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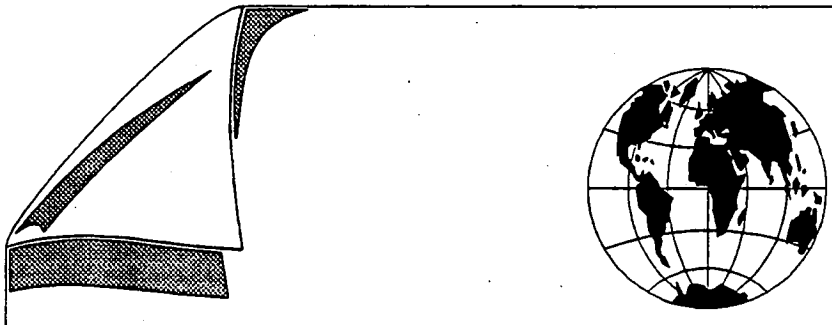

Look Before You Leap:

"Core" Labour Rights

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Look Before You Leap: "Core" Labour Rights

References to "core" labour standards or "core" labour rights, particularly in the context of developing countries' failure to abide by them, are becoming increasingly common in the press and public discourse. In particular, the United States and France, supported by human rights activists and organized labour, are pressing for the enforcement of "core" labour standards by the World Trade Organization (WTO). The term, and the issues it embraces, will be key in any future multilateral trade-labour standard discussions. But what does the term signify in a conceptual and legal sense, and do the various users of the term employ it in the same way? Moreover, inappropriate use of the term may distort public understanding and expectations of the linkages between trade and labour standards and interfere with progress on the issue. This Commentary attempts to examine the concept of "core" labour rights, while illustrating some of the difficulties arising from its overly casual use.

The Concept of "Core" Labour Rights

Labour standards are instruments for government intervention in labour markets. International labour standards, i.e., International Labour Organization (ILO) standards or what is called the International Labour Code, are international agreements on how governments intervene in their respective jurisdictions. Yet, "while national legislation directly applies to relations between the State and workers and employers, the ILO's international standards can have the same effect only with the assent of the member States, as signified through ratification of the instrument."[1] How governments at the national or sub-national level intervene, whether or not in accordance with the International Labour Code, constitutes their labour policy.

There is a wide range of potential government interventions, such as minimum wages, pensions, maternity leave, hours of work, and health and safety. The concept of "core" labour rights is an attempt to distinguish labour standards that reflect levels of economic development from labour "rights" that are fundamentally human rights. The term "core" labour rights captures government interventions that are most clearly

[1]International Labour Office, Report of the Director-General (Part 1), Defending Values, Promoting Change, International Labour Conference, 81st Session 1994, p.43. Nevertheless, unlike the ILO Conventions, the Constitution of the ILO requires that all members accepted the principle that the "freedom of expression and of association are essential to sustained progress." Source; Declaration concerning the aims and purposes of the International Labour Organization, Art. I(b).

considered inviolable basic human rights that should apply to all workers irrespective of the level of economic development of the country. To promote "core" labour rights is not to suggest that labour standards be harmonized across the full range of policies or that some minimum threshold be set. For example, a more generous minimum annual holiday package would be welcomed by many workers, but few, if any, would consider it an inviolable or "core" labour right. The separation of "core" labour rights from other labour standards removes issues such as wages from the trade-labour standards debate. Labour and human rights advocates are promoting the idea of a social clause comprised of "core" labour rights to be included under the WTO.

The concept of "core" labour rights is premised on the acceptance of a set of basic human rights. The recognition of basic human rights are addressed by a number of United Nations legal instruments. In addition to the UN Charter, which in seven different articles declares United Nations support for human rights, five major United Nations legal instruments define and protect human rights. These are: the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and, two Operational Protocols to the latter Covenant. Together they constitute the International Bill of Human Rights.[2]

The construction of a set of "core" labour rights implies the creation of an identifiable set of human rights in the field of labour. To avoid confusion, however, a distinction must be drawn between general labour principles as basic human rights, and existing international legal instruments which address this linkage, i.e., ILO Conventions. This distinction may not be immediately obvious or appreciated. To illustrate, two examples of general labour rights that do not directly refer to ILO Conventions are set out below, one from Professor Gary Fields and the other from the OECD. In Fields' view, the following would constitute a set of basic labour rights

