

### THE CHANGING LABOR MARKETS OF THE WESTERN HEMISPHERE: LABOR ISSUES RELATING TO THE FTAA

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In 1994, thirty-four countries in the Western Hemisphere met in Miami to begin negotiations designed to establish a comprehensive free trade agreement.<sup>1</sup> The initial meeting led to a "Declaration of Principles" and a "Plan of Action" which committed the signatory countries to take steps toward open markets and free trade in the hemisphere.<sup>2</sup> Subsequent meetings in 1998 and 2001 have moved the countries toward creation of the Free Trade Area of the Americas (FTAA),<sup>3</sup> with an expectation that the agreement will be in place by 2005.<sup>4</sup>

At the same time, there has been a significant rise in the anti-globalization movement, leading to large demonstrations protesting the increase of corporate power as well as adverse effects on workers, the poor and the environment. A significant focus of both protesters and academic commentary has been the effect of globalization on labor. Thus, the symposium's focus on labor issues relating to the FTAA is both timely and important.

Although there are a number of existing trade agreements in the Western Hemisphere, for Americans contemplating the labor issues that might arise under the FTAA, the agreement that comes to mind as a prototype is the North American Free Trade Agreement (NAFTA) which took effect in 1994 as the FTAA negotiations commenced.<sup>5</sup> The NAFTA is a trilateral agreement involving the United States, Canada and Mexico. American labor unions and other advocates for workers mounted a campaign against the NAFTA because it contained no provisions relating to labor.<sup>6</sup> Worker advocates feared migration of jobs to Mexico, where the wages are far lower

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<sup>1</sup> Carol Stump, *Free Trade Area of the Americas*, 4 J. INT'L L. & PRAC. 153, 153 (1995).

<sup>2</sup> *Id.*

<sup>3</sup> Sheryl Dickey, *The Free Trade Area of the Americas and Human Rights Concerns*, 8 NO. 3 HUM. RTS. BRIEF 26, 26 (2001) (Second Summit of the Americas held April 19, 1998 in Santiago, Chile. Third Summit of the Americas held April 20-22, 2001 in Quebec City, Quebec).

<sup>4</sup> Stump, *supra* note 2, at 153.

<sup>5</sup> *Id.*

<sup>6</sup> Betty Southard Murphy, *NAFTA's North American Agreement on Labor Cooperation: The Present and the Future*, 10 CONN. J. INT'L L. 403, 405 (1995).

and employment laws less restrictive. As a result of labor's opposition, among other factors, the parties to the NAFTA negotiated a side agreement relating to labor issues, the North American Agreement on Labor Cooperation (NAALC).<sup>7</sup>

The NAALC makes no attempt to harmonize labor laws or labor standards among the NAFTA countries, but rather constitutes an agreement to promote certain minimum standards, while retaining the principle that each party establishes its own labor standards.<sup>8</sup> The parties also agreed to enforce their own domestic laws, and the NAALC provides a mechanism for challenges alleging that a signatory country is not, in fact, enforcing such laws.<sup>9</sup> The limited dispute resolution procedure is cooperative rather than adversarial. For example, a country may be found in violation only if there is a persistent pattern of failure to enforce domestic standards which is not a "reasonable exercise" of official discretion, or a "bona fide decision to allocate resources to enforcement in respect of other labor matters determined to have higher priorities."<sup>10</sup> The few actions brought under the NAALC either have resulted in either a finding of no violation or remain pending.<sup>11</sup>

There is disagreement as to the impact that the NAFTA has had on relative job loss and job creation, as well as on wages in the NAFTA countries.<sup>12</sup> In addition, critics of the NAALC have argued that the scope is far too limited and the dispute resolution mechanism inadequate, making it virtually impossible to establish violations.<sup>13</sup> Further they point to the limited role of private parties both as complainants and defendants, and the fact that enforcement is available only against governments that repeatedly fail to enforce their laws.<sup>14</sup> Finally, critics urge that an effective agreement would provide for the harmonization of labor standards between countries to avoid the "race to the bottom" prompted by divergent standards.<sup>15</sup> Proponents of the NAALC have praised the cooperative approach as one that furthers better relations among the parties and thus, free trade. Moreover, they argue that free

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<sup>7</sup> *Id.*

<sup>8</sup> Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 1007-08 (1995).

