The New Balance between Labour and Capital and *Fin du siècle* Legal Transformations

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Introduction

In this article we would like to demonstrate that we are experiencing a transformation in the balance of power between capital and labour, which is reflected in the legal field. On an imaginary scale, we would be able to distinguish two large groups of rights that are currently undergoing dramatic transformation, in a process which, in one way or another, is seen in all societies.

On one side, there is a group of rights which are currently expanding, those favoring capital, where "new" economic law and property rights will be highlighted. On the other side are found the rights that are being restricted, the right to work, where we will highlight international labour norms and immigration law.

Some Comments in Relation to Law and New Transnational Spaces of the Labour-Capital Relationship

Many authors have emphasized how processes of globalization have brought about both "global" and "local" transformations; an intimate interrelationship exists between the two extremes, requiring that they be studied as a whole. Santos has distinguished "globalized localisms" from "localized globalisms," understanding the first as "the process by which a given local phenomenon is globalized successfully," and the second as "the specific impact of transnational practices and imperatives on local conditions, which are thus restructured in response to these imperatives"[2].

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2. Boaventura de Sousa Santos, *Toward a New Common Sense* (New York: Routledge, 1995).

It is frequently forgotten that globalization processes have a social base as well as a technological one (such as the information technologies, advances in communication, etc.). The most active social basis of these processes has been, until now, the "transnational bourgeoisie" acting principally through their privileged institutional means, Transnational Corporations (TNC), and an extensive network of institutions and "international forces" which for many reasons have conglomerated around them. Institutions such as the International Monetary Fund and the World Bank, etc., have contributed to the strengthening, both politically and economically, of the "transnational bourgeoisie" through the imposition of particular economic policies in peripheral and semi-peripheral countries and through the multiple conditions imposed on countries seeking loans.

However, besides a social basis of capital, a social basis of labour also exists, which, until now, has been closely tied to the domestic arena. In the past, organised efforts extending beyond national borders have always been centered on a group of wage workers, the privileged subjects of the assembly-line organization of work. However, a group of new social actors has appeared on the international scene, making up the social basis of labour. These newcomers, as represented by international indigenous organizations, human right organizations and the women's movements, have taken the first steps in forging new approaches towards transformative transnational action. Surrounding both the social basis of capital and the social basis of labour, a group of institutions and "international forces" has emerged, also for multiple reasons, which are contributing to the strengthening of these struggles.

Within the so-called "international forces" we would like to highlight the group of "concrete practices of multiple actors,"[3] exemplified by the practices of lawyers from the large, private law firms of the United States and Europe, which have been contributing actively to the expansion throughout the world of their national legal systems to the benefit of the transnational bourgeoisie. Of no less importance, although less noticeable, has been the coordinated work of activists from social organizations, national and international NGOs, who have been able to oppose the legal transnationalization of capital and the legal transnationalization of work, a struggle not without its contradictions, which are particularly visible with respect to the broad area of human rights.

However, the predominance of the transnationalization of capital over the incipient transnationalization of work is clear. We would like, nevertheless, to highlight the potential of the latter in the process of constructing resistance and alternatives to the society that capital models.

On the other hand, just as a social basis exists for the processes of globalization,

3. As Trubek and Dezalay have pointed out "the forces and processes that contribute to global economic restructuring and to political change have their origins in national systems, including lawyers' practices." See David Trubek and Yves Dezalay, Global Restructuring and the Law: The Internationalization of Legal Fields and the Creation of Transnational Arenas (University of Wisconsin-Madison. Global Studies Research Program, Working Paper Series, No. 1, 1993).

so too does a material base—a space, or rather spaces from which the actors that dominate the transnational game are privileged to build a globalized world. It is important to recognize a "material base" to processes of globalization, because, in our view, once again a hierarchization of the world system appears, in which nation states, although they may well be transforming themselves, are doing so in neither a linear nor a homogeneous fashion.

For example, not all national legal arenas have undergone processes of globalization; the one which has experienced a substantial globalization is that of the United States. It dominates not only the commercial transactions that are conducted each day by TNC, but also leadership of the new regulatory order with respect to world trade, such as the World Trade Organization (WTO), the regional and sub-regional commercial blocks such as NAFTA and ALCA, as well as the numerous contracts signed by different countries with international credit organizations.

Trubek and Dezalay consider the national legal arenas to be springboards to transnational and supranational spaces[4]. The axis of the transnational legal field is located in "the Nation State and in the normative order that originates from state law. But legal fields are more complex and multidimensional, and will be even more so with time if globalization processes continue."

On the other hand, the recognition of a "material base" to processes of globalization is related to the question of political legitimacy. In employing the notion of a "mode of legal production," Trubek and Dezalay want to express "a political economy of regulation, protection, and legitimacy in a given national space and at a specific time." This concept allows them to affirm that there is a "penetration of the mode of production of American law into European jurisdictions and those of other places" which in part explains the apparent coincidence between the interests of the transnational bourgeoisie, through the TNC, and the "national" interests of world powers like the United States and why, perhaps, the majority of times they are presented as one single concern.

