trade statutes, so I don't need to repeat it here.

The fact that the International Law Section put this topic on its

28. Robert Drinan, S.J., a former member of the U.S. House of Representatives, now on the faculty of the Georgetown University Law Center.

agenda at this annual meeting is an indication that the “linkage” between labor rights and international trade is an idea whose time has come. I don’t want to overstate its novelty. There’s a certain cycle to this dynamic, and in fact the post-World War II period and the early years of the GATT saw a flurry of interest and activity on the “social clause” issue, but it fell away under pressures of the Cold War, the decolonization movement, and simply because it was less of an issue during the three post-war decades of sustained economic growth of the United States and the rest of the industrialized world.

Now, with international competitiveness such a paramount concern, issues of labor rights and trade have again come to the front burner of policy concerns. Indeed, if you do a database search under international labor rights, labor standards, trade and worker rights, and so on, you’ll find many excellent contributions to the literature on this subject, most of it just in the past couple of years.

I would distinguish my own view from those of Sandy, at the outset, by arguing that labor rights and working conditions are inextricably bound up with trade policy and trade relationships. I don’t think that separation can be maintained anymore. For example, take the latest development involving the devaluation of the Mexican peso. Is this just a commercial affair, a technical correction of financial markets? Obviously not. It has profound social and political consequences that will operate directly on labor rights and working conditions in Mexico, where they will have to come up with an “austerity program” that will basically look to solve the problem by taking it out of workers’ hides, and in the United States, where the new exchange rate will choke down exports to Mexico and put a lot of workers here out of a job. So, I don’t think we can anymore maintain the notion that in this corner we have trade, finance, commercial relations, tariff problems and the like, and in that corner we have labor rights, environmental protection, social justice and other “political” issues, and they don’t meet in the center of the ring with a lot of conflict. They do meet. There is conflict. There’s no avoiding it. What’s needed is developing the right policies to deal with it.

I’m saved from a lot of detailed introductory remarks, because the earlier speakers gave such a lucid presentation of the variety of trade-related arenas that have taken shape in recent years where workers’ rights can be advocated. Of course, the International Labor Organization is the best known, and it is hardly recent. It was founded in 1919 in connection with the League of Nations, whose demise the ILO survived.

The ILO is a vital organization, but it has the same problem of

enforcement—or, rather, lack of enforcement—that characterizes many international institutions. At the end of the day there's been a lot of talk, and a lot of paper, but nothing is really done to change the behavior of a labor rights violator.

Here's where my views diverge from those of Tom, because I'm not agnostic on this issue. I'm a believer that you've got to have sanctions at the end of the day, because sanctions—or, more hopefully, the potential of sanctions—is what gets concrete results.

Now, we have to be extremely careful in the use of sanctions. They should not be a first resort, or a next-to-last resort. When applied they should be measured and proportional. They should not serve as a means of disguised protectionism. How to avoid these pitfalls is an important challenge for the labor rights advocacy community. But there has to be a consensus on certain fundamental norms, basic fair labor standards, that governments and multinational corporations should be bound to respect, with trade sanctions as a method of guarding against or punishing violations of such basic labor rights.

Other new arenas for working the trade and labor rights “linkage” have taken shape recently, in addition to those arenas outlined by Tom earlier. He mentioned the ILO, the NAFTA side accords, the unilateral United States labor rights amendments in the GSP, OPIC, Section 301 and other trade programs. In August, 1994, Congress passed, and President Clinton signed, a new labor rights amendment²⁹ in the statute governing U.S. participation in the World Bank, the International Monetary Fund and other international financial agencies.³⁰ That clause requires the United States delegates to the decision-making bodies of those institutions to use their voice and vote to ensure that countries receiving loans are not violating labor rights.³¹ This should make for an interesting and exciting new forum for workers' rights advocates to press their efforts.

Another important area for labor rights work is in actual litigation. This is very new, and plaintiffs' and defendants' communities and the courts are still sorting out a lot of procedural issues, but real cases have begun to emerge. In one, workers from the Korean subsidiary of a United States-based multinational corporation sued the parent company in federal district court in New York after the company shut down the

29. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1995; Foreign Operations, Export Financing, and Related Programs Supplemental Appropriations Act, 1994, Pub. L. No. 103-306, 108 Stat. 1608 (1994).

30. 22 U.S.C. §§ 282-290 (1988).

31. See Pub. L. No. 103-306, 108 Stat. 1621.

Korean plant and moved the jobs to Taiwan.³² The company left suddenly, with no advance notice, no severance pay, and owing wages for work actually performed, all required under the collective bargaining agreement and under Korean law, for that matter. The suit contained a breach of contract claim and a tort claim for interference with a contract.

The problem in Korea was that the company absconded so suddenly and completely that there were no defendants and no assets to get jurisdiction over. Surprisingly, the case went to trial here, overcoming *forum non conveniens* and other procedural defenses. The plaintiffs rejected a settlement offer that would have given them practically all the relief sought in the suit, but a certain clash of cultures emerged wherein they thought it was more important to get a judgement finding the company guilty than to get a settlement. We lost that roll of the dice in the district court on technicalities of New York state corporate law: a veil-piercing problem on the contract claim, and a "privilege" doctrine on the tort claim. On appeal, we lost when the court applied the doctrine of non-extraterritorial application of United States labor law.

