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**THIRD WORKSHOP
*THE DIVIDE BETWEEN TRADE AND HUMAN RIGHTS INSTITUTIONS:
AN INSURMOUNTABLE BARRIER?*
SYNTHESIS BY
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- **Javier Mujica**, Lawyer, Human Rights Programme, El Centro de Asesoría Laboral del Perú, Peru;
 - **Vincent Dagenais**, Confédération des syndicats nationaux et Confédération internationale des syndicats libres, Canada;
 - **Matthew Sanger**, Canadian Centre for Policy Alternatives, Canada.
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The question put to this third panel was does the current divide between trade and human rights institutions pose an insurmountable barrier? The discussion however, centred more around the issue of how to reverse the current and misplaced subordination of human rights norms and institutions to trade agreements and free market ideologies rather than on how to bridge the gap between them. The analogy adopted was one of flipping the tortilla back to its original side, that is, to place human rights norms and institutions in their rightful place of primacy. In this sense the obligations and policies adopted by states under trade agreements would be measured against their human rights obligations and in particular the obligations contracted in the domain of economic, social and cultural rights; in the case of a conflict a state's human rights obligations would prevail.

There was consensus among the panel that while it is important to work towards the inclusion of robust social clauses within trade agreements, it is equally, if not as suggested by Javier Mujica, more important to strengthen existing human rights machinery, chiefly the organs of the inter-American system for the protection of human rights. The panelists did however differ in the degree to which they viewed reinforcing human rights institutions as a priority. The divergence of opinion on this matter corresponded in large measure to the degree of confidence and optimism the panelists shared in the power of these organs to realistically hold states to account. In effect the

panel while agreeing in principle that trade should be subordinate to human rights and conceding that there are several complementary strategies for realising this, favoured distinct approaches informed by the diversity of their experience in promoting the social dimension of economic integration.

Javier Mujica in arguing for an integration of the Americas that incorporated dimensions of democratic governance and sustainable human development described three central consequences that would be sure to flow from the adoption of a strictly commercial integration regime. His assertion in this regard stemmed from the clear and violative impact that 20-25 years of unilaterally imposed commercial liberalisation policies, principally by the International Monetary Fund and the World Bank in the form of structural adjustment programmes, have had on human rights in Latin America.

The first consequence of an integration which fails to recognise the fundamental attributes of the human person and those international instruments which guarantee their protection, would be the undermining of the very foundations of state legitimacy. Mr. Mujica pointed to the cases of Argentina, Bolivia, Venezuela, Peru, and Ecuador as examples of how political systems that ignore human rights become increasingly delegitimised and face the very real risk today of being toppled of by way of popular insurgency. The second consequence is, as was mentioned above, the massive and systematic amplification of the kinds of violations suffered when trade is liberalised and the role of the state and economy are radically redefined, for which the last 20-25 years provide ample evidence. Third, is the double standard that has emerged in the discourse at various levels of trade negotiations, where the emphasis is placed on incorporating (read subordinating) the social dimension of integration within trade agreements in order to downplay the relevance and existence never mind the primacy of those human rights treaties and mechanisms already adhered to by the majority of governments in the Americas.

Mr. Mujica offered several suggestions in respect of mitigating the impact of these consequences. He recommended adopting a more active role in trying to influence decision-makers to invert the currently dominant logic. As well, he argued forcefully for the need to strengthen the inter-American human rights system, and to support proposals such as the Social Charter of the Americas¹ advanced by the PIDHDD (Plataforma Interamericana de Derechos Humanos, Democracia y Desarrollo). The purpose of the Charter would be to establish a forum for the participation of civil society and to make clear the primacy of human rights as defined in the Charter of the United Nations. As well he suggested creating a special jurisdiction of the inter-American system's organs to analyse disputes arising from the application of trade liberalisation policies by State parties. In short, Javier Mujica expressed the need to work towards giving the inter-American human rights system more teeth as a priority. He was effectively the only panellist who articulated a clear preference for improving the System rather than continuing to negotiate socio-labour clauses which did not permit public participation and scrutiny in their application and had in all respects, borne little fruit.

¹ Online: Plataforma Interamericana de Derechos Humanos, Democracia y Desarrollo
<<http://www.pidhdd.org/>>.

Vincent Dagenais began by expressing the labour movement's perplexity and frustration at the meagre advances thus far achieved which was only reinforced in Cancun upon meeting with Mr. Supachai and Mr. Lamy and learning that social and labour issues were not considered to be part of the WTO agenda. There would in fact be no mention of fundamental labour norms, social rights, sustainable development or the relationship between WTO policies and those of the ILO or other UN agencies. More significantly however, Mr. Dagenais traced the evolution of the labour movement's response over the years to this perplexity and in its efforts to protect social and labour rights in the context of economic integration. What is most notable in this evolution is the broadening of the movement's demands from a strategy focused on having fundamental labour rights recognised in trade agreements to the adoption of a more integral approach where labour rights are seen as part of a wider and interconnected set of rights. It became clear that to focus solely on the promotion of labour rights and standards was insufficient, and that working to promote education, health, and combating poverty for example, also benefited the labour movement.

This change in strategy is not limited to ensuring that a wider range of fundamental rights are recognised in trade agreements but is also aimed at broadening the movement's partner and support base especially in the South as well as increasing its credibility. There has been as well a further convergence in the positions of labour and human rights advocates in their parallel undertaking to subordinate trade to human rights. Mr. Dagenais echoed Mr. Mujica's dissatisfaction with the social clause and affirmed the importance of working to ensure that WTO rules are clearly subordinated to applicable international human rights instruments. Moreover, in promoting the respect of all rights that comprise the social dimension, the impact of all relevant treaties on these rights are considered and action is contemplated in a transversal manner, be it with respect to the GATS, Chapter 11 of NAFTA or the programmes and decisions of the IMF and World Bank. Mr. Dagenais' comments in this regard were welcomed by many members of the audience.

