

Queen's | LAW

CLCW

CENTRE FOR LAW IN THE
CONTEMPORARY WORKPLACE

Implementing and Deepening the Inclusive Trade Agenda

Queen's Institute on Trade Policy
November 18, 2019

Prof. Kevin Banks
Faculty of Law, Queen's University

Overview

1. Overview of the state of the art – CUSMA Chapter 23
2. Towards more effective implementing action
3. Potential benefits and limitations of the current approach
4. Next frontiers - further strategy and policy for inclusive trade.



CUSMA Chapter 23

Substantive obligations

- Requirements for minimum content of laws
 - Adopt and maintain in statutes and regulations fundamental rights, acceptable conditions of work (23.3)
 - Ensure migrant workers are protected under labour laws (23.8)
 - Provide job-protected leave for birth, adoption and care of family members (23.9)
- Non-waiver and non-derogation (23.4)
- Effective enforcement and compliance measures (23.5, 23.7)
- Prohibit importation of goods produced with forced or compulsory labour (23.6)
- Implement policies to protect workers against employment discrimination (23.9)
- Access to fair, impartial tribunals providing effective remedies without unwarranted delay (23.10)



CUSMA Chapter 23

Implementation mechanisms

- International dialogue and Labour Council deliberation and review (23.13, 23.14)
- Cooperation (23.12)
- Domestic: public submissions and engagement (23.14, 23.15)
- Dispute Settlement (23.17, Ch. 31)
- Consistency plan reforms anticipated prior to entry into force (Annex)



Towards More Effective Implementing Action

Challenges - why labour issues are tougher than most trade issues, even today:

- Tensions between short term competitiveness and inclusive development.
- Absence of longstanding global policy consensus to mitigate those tensions.
- Administrative, policy and political complexity of reform (capacity, rule of law, corruption, stakeholder resistance, worker vulnerability, etc...).
- As a result, in many situations neither adjudication + sanctions, nor cooperation and assistance will work on their own.



Some design principles for labour chapter implementation

Action:

- Incentivize public and private actor commitments to concrete, iterative programs of reform.
- Proactively monitor, report upon and respond to the rate of progress in relation to a baseline, preferably with the assistance of a reliable and neutral third party.
- Engage stakeholders during the design of programs and in reviews.
- Support programs through international cooperation with stable funding.



Some design principles for labour chapter implementation

Accountability

- Mainly through transparent monitoring and reviews.
- Provide for rapid and impartial dispute settlement with respect to both agreement obligations and negotiated program obligations.
- Review and report on stakeholder complaints impartially and quickly.
- But do not rely mainly on dispute settlement procedures.



Applying design principles

Action

- Ensure that Agreement benefits are conditioned on meeting consistency plan commitments.
- Use the Dialogue and Labour Council processes to create iterative improvement programs.
- Use Agreement benefits to incentivize implementation of such programs.
- Within programs, deploy incentives and monitoring to align both private and public sector actors with program goals (e.g. Better Factories / Better Work).
- Focus stakeholder engagement processes on such programs.
- Require stable funding for cooperation and monitoring in implementing legislation.



Applying design principles

Accountability

- Make Labour Council five-year reviews open to stakeholder input, informed by evidence, and focused on challenges, progress and program renewal.
- Ensure prompt, transparent and impartial review of public submissions.
- Engage a neutral third party such as the ILO to report regularly on the state of labour law enforcement and compliance.
- Ensure that dispute settlement panels are properly resourced.
- Add monitoring commitments to new Agreements.



Benefits and limitations of the current approach

Potential benefits

- Significantly improved respect for an increasingly inclusive set of rights.

Two major limitations:

- Impermeability of authoritarian/oligarchic power structures.
- Intractability of labour market inequality associated with globalization:
 - Relative supply of labour and capital in the developing world
 - International mobility and bargaining power
 - Value hoarding within value chains.



Further strategy and policy for inclusive trade

- Be careful about who you get close with (don't expect much action on inclusive trade from most oligarchic states).
- Lower the stakes of displacement for workers:
 - Enhance unemployment insurance benefits
 - Support retraining and relocation
 - Reduce the dependence of the working population on employer-provided pensions and benefits
 - Equalize other endowments (education; inheritance).



Further strategy and policy for inclusive trade

Support inequality reduction to support inclusive trade:

- Investigate and implement sound domestic and international policy to enable before and after-tax incomes in trading partner countries to increase with productivity.
- This may require deeper international policy cooperation: fiscal monetary, taxation, democratization...
- Or a different and more restrained approach to integration.



Some sources

- Kevin Banks, *Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law*, 32 Berkeley Journal of Employment and Labor Law 45 (2011).
- K. Banks “*Workplace Law without the State?*”, in S. Archer, D. Drache, and P. Zumbansen eds. “*The Daunting Enterprise of the Law: Essays in Honour of Harry W. Arthurs* (McGill-Queen’s University Press, 2017)
- K. Banks, “*Must Canada Change its Labour and Employment Laws to Compete with the United States?*”, 38 Queen’s Law Journal 419-460 (2013)
- Kevin Kolben, *A New Model for Trade and Labor: The Trans-Pacific Partnership's Labor Chapter and Beyond*, 49 N.Y.U. J. Int'l L. & Pol. 1063 (2017).
- Branco Milanovich, *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press, 2016)
- Dani Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (Princeton, 2018)
- Joseph Stiglitz, *The Price of Inequality: How Today’s Divided Society Endangers our Future* (New York: W.W. Norton, 2012).



Thank you.



Queen's | LAW

CLCW CENTRE FOR LAW IN THE
CONTEMPORARY WORKPLACE