The Free Trade Area of the Americas and Human Rights Concerns

*by Sheryl Dickey**

The Free Trade Area of the Americas (FTAA) is an agreement currently being negotiated to establish a free trade area among all the nations of the Americas except Cuba. The Third Summit of the Americas, the most recent round of FTAA negotiations, was held on April 20–22, 2001, in Quebec City, Canada. The current focus of the agreement is on trade liberalization—removing restrictions on the free movement of capital, goods, and services—in the hemisphere. While the FTAA could be a means of stimulating economic growth and cooperation, the growth should also result in a lessening of income inequality and not an increase in economic disparity, as has occurred under the North American Free Trade Agreement (NAFTA). Currently, the FTAA negotiators are looking at NAFTA as a model for the FTAA. Although NAFTA may be an effective model for promoting corporate interests, the agreement has failed as a means to strengthen and enforce workers' rights in North America.

NAFTA has encouraged the increase in the number of export processing plants (*maquiladoras*) in Mexico. Many of these *maquiladoras* have come under attack for being sweatshops. Sweatshops are workplaces with exploitative conditions, including hazardous working conditions, lack of a living wage, denial of basic benefits, and intimidation and violence directed towards workers advocating for independent unions. Stronger labor protections need to be built into the FTAA to ensure that free trade does not result in an increase of sweatshops throughout the Americas. Thus far in the FTAA negotiating process, labor organizations and other non-governmental organizations (NGOs) have not been able to raise these issues in a meaningful way. Shutting out these organizations has led to a narrow, corporate-driven agenda for the FTAA without an exploration of alternative development models that promote equitable economic growth.

The rights protected by the UDHR cannot be achieved in isolation from agreements such as the FTAA, which deals with the economic decision-making and development of nations.

Background

The FTAA grew out of the First Summit of the Americas (Miami Summit), which took place in December 1994. The Miami Summit was a dialogue between the 34 nations of the Organization of American States. At the Miami Summit, the participating nations developed a Declaration of Principles, and committed to an overall plan of action. These principles included the following concepts: preserving and strengthening the democracies of the Americas; promoting prosperity through economic integration and free trade; eradicating poverty; and guaranteeing sustainable development and the conservation of the natural environment. Further, the participating nations committed to developing a free trade area encompassing all 34 nations. The formal negotiations for the FTAA began at the Second Summit of the Americas (Santiago Summit) in April 1998, and focused on trade liberalization.

At the Santiago Summit, nine working groups were established to deal with each of the major areas of negotiation, including agriculture, market access, services, investment, intellectual property, and anti-dumping/countervailing duties. These nine working groups included government representatives from the participating nations. Currently, over 500 corporate representatives have security clearances to directly participate in the negotiating process.

In following the working group model, NGOs advocated for working groups to be established on the environment, labor, and human rights. To date, these proposed working groups have not been created. Instead of the establishment of a working group for labor, at the March 1998 San Jose ministerial meeting in Costa Rica a Committee on Civil Society was developed to function as a non-negotiating intergovernmental committee to respond to the concerns of non-business groups, including NGOs. NGO representatives, however, are limited to submitting written submissions to the Committee on Civil Society. Moreover, the Committee's role is simply to compile this information, summarize the comments, and report this information to the trade ministers of the negotiating countries without any formal discussion mechanism with the working groups. NGO efforts to participate are also being severely hampered by lack of access to the actual drafts of the FTAA negotiating documents.

For example, in the United States, the Office of the United States Representative has refused repeated requests under the Freedom of Information Act (FOIA) for access to the position documents submitted by the United States to other nations during the FTAA negotiations. On March 7, 2001, the Center for International Environmental Law, a U.S. NGO, brought suit to compel the release of these public documents and to declare the withholding of these documents unlawful under FOIA. Without access to such documents and with the ongoing secrecy of the proceedings, there cannot be meaningful participation in the development of a free trade agreement that incorporates human rights.

The Debate over Free Trade and Human Rights

The Universal Declaration of Human Rights (UDHR) established a set of standards of achievement for all nations of the world. The UDHR states that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Article 28). Countries must craft any free trade agreements in congruence with their obligations under the UDHR. While countries may argue that this debate is about trade and not human rights, these agreements extend beyond commercial concerns and have a direct impact on national political processes and individual rights.

Opponents of free trade agreements like NAFTA and the FTAA, such as the U.S.-based NGO Public Citizen and the Council of the Canadians, argue that free trade can create a race to the bottom. Free trade facilitates the movement of corporations from high-wage countries to low-wage countries. In response to this trend, governments of target nations are then pressured to lower or maintain low labor standards to attract and keep foreign direct investment. This pressure depresses wages far below the "just and favourable remuneration" required under Article 23(2) of the UDHR. It also creates incentives for governments and corporations to either bust unions or otherwise prevent workers from advocating for wage increases and improved conditions in violation of the right to form and to join trade unions under Article 23(4) and the ILO core workers' rights standards.