THE EXPANDING RIGHTS: "NEW" ECONOMIC LAW AND PROPERTY RIGHTS

"New" Economic Law as the Starting Point of the Transnationalization of Law

1. The New "*Lex Mercatoria*"

With the expansion of international trade, and particularly through transnational corporations (TNC), the customary contractual rules and principles have been bro-

4. It should be pointed out that the national arenas emphasized in the study (the European Community and the United States) correspond, precisely, to those located at the center of the world system.

ken with the regulation of commerce in the law of nation states. With this the *lex mercatoria* has re-emerged, which evokes the group of principles and customary practices that were utilized by traders at the dawn of capitalism and that were widely recognized within the merchant group. Given that a large part of TNC is of Anglo-American origin, the legal culture that expands throughout the world is logically that of common law[5].

However this resurgence of the *lex mercatoria* is no coincidence; in fact as Sassen points out:

> the central role played by Transnational Corporations can be seen by the fact that the United States and Transnational Corporations control eighty percent of international trade in the United States in the second part of the 80s; moreover, currently, more than a third of U.S. international trade is intra-firm, in other words between geographically separated units of the same firm[6].

This intra-firm trade is explained by the transformations in production with the dissolution of the large assembly-line factories. In the central capitalist countries production fragmented and was moved to other countries where labour is cheaper or where market potential is greater. For the peripheral countries this process meant an upsurge in small production units, the majority of which are familial in character.

According to Forbes magazine, U.S. businesses produce 25% of their total manufactured product in other countries; a large part of these products are later imported to the U.S. market. This trend has also been noted in Japan where today "Japanese companies produce 9% of the total manufactured output in other countries, up from barely 3% a few years ago"[7].

Santos has pointed out that:

> However informal, the new *lex mercatoria* is neither amorphous nor neutral, the customs and usages are not necessarily universal and much less traditional or immemorial. The new *lex mercatoria* as an emerging transnational legal field, is a globalized localism, constituted by great cognitive expectations and slim normative loyalties, reproduced by the routinized repetition of a myriad of contractual relations originally framed by international trading firms and their lawyers, as well as international banks and international organizations dominated by one and the other[8].

For Santos the actions of the World Bank and the International Monetary Fund contribute to the delimitation of the spaces where the *lex mercatoria* will prevail, to the opening or closing of territories or areas to transnational transactions.

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5. With respect to this point, Gessner states, "the world market dominated by the English language, North American capital and the reasoning of common law is a game, in which North American lawyers, who moreover are organized in a business form much more like that required for operation on the world stage, play the locals." quoted in Santos. *op. cit.*
6. Saskia Sassen. *Cities in a World Economy* (Thousand Oaks: Pine Forge Press, 1994), p. 14.
7. See Neil Weinberg, "If You Don't Change, You're Dead," Forbes (March 25, 1996), p. 98
8. Santos, *op. cit.*

2. The Experience of the European Union: A New Market for Law and the Necessity of a New Profile for Lawyers

The restructuring of European economies, along with the creation of the European Union has altered and flooded traditional European economic law, creating a new European market for law, in which those legal services in greatest accordance with current needs of restructured capital receive greater rewards.

For Trubek and Dezalay there are two basic dimensions to the European law market:

a. The vertical dimension: that is to say, a new source of law. European law, in other words, the "huge corpus of legal rules that emanates from Brussels and from new legal regulatory and judicial fora created under the Treaty of Rome," has progressively modified the law of Nation States, "and imposes new forms of legal practice"[9].

   There are various types of regulations in the new European law, some which supersede domestic laws (trade and anti-monopoly), others which require the harmonization of laws in the countries of the European Union.

b. The horizontal dimension: in other words, the knowledge of distinct legal systems. The new European law market requires legal services that handle the different European legal systems and, simultaneously, the new law of the European Union. Equally, legal services require the knowledge of business strategy, of the different areas of law, and specifically the ways in which these interact in the different countries of the Union and with law that emerges from the Union itself.

These two dimensions surpass the traditional capacities of the mode of production of European law; thus new actors, many of them non-lawyers (especially accountants) and on the whole non-European, have come to dominate the new and growing European law market, changing the traditional mode of legal production. Law firms from the United States deserve a special mention: with their particular strategies of legal defence and especially the provision of "complex" legal services, in other words, organizing interdisciplinary teams, they not only dominate the new European market but also drive the style of work and the organization of new European law firms.

