FROM TRADE IN GOODS TO TRADE IN SERVICES – IMPLICATIONS FOR TRANSNATIONAL LABOUR LAW

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Introduction

Challenges to the application of (what were once considered to be) established transnational labour standards have arisen in relation to an emergent trade in services. This is becoming an ever-increasingly significant sector of trade, which now constitutes an estimated 70-80% of output (and employment) in high income countries of the North.[1] This paper considers the reasons why previous political accommodations around trade and labour standards may be shifting and the implications this may have for the South.

The first part of this paper investigates past linkages between *trade in goods* and the promulgation of transnational labour standards, noting the key role played by high income countries in determining their content and application both within the International Labour Organisation (ILO) and the European Union (EU). The second part of the paper then goes on to examine the current scope for protection of labour standards where there is *trade in services*. Two particular settings are examined: the movement of natural persons under 'mode 4' of the General Agreement on Trade in Services (GATS) and EU 'posted work' which accompanies the exercise by employers of their entitlement to free movement of services between EU Member States.

[1] PHILIP A. MARTIN, GATS, MIGRATION AND LABOUR STANDARDS DP/165/2006 (ILO, 2006) at 4, available at: http://www.ilo.org/public/english/bureau/inst/publications/discussion/dp16506.pdf.

My aim is to place liberalisation of service provision in context, namely a time of expansive capitalism and financial uncertainty, where cost cutting is achieved through mechanisms such as subcontracting and agency work. In this setting, promotion of trade in services is given as a reason to evade application of labour standards and even human rights protections, which had previously seemed settled.

The scope for renegotiation of labour norms might, at least superficially, appear to open up possibilities for lower income (and even least developed) States to politically engage where they were once absent. In this sense, we could be witnessing a turn of events which has deliberative potential and it is certainly worth exploring more fully how such renegotiation around service provision could be of interest to developing and emerging economies in the South.

However, it is argued here that the development benefits may be illusory. The main drivers for change appear to be higher income States, reflecting the interests of multinational corporations in new service markets and cheaper labour. Notably these corporate ventures tend to originate from the North which scent opportunities for expansion. It may be observed that the impoverished (whether workers or low income States) remain largely excluded from the benefits which follow from such opportunities; and it may be telling that the new services model operational in the EU seeks to diminish access to collective solidarity. For these reasons, it would seem that longer term development objectives may not necessarily be served by an artificial distinction between trade in goods and trade in services, or by diminishing transnational labour standards.

I. *Trade in Goods and the Promotion of Labour Standards*

A global world view historically underlies contemporary domestic, European and international labour law. Lobbying for the first domestic labour laws stemmed from a perception that there were significant commonalities in the experience and condition of workers post-industrialisation, regardless of the country in which the worker was situated; hence the final rallying cry of the Communist Manifesto (1848):

'WORKING MEN OF ALL COUNTRIES, UNITE!' Arguably, it was the force of this sentiment which sparked the foundation of the International Working Men's Association (the 'First International') in 1864, that was in turn succeeded by the Second International demanding the eight hour working day, and which led ultimately to a trade union drive to seek the setting of international labour standards.[2]

The motivation to set domestic labour standards may be seen as a response to industrialisation and commercial competition regarding domestic trade in goods, which was manifested in the 'sweated labour' problem in post-industrial European States. The motivation to set international labour standards was perhaps more complex.

We know that one motivation was pacification of the international workers' movement post World War I, as soldiers returned from battle to their every day jobs. There was a desire to avoid the potential repercussions of Marx and Engels' bolder objectives, as witnessed during Bolshevist revolution in Russia in 1917.[3] Yet, there is evidence that there were also other underlying reasons.

Just as the First and Second International sought to reduce the potential for a negative spiral of competition which led manufacturers to progressively lower labour standards, so there is acknowledgement in the Preamble of the first ILO Constitution in Part XIII of the Versailles Treaty that 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to

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[2] See, for a history, G. M. STEKLOFF, HISTORY OF THE FIRST INTERNATIONAL (MARTIN LAWRENCE LIMITED, 1928) **.** Cf. Alvin W. Gouldner, 'Marx's Last Battle: Bakunin and the First International' *Theory and Society* , Vol. 11, No. 6, Special Issue in Memory of Alvin W. Gouldner (Nov., 1982), 853; and GERRY RODGERS, EDDY LEE, LEE SWEPSTON, AND JASMIEN VAN DAELE, THE ILO AND THE QUEST FOR SOCIAL JUSTICE 1919-2009 (INTERNATIONAL LABOUR OFFICE, 2009), 4.