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This trend is not limited to developing nations. According to Cassie Watters, an organizer for Massachusetts Jobs with Justice in the United States: "[f]ree trade has become another cudgel to use against unions and underpaid workers in this country [the United States] by threatening to move operations—and take away people's jobs—to places where they pay even less." Free trade enables and encourages multinational companies to move their operations from nations with strong labor protections to nations with weaker labor protections. This race to the bottom is directly counter to the goals of the UDHR. Article 25 specifies that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control." The rights protected by the UDHR cannot be achieved in isolation from agreements such as the FTAA, which deals with the economic decision-making and development of nations. Free trade agreements that encourage nations to attract foreign direct investment by keeping wages low and restricting workers' rights to organize are in direct opposition to Articles 28, 23, and 25 of the UDHR.

These rights are further reinforced in the conventions of the International Labor Organization (ILO)—a UN specialized agency founded in 1946. The ILO promotes labor and human rights through the work of a unique tripartite structure with workers, employers, and governments. In the June 1998 Declaration of Fundamental Principles and Rights at Work, the ILO declared that all Members of the ILO had endorsed the following core workers' rights and have a duty "to respect, to promote and to realize" these rights: freedom of association, right to collective bargaining, elimination of forced labor, elimination of child labor, and elimination of discrimination in respect to employment and occupation. As negotiators develop the FTAA, these rights must be incorporated to ensure the finished agreement does not result in their systematic violation.

NAFTA—A Model in Failure for Workers' Rights?

FTAA negotiators have looked to NAFTA as their model. NAFTA, which came into effect in January 1994, is a free trade agreement between Canada, Mexico, and the United States based on the free market principles of national treatment, most favored nation treatment, and transparency of governmental processes. Free trade advocates promoted NAFTA as an agreement that would lead to increased prosperity for all three nations. According to Public Citizen, however, since NAFTA was first implemented, an estimated 395,000 jobs have transferred from U.S. workers to Mexican workers, who earn 77 percent less. The economic growth in Mexico has been mainly limited to the industrial northern border region where over one million Mexicans work in *maquiladoras* for less than the Mexican minimum wage, which is approximately U.S.$3.40 per hour.

Human Rights and Labor Sidelined

During the development of NAFTA, the negotiators incorporated workers' rights and environmental protection (which was the first time these issues had been incorporated in a free trade agreement) into two side agreements—the North American Agreement of Labor Cooperation (NAALC) and the North American Agreement of Environmental Cooperation (NAAEC). The labor agreement was a significant development for several reasons: 1) NAALC creates a private right of action for workers, their representatives, and/or other affected individuals rather than only permitting State Parties to bring claims for violations of the side agreement; 2) the NAALC dispute resolution process is a transparent procedure with public access; and 3) the NAALC recognizes core workers' rights. With all of these strong elements, however, the labor agreement remains ineffective because the dispute resolution process does not provide enforceable remedies.

The Freedom of Association and Protection of the Right to Organize Convention of 1948 (ILO Convention 87) guarantees the rights of free association and collective bargaining. Even though Mexico signed ILO Convention 87, during the NAFTA negotiations Mexico refused to allow the inclusion of a provision that would sanction parties to NAFTA for persistent violations of core workers' rights. Instead, the NAALC requires each State Party to establish a national administrative office that would file public reports about labor issues and can recommend ministerial consultation. But consultation is voluntary, with no binding sanctions if the party, or particular companies, continue to violate provisions of the labor or environmental protection agreements. This voluntary process, while useful in documenting abuses, does not result in mandatory action in response to the findings of persistent violations of core workers' rights. Aggrieved workers at *maquiladoras* who have brought claims through the NAALC based on violations of their ILO rights have not received redress. Moreover, they have faced intimidation and violence in response to their filing a claim.

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This lack of enforceability is in stark contrast to the binding dispute resolution mechanism for the enforcement of investors' rights in the main text of NAFTA Chapter 11. Under this process, private investors can bring arbitration claims against State Parties for violations of the NAFTA investment provisions. In the past seven years, investors successfully challenged governmental regulation that companies argued violate NAFTA's investor protections. These challenges resulted in million dollar settlements. Meanwhile, workers' and community complaints filed under the NAFTA side agreements do not provide any enforceable remedy.

Learning From NAFTA's Weaknesses—the U.S.-Jordan Free Trade Agreement

The U.S.-Jordan Free Trade Agreement (U.S.-Jordan Agreement), while not a comprehensive alternative, is an important attempt to address some of the weaknesses in the NAFTA model. Former U.S. President Bill Clinton signed the U.S.-Jordan Agreement on October 24, 2000, and it is currently pending Senate ratification. The most significant elements of the treaty are that environmental and labor agreements are part of the main text as distinct articles rather than relegated to side agreements. Additionally, the agreement reaffirmed both countries' commitments to the ILO's core labor standards. While the amount of trade between the two nations is significantly less than that between the NAFTA nations, the U.S.-Jordan Agreement creates a useful starting point for the development of the FTAA.