Trubek and Dezalay point to Mergers and Acquisitions as the specific area of legal practice, "cause of the transformation of the traditional European mode of legal production". As a result they indicate:

> The law governing M&A in Europe is highly complex, and increasingly legalistic. It requires sophisticated analyses that demand the integration of economic, financial and legal matters. It provides substantial

9. Trubek and Dezalay, *op. cit.*

> opportunities for the tactical use of litigation in the pursuit of business objectives and other mega-lawyering techniques pioneered in the U.S. ...lawyers trained in the institutions and methods of the traditional European mode of legal production find practice in the area of M&A unfamiliar and risky: the Europeans were unprepared for, and unwilling to, enter this new arena created by internationalization[10].

3. The Internationalization of U.S. Legal Sanctions

a. Sanctions in Trade Law[11]

More and more frequently the United States has extended the application of its trade legislation to third countries with which U.S. businesses, or Transnational Corporations (TNCs) headquartered in the United States, have trade disputes. Following a series of reforms to trade law regulations during the last decade, the United States has used the threat of sanctions in an increasingly aggressive manner as a way of imposing its criteria for the benefit of given TNCs.

The importance of the use of trade legislation as a weapon in the conquest of markets by the TNCs must not only be seen in the successful application of sanctions. In fact, the perverse virtue of this commercial weapon is rooted precisely in the control of trading partners through fear, the mere threat of its application, especially in peripheral and semi-peripheral countries that find themselves within the area of influence of the United States such as in Latin America and the Caribbean[12].

It is interesting to highlight here how trade regulations are used as threats, or actually applied, in a unilateral manner against third countries, contrary to the regulations of the former General Agreement on Trade and Tariffs (GATT) and the recently created World Trade Organization (WTO), for widely varying goals such as

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10. Ibid.
11. This section is supported by the excellent synthetic analysis prepared by Kristopher McCahon, "Las sanciones en la legislación comercial de los Estados unidos. Una reflexión a propósito del caso del banano/The Sanctions Established by United States Commerce Legislation. A Look at the Banana Quota Agreement" *Alerta a la Apertura/Free or Fair Trade?* (N° 12, March 1996, ILSA).
12. The following are the most frequently used trade law provisions in the United States:
    i. Section 201 (Escape Clause): The Unites States will call this clause into effect when it is deemed that the increase of fairly traded imports will cause or threaten serious injury to U.S. industry.
    ii. Section 301 (Trade Barriers): The United States will call this measure into effect when it is considered that certain foreign trade practices are violating trade agreements; likewise, they will be employed when, in the opinion of the USTR, trade practices are considered as "unjustifiable," "unreasonable" or "discriminatory" and burden or restrict U.S. commerce.
    iii. Section 337 (Unlawful Marketing): The United States will call this section into effect when there are infringements of patents, trademarks, or copyright, false advertising, misleading designation of origin and trade secret misappropriation.
    iv. Section 701 (Unfairly Subsidized Imports): The United States will call this clause into effect when it is considered that targeted production or export subsidies are deemed to cause or threaten material injury to a U.S. industry.
    v. Section 731 (Dumping): The United States will call this clause into effect when it is considered that some imports are being sold below production costs and cause or threaten to cause damage to a U.S. industrial sector.

obtaining commercial advantages, eliminating competition, and even requiring third countries to abolish old protective regulations.

The use of this trade weapon against the European Union and Japan has continually failed. On the other hand, its primary use or the mere threat of its application is ever more frequently aimed against peripheral and semi-peripheral countries, in an openly unequal confrontation that offers no genuine possibilities of litigation[13].

b. Sanctions in other U.S. Laws: The Case of Anti-Cuba Legislation

Within the aggressive measures taken against the Cuban social project, a law called, "Cuban Liberty and Democratic Solidarity Act" was approved by the U.S. Congress; it is better known as the Helms-Burton Act[14]. This regulation, with clear imperial intent includes such varied issues as the condemnation of the Cuban government for shooting down two civilian aircraft that invaded Cuban airspace and the establishment of a so-called transitional post-Communist government. However, in this section we will only examine the sanctions established in the Helms-Burton Act against third countries for the violation of this law and prior legislation against Cuba, given that it represents one example of the various attempts of the United States to have a transnational influence that supersedes national legal provisions and international law.

To summarize, the Helms-Burton Act includes the following measures:

i) A reaffirmation of the economic embargo against Cuba:
The Helms-Burton Act ratifies the "Law for Cuban Democracy" of 1992, better known as the Torricelli Act, in which the President of the United States was invited to prod other countries to restrict credit and trade relations with Cuba, and additionally, to adopt sanctions against countries that help Cuba.
The Helms-Burton Act also makes clear that "United States accession to the North American Free Trade Agreement does not modify nor alter the United States sanctions against Cuba" (Sec. 110 (b)).

ii) The issue of property confiscated by the Revolution:
The Act specifies that "any person that, after the end of the 3-month period beginning on the effective date of this title, traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages ..." (Sec. 302 a)-1).
The Helms-Burton Act indicates how this procedure should be conducted in order to effect the payment of monetary damages and allocate responsibility for these damages. Likewise, confiscation performed by the Cuban government from the Revolution to the present can be made subject to claims before the U.S. courts in order that the current owner, be it a third country, the Cuban

13. See Kristopher McCahon, *op. cit.*
14. Pub.L. 104-114, Mar 12, 1996, 110 Stat. 785 (Title 22, Sec 6021 et seq. *Ed.*).

government or the Cuban Communist Party is made responsible for and required to pay damages.