[3] GEORGE N.BARNES, HISTORY OF THE INTERNATIONAL LABOUR OFFICE (WILLIAMS AND NORGATE, 1926), 80; M. IMBER, THE USA, ILO, UNESCO AND IAEA, POLITICIZATION AND WITHDRAWK IN THE SPECIALISED AGENCIES (MACMILLAN, 1989), 43.

improve the conditions of their own countries'. Further, in Section II, there was resistance to trade in labour, admitting only of trade in goods (the input of workers into which should be protected through basic workers' rights): 'labour should not be regarded merely as a commodity or article of commerce'.

However, this is still not the full story. For the Treaty of Versailles of 1919, with its overarching aim of a lasting peace, was not only concerned with pacification of potential rebels, but the desire to prevent traders from the wealthier and more powerful States being undercut by competition abroad. As George Barnes commented:

> Labour regulation had become a necessity in order to safeguard the relatively high standards of life in the advanced countries… That… is an insular sort of argument to use in favour of an organization with humanitarian outlook, but at least it is a practical one… the need had arisen for levelling out industrial competition between nations by raising the conditions of labour in the lower paid countries.[4]

The ILO was built and its history written by key political actors from Western Europe who were predominantly to take the lead as its 'Directors' and steer its policies.[5] Early debates make plain fear of China and Japan as potential trade competitors; others emerged subsequently.[6] Arguably, whether we regard the minimum terms of fair competition which were set as problematic (or not) turns on the level at which standards are set. If they merely serve basic humanitarian purposes, such as freedom of association, it is harder to object to their content than if they were trying to set a universal minimum wage which priced lower income countries entirely out of the labour market.[7] This, indeed, was the approach later taken by the OECD, when

[4] BARNES 1926, 45-7.

[5] IBID., 79.

[6] See, for example, A. ALCOCK, HISTORY OF THE INTERNATIONAL LABOUR ORGANIZATION (MACMILLAN, 1971), 3-16.

[7] Cf. Brian Langille, 'Eight Ways to Think About International Labour Standards', Vol. 31 JOURNAL OF WORLD TRADE (1997) 27; and BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE (HART, 2005) 9-13 AND 47.

espousing the potential positive development effects of basic human rights protections as a basic minimum internationally.[8] Yet, the difficulty is that collective bargaining, a significant manifestation of freedom of association, can often entail the creation of minimum wages, so that the boundaries are blurred. The content and format of ILO standards arguably remains controversial in this regard.[9]

The functions of the ILO were reiterated again post World War II, when the Declaration of Philadelphia 1944 repeated in Art. I (a) that: 'Labour is not a commodity'. Moreover, it was asserted in Art. II(c) that economic and financial policies, whether national or international, should be accepted 'only insofar as they may be held to promote and not to hinder' the achievement of the Organisation's fundamental objective, which was taken to be 'social justice'. In the ILO's role as a UN agency, a variety of international labour standards continued to be adopted through international labour Conventions (binding on ratifying States and imposing an obligation to report regardless of ratification) and Recommendations (non-binding guidance for State practice).

Among these, were ILO Convention No. 97 concerning Migration for Employment (Revised) 1949 (which is centred on the principle of 'no less favourable treatment' and ILO Convention No. 143 on Migrant Workers (Supplementary Provisions) 1975 (through which basic human rights are to be respected). These standards have since been consolidated in the UN International Convention on the Protection of the Rights of all Migrant Workers and their Families 1990. They are relevant for our

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[8] OECD, TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE (OECD, 1996); OECD, INTERNATIONAL TRADE AND CORE LABOUR STANDARDS (OECD, 2000). Discussed in Langille 1997 above.