Matthew Sanger outlined several of the policy responses developed by the Canadian Centre for Policy Alternatives² for the Romanow Commission on The Future of Health Care in Canada³ around the question of how to maintain a health care system in Canada founded on public interest principles in the face of increased trade liberalisation. The crux of the issue is that as the commercialisation of health services increases (and integration in economic terms requires a substantial amount of commercialisation), the exposure of the health care sector in Canada to NAFTA and GATS rules which could potentially conflict with Canadian health reform priorities also increases. The ability of Canada to control the integration and commercialisation of the health care sector has been entirely the result of public policy measures thus far adopted. With this in mind, the CCPA

² Canadian Centre for Policy Alternatives, *Putting Health First: Canadian Health Care Reform, Trade Treaties, and Foreign Policy* (October 2000) online: Canadian Centre for Policy Alternatives <<http://www.policyalternatives.ca>>.

³ See especially Chapter 11 "Health Care and Globalization", *Building on Values: The Future of Health Care in Canada* (November 28, 2000) online: Health Canada <http://www.hc-sc.gc.ca/english/pdf/romanow/pdfs/HCC_Final_Report.pdf>.

proposed trade policy changes directed at reducing the exposure of our health sector to trade rules by strengthening NAFTA and GATS safeguards for health, narrowing the scope of interpretation for what qualifies as expropriation under Chapter 11 of NAFTA, opposing investor-state mechanisms in the FTAA, and withdrawing the GATS commitment in the area of health insurance. In response Canada has modified its position in the GATS negotiations by exempting the core elements of our health care system, including health insurance, from the most forceful of the GATS rules as well supporting the preference of other WTO members who choose to do the same.

Other policy proposals were more focused on Canada's engagement and collaboration with other like-minded states in order to promote and strengthen international accords and institutions that reinforce the ability of governments to regulate health care in the public interest. In this vein it was suggested that Canada strengthen its coherence in health, trade and foreign policy on the basis of a commitment to health as a human right. Such a commitment, as indicated by the Committee on Economic, Social and Cultural Rights in General Comment 14,⁴ extends to the international relations of states as well as to their domestic policies and supports recommendations made by the CCPA concerning increased aid for international development and health care systems as well as ending the recruitment to Canada of health professionals from countries experiencing health emergencies.

Mr. Sanger distinguished his agenda from the work being done in the context of Mercosur and the Andean Community of Nations to create and strengthen tripartite and other social spaces within those trading blocs. Given that there are no supranational regional institutions in North America of the kind described during the Seminar's first workshop and the implausibility of the United States agreeing to create such institutions in the spirit of mitigating asymmetries, the approach adopted has been one of trying to constrain and limit the scope of trade liberalisation agreements and to strengthen existing institutions on the basis of public interest principles. It was asserted in concert with the previous panelists, that Canada should affirm the primacy of human rights treaties over trade treaties and work to strengthen international human rights institutions.

The idea of integrating a rights-based approach to the policy work being done in the area of health and trade liberalisation was viewed as complementary and as a fertile basis for helping build a social dimension in the context of trade liberalisation. It was however, suggested that if the right to health were to be truly operationalised much work remained to be done in order to better understand what such a right implied and when it could be said to have been violated. The work of Paul Hunt, UN Special Rapporteur on the Right to Health,⁵ was said to have provided significant direction in this regard as well as in suggesting further areas of study such as developing indicators for measuring government performance in progressively realising the right to health.

⁴ Committee on Economic, Social and Cultural Rights, General Comment 14, The Right to the Highest Attainable Standard of Health (Article 12), U.N. Doc. E/C.12/2000/4 (2000).

⁵ See generally, online: United Nations High Commissioner for Human Rights <<http://www.unhchr.ch/html/menu2/7/b/mhealth.htm>>.

The question period for this session brought out the nuances in the approaches and priorities of the three panelists as each one was asked to address the centrality of the inter-American human rights system in this context of integration, its role in operationalising the rights discussed, and the continuing failure of Canada to ratify the *American Convention on Human Rights* and the *Protocol of San Salvador*. Mr. Sanger expressed some scepticism as to the effectiveness of the System given the lack of adherence by the United States and Canada to the American Convention, appearing instead to favour a transversal promotion of right to health in various fora as well as the execution of concrete policies that further the right to health domestically and internationally. Mr. Dagenais considered that the inter-American system provided an important means for securing socio-labour rights in the context of integration but also remained somewhat sceptical as to its effectiveness, suggesting that work needed to be done in the area of compliance and public awareness. Mr. Mujica however, pointed out that Canada remained bound by its obligations under the *American Declaration on the Rights and Duties of Man* and subject to the supervision of the Inter-American Commission on Human Rights in this regard. He also in the spirit of transversalisation identified other inter-American mechanisms for the furtherance of the right to health and other human rights such as the Commission's country, thematic and annual reports and the work of Special Rapporteurs within the System.

There are, as this panel clearly demonstrated, many ways to flip a tortilla. There is no one solution to be imposed but rather a diverse array of strategies, mechanisms and institutions within the Americas to be pursued, used, and strengthened in realising the common goal of reinforcing the social dimension of economic integration.