<sup>9</sup> Craig L. Jackson, *Social Policy Harmonization and Worker Rights in the European Union: A Model for North America?*, 21 N.C.J. INT'L L. & COM. REG. 1, 34 (1995).

<sup>10</sup> Chantell Taylor, *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Workers' Rights*, 28 DENV. J. INT'L L. & POL'Y 401, 418 (2000).

<sup>11</sup> Leonard Bierman & Rafael Gely, *The Labor Side Agreement: The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 CONN. J. INT'L L. 533, 549-61 (1995); Barry LaSala, *NAFTA and Worker Rights: An Analysis of the Labor Side Accord After Five Years of Operation and Suggested Improvements*, 16 LAB. LAW. 319, 328-34 (2001).

<sup>12</sup> Cf. Sidney Weintraub, *The Meaning of NAFTA and Its Implications for the FTAA*, 6 NAFTA L. & BUS. REV. AM. 303 (2000) (highlighting benefits of NAFTA) and Dickey, *supra* note 4, at 26. See also Taylor, *supra* note 11, at 425-26 (citing claims of opponents and proponents); Stump, *supra* note 2, at 168-70 (same).

<sup>13</sup> LaSala, *supra* note 12, at 337; Stone, *supra* note 9, at 1010.

<sup>14</sup> Taylor, *supra* note 11, at 417-18; Jackson, *supra* note 10, at 49, 56.

<sup>15</sup> Jackson, *supra* note 10, at 56-57; Stone, *supra* note 9, at 1011. The race to the bottom refers to countries (or states) lowering their labor standards to compete more effectively for business. *Id.* at 992.

trade contemplates that countries with large unskilled labor pools will compete on the basis of the lower price of labor and that such efficiencies constitute a substantial benefit of free trade.<sup>16</sup> Removing such advantage eliminates a major incentive for low wage countries to enter into free trade agreements.<sup>17</sup> In addition, sovereignty issues require that each country set and enforce its own labor standards.<sup>18</sup>

The European Union, with its near half century of experience, offers an alternative approach to the labor issues inherent in free trade agreements. In contrast to the NAFTA signatories, the European Union, which began to grapple with these issues as early as 1959, has moved to harmonize labor standards across the member states and to provide an enforcement mechanism that transcends national borders.<sup>19</sup>

In this context, the participants in the symposium, consistent with their diverse backgrounds as academics and practitioners, have addressed various labor issues relating to the proposed FTAA. Not surprisingly, none of the participants urge the elimination of global trade, but they have varying views regarding the significance of the impact such trade has upon workers, and the appropriate approaches to resolving labor issues. All concede that some workers are injured by free trade policies, some viewing this as a minor obstacle easily overcome, and others seeing major problems that must be addressed before moving forward with the FTAA.

Mr. Reyna effectively outlines the labor issues arising under international trade agreements, including the GATT and the NAFTA.<sup>20</sup> He uses this history to analyze labor issues likely to arise under the FTAA, focusing particularly on the movement of workers across borders, and suggests that the FTAA is likely to incorporate provisions addressing labor issues. Dr. Mitchell, a geographer, also focuses on the movement of workers across borders, using the example of the NAFTA. Dr. Mitchell asks why borders are reduced or eliminated for capital and goods, while simultaneously strengthened for labor. He argues that the impoverishment of workers is a necessary precondition to globalization, which is a reconfiguration of relative geographical spaces. Fortification of the border makes it more expensive for workers to cross and renders them more vulnerable to exploitation once they are in the U.S., thus undermining the power of workers. At the same time, more workers seek to cross the border because of the displacement of rural Mexicans due to the elimination of communal ownership of land. Dr. Mitchell cites the widespread reduction in labor law enforcement in California to support his thesis. The FTAA, he suggests, will only create more poor workers, "deepening the uneven development that makes capitalism possible."<sup>21</sup>

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<sup>16</sup> Murphy, *supra* note 7, at 421.

<sup>17</sup> *Id.*

<sup>18</sup> Juli Stensland, *Note: Internationalizing the North American Agreement on Labor Cooperation*, 4 MINN. J. GLOBAL TRADE 141, 161 (1995).

<sup>19</sup> See Stone, *supra* note 9, at 999-1005.

<sup>20</sup> Jimmie V. Reyna, Address at the Richmond Journal of Global Law & Business Fall Symposium, *The Changing Labor Markets of the Western Hemisphere: Labor Issues Relating to the Free Trade Areas of the Americas* (Oct. 5, 2001).