[9] Leading HEPPLE 2005 to observe (at 66): 'Beyond the core and priority conventions, the present subjects of international regulation do not serve the real needs of developing countries'. This has led him to advocate different modes of setting labour standards, moving beyond a dichotomy between hard law conventions and soft law recommendations and moving rather towards 'frame work conventions' which could offer scope for flexibility and dialogue. See also Brian Langille, 'Imagining Post "Geneva Consensus" Labor Law for Post "Washington Consensus" Development' COMPARATIVE LABOR LAW & POLICY JOURNAL vol. 31(3) (2010).

purposes, as importing cheaper labour from other States has long been a method by which terms and conditions of employment for a domestic workforce can be undercut and, ultimately, lowered. Throughout these Conventions a principle of 'equality of treatment' of home and migrant workers is espoused, subject however to some exceptions which may have peculiar relevance to the supply of services, as we shall see.[10]

Other notable ILO innovations have included the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1977 (revised in 2000 and again in 2006) and the International Programme for the Elimination of Child Labour (or IPEC), which is illustrative of increased ILO preoccupation with programme-based technical assistance for countries of the South. Further, the 1998 Declaration on Fundamental Principles and Rights at Work secured global (and unchallenged) recognition of core labour principles: freedom of association and collective bargaining, non-discrimination, forced labour and child labour,[11] reiterated as essential in a Declaration of 2008 (on Social Justice for a Fair Globalization) where they have also been linked to development objectives.[12]

Yet, despite these compelling achievements, the ILO and its standard setting has been the subject of challenge since the end of the Cold War.[13] There have been questions relating to the number of standards produced by the Organisation and their capacity to hinder economic growth, leading to a review and prioritisation of

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[10] See reference to ILO Convention No. 143, Article 11 below.

[11] The 1998 Declaration was not voted for unanimously, but was adopted without dissent at the annual International Labour Conference. See Janice Bellace, 'The ILO Declaration of Fundamental Principles and Rights at Work' *International Journal of Comparative Labour Law and Industrial Relations* vol. 17 (2001), 191.

[12] See the preface written by the former ILO Director-General, Juan Somavia, for the 2008 Declaration; also the Premble and Article IA and B.

[13] TONIA NOVITZ, INTERNATIONAL AND EUROPEAN PROTECTION OF THE RIGHT TO STRIKE (OXFORD UNIVERSITY PRESS, 2003), 102-6; Tonia Novitz, 'Connecting Freedom of Association and the Right to Strike: European Dialogue with the ILO and its Potential Impact' CANADIAN LABOUR AND EMPLOYMENT LAW JOURNAL Vol. 15(3) (2009-10), 465, 476-8.

standards.[14] There have also been challenges to established modes of governance, some of which have been aimed at achieving greater voice for low-income States otherwise potentially excluded,[15] but also pursued by a strong employers' lobby whose capitalist objectives are no longer checked by the aspirations of a potential alternative 'Eastern' bloc.[16] Although Guy Ryder with an extensive background in trade union activity, being prior president of the International Trade Union Confederation (ITUC) has taken on the most recent mantle of ILO Director-General, which might seem to signify respect and priority for workers' interests in the Organisation,[17] the occasion was marked by a rebellion by the employers' group at the Conference Committee on the Application of Standards challenging long-standing interpretations of ILO supervisory bodies relating to freedom of association and the right to strike.[18]

a. The WTO and the ILO

Looking back to framing of the ILO role post-1944, it is possible to see its role as a deliberate counterpoint to an International Trade Organisation (ITO) under initial UN plans,[19] which were thwarted only by the peculiarities of requirements for US

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[14] E. Cordova, 'Some Reflections on the Overproduction of International Labour Standards' COMPARATIVE LABOR LAW AND POLICY JOURNAL Vol. 14 (1993) 138; and HEPPLE 2005, 37-63.

[15] Sean Cooney, 'Testing Times for the ILO: Institutional Reform for the New International Political Economy' COMPARATIVE LABOR LAW AND POLICY JOURNAL vol. 20 (1999), 365; and T. Fashoyin, 'Tripartism and Other Actors in Social Dialogue' INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS VOL. 21 (2005), 37.

[16] See NOVITZ 2003 and 2009-10 above.

[17] See http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/lang--en/index.htm; http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/WCMS_205241/lang--en/index.htm.

[18] See K. Ewing, 'Myth and Reality of the Right to Strike as a "Fundamental Labour Right"' INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS vol. 29 (2013) 145 who does not link the two, but there may be more than coincidence here.