The property of a foreign state is immune from attachment and from execution under the Act "to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes (Sec. 302 a)-8 e); likewise, it excludes "transactions and uses of the property by a person who is both a citizen of Cuba and a resident of Cuba and who is not an official of the Cuban Government or the ruling political party" (Sec. 4 13) B iv)).

4. Pressure for the Fight against Corruption as a Means of Deregulation

In peripheral and semi-peripheral countries, another way to achieve the transformation of legal provisions, especially in customs regulations, statutes governing contracts and government procurement, is through pressure exercised by the U.S. government for the abolishment of national measures and their replacement by new international provisions.

Recently, diverse economic actors have been promoting the inclusion in the trade agenda of the question of bribery and corruption as elements that threaten their economic and political interests. The argument typically revolves around the notion as expressed by Mickey Kantor, the United States Trade Representative (USTR), that "bribery is essentially equivalent to a tariff increase."[15]

Kantor has pointed out that:

> There is anecdotal evidence that clearly indicates that the problem is in the order of billions of dollars. In the period between April 1994 and May 1995, the U.S. government had knowledge of almost 100 cases in which foreign bribes prevented U.S. firms from winning contracts valued at 45 billion dollars.[16]

Likewise, as a way to pressure trade deregulation, there have been insinuations that officials who are opposed to liberalization are so because they are corrupt and afraid of losing their privileges. Kantor recently observed, "Let's be clear about this: every time a country closes its eyes to bribery and corruption it is a erecting a trade barrier." For this reason, the USTR pointed out that its government is acting simultaneously in six settings: OECD, WTO, APEC, NAFTA, the World Bank and the International Monetary Fund and through U.S. trade regulations.

Newsweek contributed the following:

> Perhaps, when all is said and done, the only universal cure for corruption is to quietly nourish democracy, property rights and the free market, and simply wait for the golden age to arrive. However, there is no doubt that governments can help. One way is to decrease tariffs so that

15. See Boletín *Antena del SELA en los Estados Unidos,* n° 26 (April, 1996).
16. Ibid.

corruption in customs —perhaps the most universal plague— is not worth the hassle."[17]

Legal Mechanisms for the Guarantee and Protection of Investments and Property

This is one of the central points and inherent in the globalization of law. It includes matters ranging from the protection of investment to the protection of intellectual property rights. There are multiple ways that transnational capital is in search of such guarantees. We mention only some of them, as examples:

1. Bilateral Investment Treaties (BITs)

During the last decade Bilateral Investment Treaties, commonly referred to as BITs, have proliferated throughout the world. Essentially, BITs are a set of international legal parameters for protecting investment. Their development has been at the hands of central capitalist governments, who are the promoters of these types of agreements world-wide.

The literature on BITs acknowledges that they follow certain models[18]. We will analyze the BIT using an example ready to hand: "Agreement between the Government of the Republic of Colombia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Furthering and Protection of Investments." The Colombian-British BIT basically tackles the following themes:

a. Investment is understood as "all types of activities."

b. Aims to protect past, present and future investments.

c. The definition of "territory" reflects the neo-colonial interests of powers such as the United Kingdom.

d. The admission of investments ceases to be a right of the States and becomes an "obligation."

e. Three basic principles for the treatment of investment are established: "non-discriminatory" treatment, "national treatment," and "most-favored-nation clause".

f. Losses resulting from internal conflict must be compensated.

g. Nationalization and expropriation of business sectors or services is prohibited.

h. A rigorous compensation scheme is established in case of nationalization or expropriation.

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17. Newsweek, "La batalla contra los dineros mal habidos," *Revista Summa* N° 104 (Bogotá, febrero 1996).

18. See Maurice Mendelson, "Principios que rigen los BITs y sus tendencias internacionales," in *Políticas de inversión extranjera. Tratados de promoción y protección de inversiones* (Bogotá: Coinvertir, 1995), pp. 91-102.

i. Investments and profits can be repatriated without any type of restriction.

j. Differences between the two parties with respect to investments will be subject to obligatory conciliation and arbitration under the International Center for the Settlement of Differences related to Investment.

k. Legal differences with respect to the interpretation of the treaty will be resolved through diplomatic means and in the second instance through an arbitration court named by the Parties.

l. If more favorable rules for investors are found in the legislation of one of the Parties or in international law, these will apply.

m. The treaty is valid for 10 years, but terminates in 20 years in the case of new investment.