[2]The Universal Declaration of Human Rights is the basic international statement on human rights. It is a manifesto with primarily moral authority. The two Covenants are treaties binding on States that ratify them. The Covenant on Economic , Social and Cultural Rights, "recognizes the right to work and to free choice of employment, to fair wages, to form and join unions, to social security and to adequate standards of living conditions for people." The Covenant on Civil and Political Rights, "recognizes the right of every human person to life, liberty and security of person, to privacy, to freedom from cruel, inhuman or degrading treatment and from torture, to freedom from slavery, to immunity from arbitrary arrest, to a fair trial, to recognition as a person before the law, to immunity from retroactive sentences, to freedom of thought, conscience and religion, to freedom of opinion and expression, to liberty of movement, including the right to emigrate, to peaceful assembly and to freedom of association." See United Nations, Human Rights: The International Bill of Human Rights, United Nations, New York, 1993.

for workers:[3]

- No person has the right to enslave or to cause another to enter into indentured servitude, and every person has the right to freedom from such conditions.
- No person has the right to expose another to unsafe or unhealthy working conditions without the fullest possible information.
- Children have the right not to work long hours whenever their families' financial circumstances allow.
- Every person has the right to freedom of association in the workplace and the right to organize and bargain collectively with employers.

A draft OECD report on trade and labour standards selects four general standards as "core" labour rights.[4]

- Freedom of association and collective bargaining, i.e. the right of workers to form organizations of their own choice and to negotiate freely their working conditions with their employers.
- Elimination of exploitative forms of child labour, such as bonded labour and forms of child labour that put the health and safety of children at serious risk.
- Prohibition of forced labour, in the form of slavery and compulsory labour.
- Non-discrimination in employment, that is the right to equal respect and treatment for all workers.

Nevertheless, many articulations of "core" labour rights do not directly address the concept of general principles. Most public discussion revolves around ILO Conventions and assumes that one or another ILO Convention adequately embodies a general principle, i.e., such as elimination of exploitation of child labour, in a legal instrument. This association of "core" labour rights as general principles with specific ILO Conventions has generated a legal framework, which at first glance appears as a ready-made list of more-or-less internationally agreed "core" labour rights.

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[3]Gary S. Fields, "Labor Standards and International Trade", Paper prepared for Informal OECD Trade Committee Meeting on Trade and Labour Standards, the Hague, September, 1994.

[4]OECD, Trade and Labour Standards, COM/DEELSA/TD(96)8, January 1996, p.13.

ILO Conventions and "Core" Labour Rights

Since its establishment in 1919, the International Labour Organization[5] has adopted more than 170 Conventions dealing with an extremely broad range of labour standards and rights. These conventions cover a wide range of labour issues including: basic labour rights; conditions of work; labour market and social policy; and industrial relations. ILO Conventions are subject to individual country ratification, and when ratified constitute a binding obligation.[6] The total number of ratifications by ILO members is around 6000.[7]

The ILO has also adopted a large number of "Recommendations". Their aim is to act as guidelines for national policy implementation of Conventions. Recommendations are not ratifiable and there is no obligation for countries to apply them. This system of individual country ratification and implementation stands in contrast with the WTO, where international trade-rules have been accepted as a single undertaking with few exceptions. While both the WTO and ILO have international legal instruments, the structure of the instruments are very different.

There is no formal international agreement on a precise list of labour standards that would make up a set of "core labour" rights. Nor does the ILO itself identify a group of conventions as "core" Conventions. The ILO does, however, have a classification guide which places conventions and recommendations into one of fourteen categories. The first category is "basic human rights", although a footnote to the category indicates that the designation does not mean conventions and

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[5]In 1946 the International Labour Organization became the first specialized agency of the United Nations.

[6]The ILO has an elaborate supervisory mechanism. If a country has ratified a Convention, it must report regularly to the ILO on measures it has taken to give effect to the provisions of the Convention. The ILO also requires that countries report at intervals on their legislation and practice with respect to unratified Conventions and Recommendations. Moreover, in addition to the regular supervision, a special body, the tripartite Committee of Freedom of Association of the Governing Body, examines complaints on alleged violations of the ILO freedom of association Conventions. Complaints, and the subsequent examination, may be raised against countries that have not ratified the freedom of association Conventions. See International Labour Office, The Impact of International Labour Conventions and Recommendations, and the International Labour Office, Trade Unions and the ILO.

[7]International Labour Office, Report of the Director-General (Part 1), Defending Values, Promoting Change, International Labour Conference, 81st Session 1994, p.41. At this time the ILO had 170 Member States.

recommendations in other categories do not cover human rights subjects. The first category includes Convention 87 (freedom of association), Convention 98 (right to collective bargaining), Conventions 29 and 105 (forced labour), Convention 111 (discrimination), Convention 100 (equal remuneration), as well as some others. It does not include Convention 138 (minimum work age). "Core" labour rights are also not synonymous with what are generally considered to be the major ILO Conventions as these conventions are concerned with more than basic human rights.