[19] See the Havana Charter for an ITO, available at: http://www.jus.uio.no/english/services/library/treaties/15/15-02/ito.xml, Article 7 of which stated: Fair labour standards

ratification of international instruments.[20] Informally, there seems to have been an underlying political acceptance that the ILO would set fair labour standards as desirable terms for trade in goods under the General Agreement on Tariffs and Trade (GATT) 1947,[21] now modified and incorporated in the wider remit of the World Trade Organisation (WTO) from 1994.

There has never been any formal linkage between WTO and labour standards. Indeed, as para. 4 of the 1996 Singapore Ministerial Declaration makes clear, while the WTO may be committed to 'the observance of internationally recognized core labour standards', it is not the WTO but the ILO that is viewed as 'the competent body to set and deal with these standards'. The ILO merely has WTO 'support for its work in promoting them'.

1.	The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.
2.	Members which are also members of the International Labour Organisation shall cooperate with that organization in giving effect to this undertaking.
3.	In all matters relating to labour standards that may be referred to the Organization in accordance with the provisions of Articles 94 or 95, it shall consult and co-operate with the International Labour Organisation.

See also Clair Wilcox, 'The London Draft of a Charter for an International Trade Organization' The American Economic Review, Vol. 37, No. 2, PAPERS AND PROCEEDINGS OF THE FIFTY-NINTH ANNUAL MEETING OF THE AMERICAN ECONOMIC ASSOCIATION (May, 1947), 529-541.

[20] JOHN JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW (CAMBRIDGE UNIVERSITY PRESS, 2006) at 93; ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW, (OXFORD UNIVERSITY PRESS, 2008), at 28-30.

[21] The capacity for which has been maintained by Article XX of the GATT.

The ILO responded to controversies over trade and labour standard linkages by launching a World Commission on the Social Dimension of Globalization, concluding (in 2004) that cooperation between international agencies is key for successful promotion of international labour standards in the face of challenge from Exclusive Economic Zones (EEZ) and competitive outsourcing of manufacture by multinational corporations.[22] Notably, despite a UN Declaration on the subject,[23] this cooperation has not altogether been forthcoming from the International Monetary Fund, World Bank or the WTO.[24]

What has become a feature of the international trade landscape is extensive reference to ILO 'Core Conventions' and core labour standards in bilateral and regional trade agreements and conditionality.[25] Their use in the EU Generalized System of Preferences as a basis to gain additional trade preferences in relation to entry of goods to EU markets is also notable, although in many respects hypocritical,

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[22] Available at: http://www.ilo.org/fairglobalization/report/lang--en/index.htm.

[23] Resolution A/RES/59/57, 59th Session of the UN General Assembly, *Tabled by the United Republic of Tanzania and the Republic of Finland with the support of 74 other co-sponsoring Member States,* Item 55: Follow-up to the Outcome of the Millennium Summit, 'A Fair Globalization, Creating Opportunities for All', Report of the World Commission on the Social Dimension of Globalization. The nations presenting the Resolution were those who had chaired the Commission.

[24] Although there have been since been some further steps in this direction since Somavia complained of the 'habits of fragmentation' (REPORT OF THE DIRECTOR-GENERAL, REDUCING THE DECENT WORK DEFICIT: A GLOBAL CHALLENGE (International Labour Office, 2001), at chapter 3.4). See TRADE AND EMPLOYMENT: CHALLENGES FOR POLICY RESEARCH: A JOINT STUDY OF THE INTERNATIONAL LABOUR OFFICE AND THE SECRETARIAT OF THE WORLD TRADE ORGANIZATION, (Geneva: World Trade Organization and International Labour Office, 2007) reviewed critically by Steve Charnowitz, (2008) 11(1) JOURNAL OF INTERNATIONAL ECONOMIC LAW 167 – 178; but also see more recently joint ILO-WTO Joint Publication MAKING GLOBALISATION SOCIALLY SUSTAINABLE (2011): http://www.ilo.org/global/about-the-ilo/multimedia/video/events-coverage/WCMS_163866/lang--en/index.htm.