2. The Protection of Intellectual Property Rights

The issue of the interrelationship of trade and intellectual property has arisen during the last 15 years due to profound transformations in production resulting from a growing number of goods with a high "knowledge" content being object of intellectual property rights. Likewise, and as a characteristic of post-assembly line production, every day "new" products come into existence which seek protection, such as computer software, electronic components, biotechnology, and encoded satellite transmission, etc.[19] Since the early eighties, and as a reaction to the intention of some peripheral countries to adopt intellectual property legislation that would contribute to their development, a group of transnational organizations have been promoting protective legislation for intellectual property in the different arenas of world power. Their vision emphasized that measures currently in force lead to enormous losses for many creators due to the growing commercialization of "pirate" products, which represented losses close to 15 billion dollars in computer programs alone[20].

Over the last 10 years TNCs have succeeded in modifying national and international legislation in a number of areas such as:

i. The elimination of import restrictions within some "strategic" sectors protected by legislation.

ii. The elimination of obligatory licenses required for the commercialization of certain products, for example in the pharmaceutical industry.

iii. The incorporation of new objects subject to protection through the law on intellectual property.

iv. The widening of sanctions for violations of the provisions on intellectual property.

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19. Victor Osorio, "La experiencia mexicana en el ALCAN: Un pésimo precedente para futuras negociaciones sobre propiedad intelectual," in *Alerta a la Apertura,* n° 7 (septiembre, 1993).
20. Ibid.

Multiple ways to achieve these changes in domestic intellectual property rights legislation have been utilized, ranging from the threat of sanctions through United States trade law, specifically through Section 301, leading to its inclusion in practically all negotiations and trade agreements. Recent examples include GATT-WTO, NAFTA, all of the regional agreements for integration and even sub-regional and bilateral accords.

3. Legal Security and Guarantees of Property Rights to Rural and Urban Land: The Direction of Legal Reforms

Rural and urban property has not escaped the current restructuring. The World Bank and other international financial institutions such as the Inter-American Development Bank (IADB) are promoting and supporting legal reform projects in semi-peripheral and peripheral countries. In these countries, the issue of legal protection and guarantee of property rights over rural and urban land is one of their growing concerns.

In the second Conference on Justice and Development in Latin America and the Caribbean, at the end of 1995, the IADB began to highlight the urgency for countries to guarantee adequate levels of legal title protection, essential, in their view, in order to the consolidation of the Rule of Law and the functioning of a market economy. To this end it was necessary that legal reforms "tackle the great task in our countries of extending and guaranteeing property rights. In this respect, the urgency to begin a massive process of legalization of rural and urban land titles was noted"[21].

In Latin American societies, where the large majority of the great urban populations live in substandard settlements, the issue of a title to land is enormous, some common reasons being that land was acquired through occupation and organized struggle or because land was purchased from "pirate" developers, who sold lots they did not actually own. Similarly, rural property reflects the enormous inequalities and serious disputes concerning property ownership.

This is, therefore, a profoundly controversial issue, and is a direction that is barely beginning to be explored, but which merits our attention from now on.

SHRINKING RIGHTS: INTERNATIONAL LABOUR LAW AND IMMIGRATION LAW

The Erosion of "Old" International Legal Spaces: the International Labour Organisation (ILO)

Although not publicly known, the defeat of labour by capital has been so great that domestic labour laws, reformed de facto as well as through formal means in almost

21. Ibid.

every country over the past 15 years, have been virtually destroyed to accommodate the contemporary needs of capital. Currently, labour standards emanating from the oldest international institution, the International Labour Organisation (ILO), are undergoing a similar process.

The ILO during its more than 70 years of work has managed to construct a coherent body of protective norms for workers, especially in the early days of assembly line production when a pact was achieved between capital and labour interests that created a series of limits to discretionary action in the management of the workforce.

However, the new logic of capital, alied to the defeat of the workers' movement, has begun to create on an international level what some authors label, in certain national cases, "de facto labour law reform"; that is to say, the ILO norms are first relaxed, then they are ignored in practice, and ultimately they are exchanged for new international arrangements, such as the North American Free Trade Agreement. Attempts to include social clauses in trade agreements mean in practice a tacit acceptance of the abandonment of the greater part of the standards emanating from the ILO.

In this section we will provide an overview of the North American Agreement on Labour Cooperation, better known as the parallel agreement, and proposals for the inclusion of social clauses in trade agreements.

1. North American Agreement on Labour Cooperation:[22]

a. The Origin of the Agreement

The forces that intervened in the process of creating and writing the text for NAFTA reflect to a great extent the forces which dominate the economic panorama of North America, that is to say the Transnational Corporations (TNC) as well as the bourgeoisie of the three countries, clearly represented through each of their respective state bureaucracies. Labour organizations from the three countries along with other social organizations were openly excluded from the negotiations.