<sup>21</sup> Donald M. Mitchell, Address at the Richmond Journal of Global Law & Business Fall Symposium, *The Changing Labor Markets of the Western Hemisphere: Labor Issues Relating to the Free Trade Areas of the Americas* (Oct. 5, 2001).

Dr. Wight's analysis of the effect of trade on labor argues that the impact may be positive or negative depending on the underlying economic and social conditions in the trading countries. Some workers will win and others will lose as a result of trade. He acknowledges that the FTAA may heighten hunger problems among the rural poor in Latin America because of uncompetitive labor markets and issues relating to uneven land distribution and uncertain property rights. Nevertheless, he optimistically asserts that trade may bring about institutional changes to improve such conditions. Moreover, he sees progress toward creating alternative employment for rural workers through export markets for their manufactured products, such as textiles, silver and pottery.

In contrast to the critical view of Dr. Mitchell and the mixed view of Dr. Wight, Ambassador Fisher and Ms. DeBusk, consistent with their roles as advocates of trade in the Clinton administration, see trade as beneficial for workers overall. Ambassador Fisher's keynote address cites statistics supporting his view of trade as essential to the American economy, and urges that fast track authority be given to the President to negotiate free trade agreements, keeping in mind the welfare of workers. To Ambassador Fisher, worker dislocation is outweighed by job creation and easily addressed through training and education, along with imposition of model business codes for American business abroad encompassing safe and healthful workplaces and fair employment practices. Ms. DeBusk similarly maintains that free trade has benefitted workers, by creating lower prices on imported goods purchased by workers, and by creating jobs based on imports. She also posits that free trade promotes democracy and raises living standards in poor countries. In light of these benefits, she supports presidential authority to negotiate agreements, with Congressional guidance as to negotiating objectives relating to labor issues. Her recommended objectives, which respond to some of the criticisms of the NAALC, included respect for worker rights consistent with International Labor Organization core standards;<sup>22</sup> party agreements to enforce their own labor laws with dispute resolution programs analogous to those for other disputes under the trade agreement; consultation and cooperation to strengthen core labor standards; and finally, review and reporting mechanisms relating to the impact of trade on American workers and the laws of the other parties to the agreement.

Dr. Palley and Mr. Collingsworth, both representing organizations serving as advocates for workers, urge inclusion of labor standards in free trade agreements. Dr. Palley's paper makes the economic case for labor standards, focusing specifically on the core labor standards of the ILO. He contends that just as the New Deal federal labor standards created a vibrant national economy in the U.S., international labor standards can spur the establishment of a strong global economy and aid developing countries by improving wages and income distribution, which will advance market development as well as democracy. Dr. Palley urges the International Monetary Fund,

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<sup>22</sup> The core standards of the International Labor Organization, which have been urged by some as standards that should be enforceable parts of any trade agreement, are: freedom of association; the right to organize and bargain collectively; freedom from discrimination on the basis of race, religion, ethnicity, gender or political views; freedom from forced labor or slavery; and a prohibition on child labor. Dickey, *supra* note 4, at 27.

the World Bank and the World Trade Organization to implement policies requiring phased compliance with labor standards.

Mr. Collingsworth makes a specific proposal for inclusion of labor standards in the FTAA. He suggests that the initial focus be on existing labor laws and international standards that most countries have already accepted, and would condition participation in the FTAA on compliance with such standards. The majority of his paper concentrates on the appropriate enforcement mechanism, which he views as essential to effective standards. He advocates a phase-in process for countries not currently in compliance, harmonizing the standards upward. Further, in contrast to the NAFTA, he would focus enforcement efforts on employers as well as governments, and would penalize governments only when they systematically violate standards after notice and an opportunity to comply.

Professor Del Conte's paper offers an opportunity to review a different approach to free trade, highlighting the history of the development of the European Union, with specific emphasis on the labor standards. In contrast to the NAFTA and the FTAA proposals, the EU allows free movement of labor and establishes uniform labor standards for all participating countries. Professor Del Conte stresses the evolutionary process of creating the EU, and suggests that the same could occur in the Americas to the advantage of all involved.

In sum, the participants in the symposium have highlighted the major labor issues facing the countries involved in negotiating the FTAA. Their contributions to the symposium will continue to provoke thought and stimulate dialogue as FTAA negotiations move forward.