[25] T. Novitz, 'Core Labour Standards Conditionalities: a means by which to achieve sustainable development?' in JULIO FAUNDEZ AND CELINE TAN (EDS), INTERNATIONAL ECONOMIC LAW, GLOBALIZATION AND DEVELOPING COUNTRIES (EDWARD ELGAR, 2010), 234 at 247-250.

inconsistent and ineffectual.[26] The employer lobby at the ILO is clearly aware of this development, and their acute concern over this new form of application of ILO standards would seem to be leading them to challenge the observations of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) at the 2012 Conference.[27]

b. The EU and a 'Social Europe'

Similarly, trade in goods was initially central to what has since emerged as the EU, which began with the establishment of a European Coal and Steel Community (ECSC) in 1951.[28] Yet, built into the European Economic Community (EEC) Treaty of Rome of 1957 was a broader vision of an internal market, encompassing, not only free movement of goods, but free movement of persons, establishment and services, even if the latter aspirations have been more gradually realised.[29]

The ILO did not initially anticipate any need for specific adoption of labour standards in respect of the planned EEC. A panel of ILO experts concluded that respect for the domestic labour laws of participating European States would be sufficient,[30] although they did not object to Article 119 which provided the potential scope for

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[26] See Council Regulation (EC) No.732/2008 of 22 July 2008 extended to 31 Dec 2013; note new EU Regulation 978/2012 to operate from 1 January 2014. For discussion, see Tonia Novitz, 'In Search of a Coherent Social Policy: EU import and export of ILO labour standards' in JAN ORBIE AND LISA TORTELL (EDS), THE EUROPEAN UNION AND THE SOCIAL DIMENSION OF GLOBALIZATION: HOW THE EU INFLUENCES THE WORLD (ROUTLEDGE, 2009), 27; and Jan Orbie and Ferdi de Ville, 'Core Labour Standards in the GSP Regime of the European Union: Overshadowed by other considerations' in COLIN FENWICK AND TONIA NOVITZ (EDS), HUMAN RIGHTS AT WORK (Hart, 2010), 487.

[27] Report of the CCAS, Provisional Record of Proceedings, ILC 2012, Part I/13.

[28] See THE UNION OF EUROPE: ITS PROGRESS, PROBLEMS, PROSPECTS AND PLACE IN THE WESTERN WORLD (Council of Europe, 1951), 14-15 and 18.

[29] G. Majone 'Legitimacy and Effectiveness: A Response to Professor Michael Dougan's Review Article on Dilemmas of European Integration (2007) 32 EUROPEAN LAW REVIEW 70.

[30] See the Report of a Group of Experts ('the Ohlin Report'), SOCIAL ASPECTS OF EUROPEAN ECONOMIC CO-OPERATION (International Labour Office, 1956).

French defence of equal pay practices, since other signatories did not meet those same standards.[31]

Nevertheless, it soon became clear that a 'human face' was needed for the EEC during recession which followed the oil shocks of the 1970s.[32] This objective was realised by a series of legislative measures, generally taking the form of a series of Regulations and Directives, which have come to be associated with a 'European Social Model' – although many question the veracity of that description, given the limitations of the standards and the diversity of implementation and application in national systems.[33] Legislation at the EU level covers such matters as discrimination (building on what was Article 119), health and safety (including working time), and even redundancies and transfers, which are arguably of particular relevance during a time of recession. Such standards have come to be regarded by many commentators as a basis or 'floor' for fair competition or labour market integration,[34] and to join the club you had to accept this '*acquis*' as the terms governing trade. The *acquis* is still of restricted ambit; there are for example no standards set by EU Directive or Regulation relating to freedom of association or the right to strike, although such entitlements are recognised in the EU Charter of Fundamental Rights 2000, which provides a basis for scrutiny of actions taken at EU level. There is also an entitlement to freedom of association (which, it has been established includes an entitlement to collective bargaining and a right to strike) under Article 11 of the European Convention on Human Rights (ECHR) to which all EU Member States are party.

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[31] Treaty of Rome 1957, Article 119; see Paul Davies, 'The Emergence of European Labour Law' in WILLIAM MCCARTHY (ED.), LEGAL INTERVENTION IN INDUSTRIAL RELATIONS (Oxford University Press, 1992), 319.

[32] KENNETH ARMSTRONG AND SIMON BULMER, THE GOVERNANCE OF THE SINGLE EUROPEAN MARKET (Manchester University Press, 1998), 228.

[33] Cf. Fritz W. Scharpf, 'The European Social Model' JOURNAL OF COMMON MARKET STUDIES vol. 40 (2002) 645.

[34] PHIL SYRPIS, EU INTERVENTION IN DOMESTIC LABOUR LAW (Oxford University Press, 2007); DAGMAR SCHIEK, ECONOMIC AND SOCIAL INTEGRATION: THE CHALLENGE FOR EU CONSTITUTIONAL LAW (Edward Elgar, 2012).