The signing of NAFTA coincided with U.S. Presidential elections. As a result the Democratic candidate was obliged to incorporate the labour question concerning NAFTA into his campaign platform, as one of the most sensitive and fundamental aspects of the historic link between the Democratic party and the union movement and social movements in general. Therefore, the candidate, Bill Clinton, promised Democratic supporters that he would work for the inclusion of additional agreements along with NAFTA, which would contain labour and environmental aspects that had been ignored by the main Agreement. In these circumstances the weak compromise to include these additional issues was born.

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22. Laura Trigueros, "El Acuerdo Complementario en Materia de Trabajo," in *Alegatos* No. 26. (UAM México, January-April 1994); see also Alejandro Quiroz, "Acuerdo Complementario en Materia Laboral." in *Tratado de Libre Comercio de América del Norte: Análisis, Crítica y Propuesta.* (México: Red Mexicana de Acción Frente al Libre Comercio, 1993).

b. General Principles of the North American Agreement on Labour Cooperation

Eleven principles guide the Parallel Agreement of NAFTA, to which the U.S., Canadian, and Mexican governments have agreed:

i. Legislative and administrative autonomy in each country regarding labour.

ii. Labour standards proportionate to workplace quality and productivity.

iii. Effective application of labour legislation.

iv. Requirement of Standing in order to table actions and just, equitable and transparent procedures.

v. Publication of laws and general administrative measures.

vi. Cooperation with the Ministerial Council, proportionate to resource availability in each country.

vii. Review of labour legislation by the National Administrative Offices (NAO) of other countries in agreement with the procedures of the country subject to review.

viii. Ministerial Consultations with respect to any of the eleven labour principles of the agreement.

- Freedom of association and protection of the right to organize.
- Right to bargain collectively.
- Right to strike.
- Prohibition of forced labour.
- Restrictions on the work of minors.
- Minimum employment standards.
- Elimination of discrimination in employment.
- Equal pay for men and women, according to the principle of equal pay for equal work in the same establishment.
- Prevention of occupational illness and injuries.
- Compensation in cases of workplace injuries or occupational illness.
- Protection of migrant workers.

ix. Evaluation of "standards" relative to the effective application of eight of the labour principles of the Agreement by a Committee of Experts in case of discrepancies which arise in the consultations (that is to say the first three "principles" noted above are not included).

x. Additional consultations and establishment of an Arbitration Panel.

xi. Issues subject to evaluation or resolution of controversies must be trade-related.

c. Preliminary Evaluation of the Parallel Agreement[23].

The results of NAFTA have been extremely poor since it came into effect January 1, 1994. Effectively it has been reduced to meetings between the labour officials of the three countries, the exchange of delegations of professionals and technicians, the exchange of information with respect to norms and procedures, co-sponsoring public seminars and conferences, and some specific agreements to share experiences in technical assistance and training. Only two ministerial consultations have been held from which no concrete results were derived.

d. Implications of NAFTA for the Protection of Labour Rights

We can draw the following conclusions:

i. The importance of NAFTA's parallel agreement is that it is the first concrete attempt to create an institution responsible for international labour issues working outside the ILO.

ii. Its structure also breaks with a fundamental building block of the ILO: its composition is not tripartite (government, business and workers) but intergovernmental (the governments of Mexico, Canada, and the United States), which is reflected in its distinctive administrative bodies[24]. Similarly, enforcing respect for labour rights depends on the will of the respective governments.

iii. It is no coincidence that the United States has been the principal supporter of NAFTA's Parallel Agreement; it has been one of the major opponents of the ILO throughout its 75 year history, to the point of not ratifying its principal agreements.

iv. The Parallel Agreement is more an agreement that seeks to provide technical information to governments and businesses about labour norms and the structure of the three countries than an accord that seeks effectively to protect the labour rights of its workers.

v. The Ministerial Consultations[25] fluctuate according to the degree of common ground or distancing between the respective governments involved: If we look at the two Ministerial Consultations held to date, it is clear that once the first was held by the United States, the immediate response of the Mexican government was to propose a consultation as a means of retaliation, on the same issue: the violation of the right to association and union membership.

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23. *El mundo del trabajo en los países del TLC.* Boletín de la Comisión para la Cooperación Laboral. Vol. 1, No. 1 (March 1996).
24. There are two administrative organisms in NAFTA: i) The Commission for Labor Cooperation, comprised of Ministerial Council, the International Coordinating Secretariat (ICS) and three National Administrative Offices (NAO); and ii) Special bodies: the Evaluation Committees of Experts and Arbitration Panels.
25. Ministerial Consultations are the mechanism through which complaints of labor law violations are brought to the attention of the Minister or Secretary of Labor of the accused country and, in

vii. The solutions which are proposed by the Ministerial Consultations reduce the problem of the violation of workers' labour rights to a technical problem of lack of information on the part of employers. As a consequence, the proposed solutions do not go beyond the organization of public fora where the importance of laws are debated abstractly (e.g. the right of free association or "the effects of sudden firm closures on the Principle of free association and the right to organize") without even being a public forum for debate on specific cases.