The important thing here was not necessarily the winning or losing, but the fact that the case went to trial and that, given a different fact situation, it could have come out differently. Future cases involving international labor rights litigation might well be successful.

In contrast, we did have a successful lawsuit where success came even before the suit was filed. This involved the United States owner of a Guatemalan *maquila* sector clothing factory who fired more than one hundred employees who formed a union in 1989. The workers obtained a back pay and reinstatement order from the Guatemalan courts, but the mechanisms there for enforcing court orders are deficient. We learned that the firm's distribution company is located in Miami, where it has substantial assets in accounts receivable from buyers, mostly in New York.

A labor rights advocates team began researching and drafting complaints for filing in New York or Florida state courts seeking enforcement of the Guatemalan judgement. A group went to Guatemala to locate individual plaintiffs and determine how much they were owed. The whole effort created something of a sensation in the Guatemalan business community, over the fact that they could be sued in United States courts for violating worker rights in Guatemala, and that accounts

32. See *Labor Union of Pico Korea, Ltd. v. Pico Prod. Inc.*, 986 F.2d 191 (2d Cir.), *cert. denied*, 113 S. Ct. 493 (1992).

receivable might be diverted to affected workers rather than to their Miami bank accounts. Pressure from his colleagues forced the owner to settle the case in 1992, reinstating the workers with back pay and recognizing the union. They later reached a collective bargaining agreement and have had stable labor relations since then. So there's an example of how creative litigation strategies by United States labor rights advocates can make a real difference for workers and trade unions in the global economy.

Another arena that I want to add to the picture involves corporate codes of conduct, efforts at private rule-making and enforcement of international labor rights. These take different forms. There are some multilateral government-inspired codes, like that of the OECD and the ILO. They are mostly in the form of guidelines rather than enforceable standards for multinational companies, but some unions have gotten results from them.

Then there are codes of conduct formulated by nongovernmental organizations that are offered for multinationals to sign onto, or to "take the pledge" to abide by. The Sullivan Principles plan for United States corporate involvement in South Africa was probably the most prominent of these. Today, to take another example, there is a "Maquiladora Standards of Conduct" code developed by a coalition of labor, religious, environmental and community organizations on both sides of the United States-Mexico border. They are pressing United States companies to adopt the code for their operations in that area.

Perhaps the greatest movement has come with codes of conduct being developed internally by several United States-based global companies. Their motives are probably mixed: a combination of altruism, marketing strategy and a desire to forestall mandatory labor rights standards imposed by governments and enforced by trade sanctions. So, for example, you have a company like Levi Strauss, which has established a very strong code of conduct on labor rights and labor standards for its subsidiaries and suppliers around the world. Reebok is another. These tend to be companies that are very sensitive about their brand name and corporate image. They want to be sure that consumer sentiment stays favorable, so they don't want their name associated with child labor, sub-minimum wages and abusive working conditions. Whatever their motivation, they are getting concrete results. Already several suppliers who failed to measure up to the new codes of conduct have lost contracts, and others quickly improved conditions to come into compliance.

So we see this phenomenon of "linkage" between labor rights and trade growing in many areas. One of the earlier speakers was right to

say this is just a beginning. We're going to see a lot of new developments on workers' rights in connection with international trade. It's possible, too, that the cycle I mentioned at the outset will take a turn, especially in the wake of the latest national elections. The new Republican majority in Congress has taken the position that, as the price of any new fast-track negotiating authority, the Administration must explicitly renounce any effort to include labor rights, environmental protection or other social standards in newly-negotiated trade agreements.

The first test will come in connection with the accession of Chile to the North American Free Trade Agreement. Chile appears willing to sign the side agreements as well as NAFTA. Will Congress try to preclude this in its fast-track legislation? I think there could be quite a fight over this issue. The Clinton administration appears to be accommodating the new majority in a lot of areas—military spending, welfare reform, “downsizing” government and so on. I think this is one area where the Administration ought to take a stand against the Republican effort and use this issue to define itself in opposition to this notion of “de-linking” trade and workers' rights, even to the point of a veto and doing without fast track for a time. International labor rights became something of an issue in the 1992 campaign, and it could be an important issue for Clinton and the Democrats in the months ahead and going into the 1996 elections.

Let me end on points that earlier speakers correctly pointed out need attention in this subject area: problems of definition, problems of enforcement mechanisms, problems of sanctions. We have to reach an international consensus on what labor rights are truly fundamental, that should not be violated under any circumstances—forced labor, for instance. We have to figure out how to properly take into account a country's level of development or a firm's ability to pay in defining labor standards that related to economic items. We have to create mechanisms that are fair, transparent, multilateral. We have to fashion a program of sanctions that are targeted and proportional, that come at the end of a long day with plenty of opportunity for dialogue and efforts to avoid sanctions. This means bringing together the legal communities represented here: researchers, teachers and advocates in international law, scholars, labor law, international trade law, international human rights law and related disciplines. We have to start melding these three lines of scholarship: labor, trade and human rights, in an international law framework that encompasses workers' rights in the new global economy.

Thank you very much.