The question is which ILO labour standards should be included in the set of "core" labour rights? The OECD's Trade Union Advisory Committee (TUAC) has proposed that seven ILO Conventions, constitute "core labour standards". These are Convention 87, Convention 98, Conventions 29 and 105, Conventions 100 and 111, and Convention 138. A review of eight different proposals by Van Liemt[8] found that a group of standards were mentioned by all (Nos. 1 to 3 below), and another three (Nos. 4 to 6 below) in at least six of the eight proposals reviewed.

1) Freedom of association (ILO Convention 87).

2) The right to organize and bargain collectively (Convention 98).

3) Minimum age for the employment of children (Conventions 5 and 138).

4) Freedom from discrimination in employment and occupation on the grounds of race, sex, religion, political opinion, etc. (Convention 111).

5) Freedom from forced labour (Conventions 29 and 105).

6) Occupational safety and health (various Conventions).

It is interesting to see the extent to which Canada and the United States, a major proponent behind the idea of linking "core" labour rights with trade, have ratified ILO Conventions. Canada has not ratified all of the labour conventions set out above.[9] From the first group (Nos. 1 to 3) of standards identified by Van Liemt, Canada has not ratified the right to organize and bargain collectively (Convention 98) and the minimum age for the employment of children (Conventions 5 and 138). The U.S. has not ratified any of the conventions within this group. Of the remaining

[8] Gijsbert van Liemt, "Minimum Labour Standards and International Trade: Would a Social Clause Work?", International Labour Review, Vol. 128, No. 4, 1989, p. 437.

[9] The Annex presents the ILO Conventions ratified by Canada.

conventions set out above, with the exception of occupational safety and health conventions, the U.S. has only ratified the abolition of forced labour - Convention 105. For this paper's purpose the TUAC proposal could serve as a working set of "core" ILO Conventions.

Adequacy and Transparency of ILO Conventions

This paper is not a comprehensive legal analysis of the seven "core" ILO Conventions or how well they capture the concept of basic human rights as set out by the UN's International Bill of Human Rights. The purpose of the Commentary is much simpler: it is to question, and invoke thought about the assumption that the ILO "core" Conventions are sufficiently defined and universally understood to allow easily for the effective use of trade sanctions as an enforcement instrument.[10] The paper suggests that there should be cause to pause for reflection on embracing existing ILO Conventions as de facto adequate legal instruments for the possible use of trade sanctions or other punitive measures.[11] Hence, the title of this paper - Look Before You Leap.

Freedom of association is considered the most fundamental of labour rights. The aim of Convention 87 is: "The right, freely exercised, of workers and employers, without distinction, to organise for furthering and defending their interests."[12] The aim of Convention 98 is: "Protection of workers who are exercising the right to organise; non-interference between workers' and employers' organizations; promotion of voluntary collective bargaining." Yet the scope of this freedom is not without controversy. The "right to strike", for example, is not specifically set out in any ILO Convention or Recommendation.[13] To consider establishing a mechanism that allows

[10]In this regard, it is insightful to recall that the North American Agreement on Labor Cooperation (NAALC) commits each country (Canada, Mexico, and the United States) to enforce its own labour laws.

[11]There is also the question of in practice what is being effectively enforced. How the existing ILO core conventions are implemented and enforced are an important component for any serious discussions.

[12]International Labour Office, Summaries of International Labour Standards, 1988, p.5.

[13]The Employers' group of the ILO and several governments disagree with the interpretation of the Committee on Freedom of Association concerning the right to strike. OECD, Trade and Labour Standards, COM/DEELSA/TD(96)8, January 1996, p.96. Lucile Caron has also noted "the kind of jurisprudence which has evolved over the years with respect to freedom of association and which, in

WTO sanctioned trade measures to enforce a right that countries have different views on would be problematic.