2. The Inclusion of a "Social Clause" in Trade Agreements

a. The Origins of the Discussion

In the last 20 years, along with the transformation of capitalism characterized by the decentralization of production and the associated labour reforms, labour rights have gone unrecognized in many countries of the world. Moreover, a revival of forms of forced labour and child labour, which were thought to have been overcome, has occurred. The necessity to think about how to reestablish minimal social laws that offer stability to a capitalist system in the long run has become a topic for discussion in certain circles. However, it was only with the collapse of the socialist regimes of Eastern Europe that the notion of the "social clause" began to emerge clearly on the international agenda, led especially by the European Parliament.

As in the case of NAFTA, what lies behind the discussion of the inclusion of a "Social Clause" in trade agreements is the tacit understanding that the ILO provisions are not being applied, especially in capitalist peripheral and semi-peripheral countries. In order to guarantee that a minimal level of rights be enforced, then, the establishment of a new international pact would become necessary.

b. What Would "Social Clauses" Include?

Social clauses seek to reduce respect for international labour norms to a fundamental core:

i. Freedom of association (Covenant 87);

ii. Right to bargain collectively (Covenant 98);

iii. Prohibition of forced work (Covenant 105);

iv. Abolition of child labour (Covenant 136)[26].

If these fundamental rights are not respected in a given country, trade sanctions could be invoked against the violator.

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common agreement between the accused country and the accusing country, a series of actions are defined to prevent future violations.

26. Alejandro Teitelbaum, "Conditionality, Human Rights and International Law," *Beyond Law*, Vol. 5, N°15-16 (September 1996), pp 131-149.

So, facing the design of new international trade institutions, in the Uruguay Round of GATT from which was derived the creation of the World Trade Organization (WTO), some sectors of the European Union began to stimulate discussion with respect to the inclusion of social clauses in these international trade agreements. ASEAN (Association of Southeast Asian Nations) member countries were major opponents of the inclusion of a social clause in the WTO, and in a hypocritical, albeit effective, manner they argued that trade treaties were not the appropriate fora to discuss labour issues; these must be discussed within an ILO framework[27].

If we are trying to strengthen labour rights by linking them to trade, it is obvious, as some have pointed out, that the social clause is not the only way to guarantee success. In fact, the strengthening of the ILO would without a doubt have been the best way, but the ASEAN member countries sought to refer the discussion to the ILO because this organization does not have the power to sanction beyond moral pressure. However, we must not forget that the issue of labour rights is a political, not merely technical problem, in the historical moment of defeat of labour by capital.

Provisions of this type already exist in various trade regulations of the United States, like the General System of Preferences, the Overseas Private Investment Corporation (OPIC), the Caribbean Basin Initiative, and Section 301 of the Trade Act[28]. In December 1995 the European Union also included a social clause in its General System of Preferences (95-98)[29].

c. *The Polemic surrounding the Social Clause*

Various points of contention have been debated in the context of the eventual creation of a social clause; among them the following stand out:[30]

i. The so-called developing countries consider that social clauses are a reflection of the protectionist measures being designed by the so-called developed countries.

ii. The removal oversight of labour rights from the purview of the ILO and refer it to the WTO or to those States that include it in their sub-regional or bilateral treaties, as has occurred with the North American Agreement on Labour Cooperation.

i. The abolition of child labour: this is a very complex phenomenon in poor countries, and it also exists in rich ones.

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27. See Paul Lim, "Conditionality and International Relations," *Beyond Law, op cit.*
28. See "Trabajo" in *Análisis de ciudadanos estadounidenses del Tratado de Libre Comercio de América del Norte.* Mimeo. 1992. It should be mentioned that within the basic rights envisioned in U.S. trade provisions are found minimally acceptable conditions with regard to minimum wage, hours of work and occupational and job security.
29. Francisco Gómez Martos, "Los aspectos sociales de la cláusula de derechos humanos en los acuerdos internacionales de comercio," in *La condicionalidad en las relaciones internacionales. ¿Sirve para la protección de los derechos humanos?,* Colección Documentos, N° 13 (Bogotá: Instituto Latinoamericano de Servicios Legales Alternativos, ILSA, 1996).
30. Ibid.

iv. It is not clear if sanctions for the failure to comply with the social clause would include TNCs that violate it.

v. What would be the situation of countries which have not ratified one or more of the covenants considered to make up the core group of basic rights to be included in the social clauses? This is the case of the United States, which has not ratified Covenants 87, 98, and 138.