According to former U.S. Trade Representative Charlene Barshefsky, "[t]he agreement is also the first to ever have, in the

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body of a U.S. trade agreement itself, key provisions that reconfirm that free trade and the protection of the environment and of the rights of workers go hand-in-hand. It will not require either country to adopt new laws, but rather requires each to enforce the laws it currently has, which will join free trade and open markets with other public responsibilities." The U.S.-Jordan Agreement moves beyond NAFTA by incorporating labor issues into the main text of the free trade agreement and utilizes the same dispute resolution and enforcement mechanism for labor disputes as is used for the agreement's commercial terms.

Although it is significant that investment disputes are not privileged over labor disputes, the U.S.-Jordan Agreement nonetheless has significant weaknesses. Most strikingly, the Agreement does not permit private parties to challenge violations of the labor provisions. Rather, it forces them to rely on State Parties to challenge such violations. Lastly, the Agreement does not create explicit sanctions for violations of the labor provisions.

Improving the FTAA

Theoretically, the NAFTA labor side agreement creates a useful model by providing a private right of action and a transparent procedure. In practice, however, the lack of an enforceable remedy means that the NAALC is ineffective in protecting workers' rights. The U.S.-Jordan Agreement, while a step forward in elevating labor concerns to the same level as commercial concerns, does not go far enough in developing enforceable labor protections and limits access to the dispute resolution mechanism to the State Parties themselves. An effective model for the FTAA would draw on strengths of these previous free trade agreements and leave behind the weaknesses of non-enforceability. These agreements, however, are not the only possible models for the FTAA.

The International Labor Rights Fund has summarized the various proposals by numerous NGO's on how to effectively incorporate labor rights into free trade agreements. These proposals move beyond the requirements under NAFTA and the U.S.-Jordan Agreement that nations simply enforce their own laws. The following principles are outlined in the proposals: compliance with a social clause outlining workers' rights as a condition to participate in the trade agreement; participation in a process to harmonize labor laws upward with each nation agreeing to enforce its own laws as a starting point; a requirement that multinational companies operating within the free trade area comply with the terms of the social clause; and enforcement provisions for violations of the social clause by a member country and/or a company operating within a member country. These remedies could take the form of labor sanctions or monetary penalties. These proposals would mean that not only are the ILO core workers' rights respected but that nations would work toward securing the broader economic rights advocated by the UDHR, such as the living wage.

The Need for Meaningful Participation

This basic set of principles is just the start of developing a workable proposal for how to effectively address human rights and labor concerns. These improvements should come from a more transparent process with a genuine incorporation of a broader spectrum of interests than simply corporate interests. These suggestions should not be compiled by the Civil Society Committee and ignored, but must be integrated into the actual negotiations. The public must have access to the negotiating documents in order to have a useful role in the integration of labor protections into the FTAA. If there is not meaningful participation in the development of the FTAA, the public must at least have a meaningful say in whether their nation should join or reject the FTAA.

Conclusion

At the Third Summit of the Americas in Quebec, the negotiators must take heed and listen to the thousands of protestors who gathered outside of the event advocating for greater public participation in the FTAA negotiating process and a more significant focus on equity concerns. Only through a more open and transparent process will it be possible to develop alternative models for the FTAA, models that help foster rather than degrade the protection of human rights. While the FTAA negotiations are focused on increasing economic prosperity through free trade, the focus of these negotiations should not be in isolation from the other enumerated goals of the Miami Summit, which include the eradication of poverty. Economic prosperity cannot be achieved simply through opening markets, but must be accompanied by appropriate government involvement to ensure that greater equity comes with greater prosperity. One important way of achieving this goal is by incorporating meaningful mechanisms into the FTAA to ensure that core workers' rights are recognized and enforced.

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shouldering. The gacaca plan, however, is not the only possibility for improvement. Its conception of unchecked popular participation in the prosecution and judging of defendants jeopardizes key guarantees of judicial independence and impartiality, and its denial of the assistance of counsel and other procedural rights compromises human rights protections at the heart of a fair trial.

Furthermore, the gacaca plan may not meet its own stated goals. The increase in popular participation may not correspond to an increase in perceived legitimacy of process because the new plan does not resemble the traditional gacaca practice in critical ways. Some observers also doubt the gacaca system would provide the promised increased rate of adjudications: the selection and training of so many lay judges poses enormous logistical challenges, and the proposal has already been delayed over one year beyond its original starting date. According to Amnesty International's April 2000 report, the gacaca plan's notion of forced testimony in highly public proceedings also increases the risk of false testimony. These shortcomings are all the more serious given the current acquittal rate of 20 percent in ordinary trials.

In order to avoid trading one system for a more harmful one, Rwanda should take steps to safeguard the independence and impartiality of the gacaca plan, allow for access to counsel and for a meaningful opportunity to prepare a defense, and provide the possibility for review before an ordinary court.

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