"Child labour" is an extremely complex issue. The ILO Conventions that deal with employment of children and young persons appear to be particularly poorly understood. Convention 138, which revises a number of earlier Conventions in the same field, sets out that the minimum age for child labour should not normally be less than 15 years, but does not address child labour exploitation per se.[14] Only 46 countries have ratified this convention, and there is increasing recognition that a new convention that addresses exploitation is required.[15] Indeed, the ILO is currently discussing such an initiative. The use of trade sanctions to enforce minimum age requirements could have particularly negative social and economic effects.[16] This view is reflected in a recent OECD analysis which has concluded that:

> ...part-time work is a fact of life for many children and is neither exploitive nor detrimental to the child's development. It can help young people acquire skills and build confidence. In combating child labour, it is necessary, therefore, to consider carefully its various forms, making a distinction between work and exploitation, and analyzing the developmental and cultural contexts.[17]

In short, it is questionable whether linking trade sanctions to the problem of child labour in general or the current ILO "child labour" Convention would be effective.

The ILO Conventions on discrimination and equal remuneration as they stand also appear unsuitable as the basis of engaging in trade actions. Convention 111 aims: "To promote equality of opportunity and treatment in respect of employment and occupation." The goal of Convention 100 is: "Equal remuneration for men and women for work of equal value." These Conventions set down general principles, not

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some cases, goes much further than the actual texts of the Conventions, in a manner considered by the employers and many governments to be excessive." Lucile G. Caron, "The ILO, Worker's Rights and 'Core' Labour Standards Within a Globalised Economy.", March 1996.

[14]Article 32 of the UN Convention on the Rights of the Child prohibits the economic exploitation of children.

[15]Canada has not ratified Convention 138.

[16]Also, it is estimated that less than ten percent of child labour is employed in export sectors.

[17]OECD, Trade and Labour Standards, COM/DEELSA/TD(96)8, January 1996, p. 21.

detailed legal obligations for ratifying states.[18] These Conventions are so-called "promotional" Conventions, "whereby individual ratifying States undertake to pursue stated objectives, but by methods that are left largely to their own discretion, as is the timing of the changes made."[19]

Moreover, exceptions to general principles are allowed. Convention 111 allows ratifying countries to treat some workers differently.[20] Article 5 reads "Any Member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities of social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination." And Convention 100 allows individual states to determine what is work of equal value. Hence, the Conventions allow for national determination, there is no well-defined international obligation. So, even if trade sanctions were available, as the ILO Conventions stand it is not clear how trade measures could be used, since there is no clear international legal standard to enforce. You would have a system with "teeth", but nothing to bite. Conversely, it is another matter if some advocates of a trade-linked social clause believe it would allow them to use trade sanctions to enforce their view of social justice. Each country, no doubt, would see its affirmative action or equality of wage efforts as working toward a noble goal. Unfortunately, other countries or protectionist interests may not have similar views.

[18]In respect to the concept of "basic" rights, the Director-General of the ILO recently observed that "the delineation of these rights, especially equality of treatment, has not yet been fully settled. How they are ultimately delineated in fact depends on the reasons why each of them should be seen as unconditional, and on the consequences of their definition in a particular way." International Labour Office, "The Social Dimension of the Liberalization of International Trade," Contribution to the G7 Employment Conference submitted by the Director-General of the International Labour Office. April, 1996.

[19]International Labour Office, International Labour Standards, 1978, p.24.

[20]The purpose of this paper is not to debate the alleged merits or injustices of affirmative action measures. It is to signal that this debate is an inherent element of considerations linking core labour rights (the concept) or core labour conventions (the existing ILO Conventions) with trade measures.

Conclusions

Looking ahead, particularly with a view to the 1996 WTO Ministerial Conference in Singapore, we can begin to develop some thoughts on how to approach the trade-labour interface. Though the agenda for the Ministerial has yet to be finalized, several countries have expressed an interest in placing discussion of a social clause on the agenda. What could the Ministerial aim to achieve? First, it could deliver an understanding that any potential social clause would address "core" labour rights. A social clause in a trade context would not encompass the principles or embodiment of the principals into ILO Conventions, of working hours, wages or benefits. The distinction between "core" rights and other standards needs to be explicitly accepted internationally.

Secondly, the Ministerial could recognize that it is premature to negotiate linkages of ILO "core" labour Conventions and WTO trade rights and obligations. This cannot be overstated. There is a real danger that the linkage of often generally stated ILO obligations for ratifying states, with the WTO's relatively more defined and concise rules could be exploited by protectionist interests. The current ILO conventions do not embody the transparency and predictability of the GATT and the WTO.

This points to a need for legal clarification of the scope of the ILO "core" Conventions. Prior to any discussion of trade sanctions as an enforcement mechanism there is a need to elaborate on the internationally agreed content of the ILO Conventions. The clarification of "core" labour rights is a task for the ILO, not the OECD, and certainly not the WTO. Without even considering the actual effectiveness of trade sanctions to alter a state's behaviour[21], to attempt to negotiate a set of WTO trade rules to enforce the ILO "core" conventions as they stand could well be a recipe for disaster.