The Erosion of Provision for Migrant Workers' Protection

Some estimates calculate that in an average day more than seven million people cross national borders, by different routes and in different capacities, including refugees, workers, business people, tourists, etc.[31] Despite this, protection for all types of migrants has been weakened in recent years in parallel with the increased protection offered to the circulation of money, commodities and so-called "business people". Santos has stressed that "the legal protection of human beings seems to be much more linked to territory than the legal protection of goods and services," thus emphasizing that these people rely on the domestic legal provisions, which each day become stricter.

In this section we would like to underscore how national standards with regard to the protection of migrants have begun to suffer a process of erosion that threatens to leave thousands of people wandering about the world without even minimal levels of protection. This is especially true following the economic restructuring of capitalism which has atomized the traditional factory and profoundly altered the map of labour requirements. Restructuring has also resulted in growing unemployment and has reawakened anti-immigrant xenophobic movements, especially in the states of the center, e.g. fortress Europe, where not only is there no room for future immigrants but in which the current influx are not welcome either. For this reason Santos suggests that "in the future the flow of international migration will grow principally in the south, among the peripheral and semi-peripheral countries"[32].

The flexibility that is currently demanded of the labour force is also reflected in the use of migrant labour. New forms of production are eliminating permanent migration and privileging seasonal and temporary migration, which, along with illegal migration, is one of the greatest problems for the near future. The magnitude is such that the ILO estimates that in the next 20 years there will be 25,000,000 migrants in unstable situations throughout the world, not including refugees, a further demonstration of the gravity of the problem.

The privileging of temporary migration above permanent migration is already reflected in the new provisions. The North American Free Trade Agreement refused

31. Boaventura de Sousa Santos, *op. cit.*
32. Ibid.

to address the issue of migration, despite the magnitude of the flow between Mexico and the United States and despite the fact that it is the one of the most heated issues between the two countries. On the other hand, NAFTA dedicated a chapter (Chapter XVI) to the "temporary entry of business people."

Some critics have stressed that:

> The NAFTA measures regarding temporary entry create a group of workers in limbo, whose right to remain in a country depends on the whim of a single employer (...) The "business people" and "professionals" protected by NAFTA include nurses, paramedics, tourist bus drivers, truck drivers, as well as architects, engineers, doctors and lawyers. These workers could get temporary permits, always given that they can prove that they have been offered a job in the country to which they travel. The permission granted to stay in the country depends on this employer.[33]

As for repressive measures, the United States has built fences on the Mexican border. They have also promoted laws which seek to remove social benefits from illegal immigrants, such as the infamous Proposition 187 in the State of California.

European countries have been no exception. Following a joint working group meeting of the Interior Ministers of a group of European Union countries, the so-called "Schengen Agreement" was signed guaranteeing a certain freedom of movement to citizens of the member states to circulate in the Union but establishing a series of draconian measures at the borders. In Europe, the 1992 figure of 700,000 applications for asylum fell to only 300,000 in 1995[34]. As the number of people seeking legal entry into the Union has decreased, the number of migrants who enter illegally has increased. Legal status is increasingly more difficult to obtain and drastic sanctions await the rest.

The anti-immigration measures of the European Union do not only refer to the exclusion of migrants from southern and eastern Europe but also extend to the opinion that the right to asylum cannot be granted between European countries, as political rights are supposedly guaranteed in these cases[35].

Conclusions

Some preliminary conclusions that can be derived from the discussion are the following:

- *Fin du siecle* legal transformations reveal the triumph, for the moment, of capital over labour, and this is reflected in the expansion of a "new" economic law and the predominance of property rights over labour rights.

33. Trabajo, *op. cit.*
34. Ibid.
35. Ibid.

- There is a process of transnationalization of law, better stated as the legal culture of common law, underway today that is not creating a global legal culture but which is, on the contrary extending U.S. law throughout the world. (Contract law, standard-setting for business, sanctions stipulated in its legislation, and even the work practices of U.S. lawyers from large private firms are some examples.)[36]
- The national legal field continues to be the springboard for the transnationalization of legal spaces, particularly the legal systems of those countries at the center of capitalism.
- Globalization possesses a social base, led up to now by the "transnational bourgeoisie," including its legal dimensions. As transformative forces we must contribute to the consolidation of a heterogeneous group of subjects, the social base of labour, that can struggle against capital in these new transnational spaces.

36. Santos has emphasized that "the idea that a global legal culture is being formed must be denied especially if it is conceived as the ideal-typical culture of the great transnational economic actor that 'receives assistance from international banks and the large offices of lawyers that use a quasi-universal business language and who resolve any conflict at the level of their interests before that of values, worldviews, or social norms'." Santos, *op. cit.*