If there is to be an institutional linkage with the WTO it is apparent that the ILO Conventions would need to be reviewed. For at least some of the "core" labour rights Conventions there appears to be a clear requirement for a new convention. This is particularly true for "child labour" which, as discussed above, deals with minimum ages and not exploitation. Yet revising conventions would be a long and complex process, and raises the question of the political will of countries (and of business and

[21]Robert T. Stranks, "Economic Sanctions: Foreign Policy Foil or Folly?", Policy Staff Commentary No. 4, Department of Foreign Affairs and International Trade, May 1994.

labour interests, since the ILO is a tripartite organization) to do so.[22] Concerns have been expressed that the ILO, while well situated to play an institutional role in the labour-globalization interface, has yet to fully realize its potential in addressing labour issues. These concerns, however, may be diminishing as the ILO evolves into a more dynamic organization, as witnessed by the establishment of a Working Party on the Social Dimensions of the Liberalization of International Trade.[23]

[22]The ILO's Governing Body has tasked its Committee on International Labour Standards and Legal Issues (LILS) to address the issue of possible reform of the ILO's standard setting process. This paper suggests that it may be worthwhile for the LILS to look at ILO reform with respect to the type of changes that would be needed, and the associated problems, to accommodate the trade rules approach of the WTO.

[23] As with a number of other international organizations, the ILO has been criticized in some quarters for failing to realize its potential. Discussions with Canadian government officials indicate that the ILO is evolving into a more dynamic organization with a greater ability to address the labour-globalization interface. See Gordon Betcherman, "Labour in a More Global Economy", a paper prepared for the Office of International Affairs, Human Resources and Labour Canada, 1993, pp. 19-20.

ANNEX

ILO CONVENTIONS RATIFIED BY CANADA

1. Hours of Work (Industry) Convention, 1919
(Ratified by Canada March 21, 1935)

7. Minimum Age (Sea) Convention, 1920
(Ratified March 31, 1926)

8. Unemployment Indemnity (Shipwreck) Convention, 1920
(Ratified March 31, 1926)

14. Weekly Rest (Industry) Convention, 1921
(Ratified March 21, 1935)

15. Minimum Age (Trimmers and Stokers) Convention, 1921
(Ratified March 31, 1926)

16. Medical Examination of Young Persons (Sea) Convention, 1921
(Ratified March 31,1926)

22. Seamen's Articles of Agreement Convention, 1926
(Ratified June 30, 1938)

26. Minimum Wage-Fixing Machinery Convention,1928
(Ratified April 25, 1935)

27. Marking of Weight (Packages Transported by Vessels) Convention, 1929
(Ratified June 30, 1938)

32. Protection Against Accidents (Dockers) Convention (Revised), 1932
(Ratified April 6, 1946)

58. Minimum Age (Sea) Convention (Revised), 1936
(Ratified September 10, 1951)

63. Convention Concerning Statistics of Wages and Hours of Work, 1938
(Ratified April 6, 1946)

68. Food and Catering (Ships' Crews) Convention, 1946
(Ratified March 19, 1951)

69. Certification of Ships' Cooks Convention, 1946
(Ratified March 19, 1951)

73. Medical Examination (Seafarers) Convention, 1946
(Ratified March 19,1951)

74. Certification of Able Seamen Convention, 1946
(Ratified March 19, 1951)

80. Final Articles Revision Convention, 1946
(Ratified July 31, 1947)

87. Freedom of Association and Protection of the Right to Organise Convention, 1948
(Ratified March 23, 1972)

88. Employment Service Convention, 1948
(Ratified August 24, 1950)

100. Equal Remuneration Convention, 1951
(Ratified November 16, 1972)

105. Abolition of Forced Labour Convention, 1957
(Ratified July 14, 1959)

108. Seafarers' Identity Documents Convention, 1958
(Ratified May 31, 1967)

111. Discrimination (Employment and Occupation) Convention, 1958
(Ratified November 26, 1964)

116. Final Articles Revision Convention, 1961
(Ratified by April 5, 1962)

122. Employment Policy Convention, 1964

(Ratified September 16, 1966)

162. Asbestos Convention, 1986
(Ratified June 16, 1988)

147. Merchant Shipping (Minimum Standards) Convention, 1976
(Ratified June 1, 1993)

160. Labour Statistics Convention, 1985
(Ratified December,1993)