Complaints relating to breach of Article 11 of the ECHR may be made before a European Court of Human Rights in the Council of Europe (not the EU).[35]

The key question which we are facing today would seem to be whether a shift towards trade in *services* (from trade in *goods)* makes a difference to the past political accommodations – shaky though they may have been – concerning transnational labour standards. Or is this merely a pretext for fundamental changes to workers' entitlements internationally and within Europe?

II. *Trade in Services and the Evasion of Labour Standards*

Labour law when focussed on trade in *goods* is very much concerned with specific sites where products are manufactured and treatment of workers on those sites. It has long been recognised that practices such as child labour, forced labour, restrictions on workers' organisation, discrimination, exposure to unsafe working practices, long working hours and low wages are capable of causing misery for workers while lowering costs of goods emanating from those sites. We have therefore come to expect minimum labour standards, which may be agreed at an international or European level and then imposed at a domestic level, so as to set what can be regarded as fair terms of competition. It is a model that works on settled assumptions relating to a market in goods which is conveniently consonant with State sovereignty.

Contemporary trade in *services* would seem to challenge some of those assumptions, insofar as services can be delivered in one country from another by use of telecommunications, computers and other technology. National boundaries are therefore more difficult to regulate and domestic legislation may struggle to address this cross-territorial phenomenon.

[35] Application no. 34503/97 *Demir and Baykara v Turkey*, Grand Chamber Judgment of 12.11.08; and Application No. 68959/01, *Enerji Yapi-Yol Sen v Turkey*, Judgment of 21.04.09 (available only in French). See K. D. Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' INDUSTRIAL LAW JOURNAK vol. 39 (2010) 2.

We also have to think about what 'services' mean. In their simplest sense, a market in services involves the provision of people to carry out particular functions even though there is at the end no saleable moveable product. Examples include construction (where the structure built – whether tower, plant, hotel or railroad - stays in its actual location), cleaning (where the results may be significant in terms of others' working environment or living standards, but temporary), care work (where the result may be safety, happiness and health for the person requiring care perhaps due to age or health-related needs – for people are not themselves usually regarded as saleable products), and medical assistance (where the restoration of health is not a straightforward product for sale for the same reasons). Financial services and telecommunication services entail products, but ones which are not wholly tangible. The financial product may vary in value, being conceptual rather than physical; while a telecommunication service may consist of access to conversation or information, rather than something concrete which can be touched or held.

There is, further, in contemporary labour markets a tendency, even where there might be a saleable product involved, to sever the 'service' from the 'product'. A contractor may be on site to provide a 'service', for example to cook, to design, to draft and there may be a product at the end of the day, such as an item of food, an architectural plan, or a legal contract. Yet we talk about catering services, design services, and legal services, as if there were no end product in sight. This may be because we have become familiar with making these distinctions as part of our popular culture, despite their lack of meaning. In the same way, agencies can also be regarded as providing 'services', even though their 'service' is to supply people to do a job which may also involve production of a manufactured item.

Arguably, what all these manifestations of the term 'services' have in common is that we use the term to signify that instead of services *being a component part of* making a product, the service *is* the product. Insofar as the service consists solely of the devotion of a worker's skills, despite ILO injunctions that 'labour is not a commodity',

it is the worker who is the product. Commodification is thereby inherent in this creation of a market in services.

The 'means of production' then become the infrastructure which is necessary for the supply of services: purchase or rental of a site of business, the legal costs of incorporation and maintenance of the corporate entity, advertising costs and the provision of any equipment. Philip Martin, analysing these developments in the context of GATS and from an ILO perspective, observes that labour typically accounts for 70 – 80% of the cost of supply of services but only 20% of manufactured goods.[36] If this estimate is correct, one can see why there might be particular incentives for employers who are service providers (especially at a time of recession) to minimise implementation of labour standards and thereby reduce their costs. This cost differential may help to explain the 'under-regulation' of workers supplied by agencies to perform services,[37] which merits further examination. However, there are various scholars working on the issue. For the purposes of this paper, my focus is on as workers sent by their employer to another country to temporarily provide 'services' abroad.

So what happens when provision of services is blended with 'migrant work'? As we shall see, there are at least two transnational legal regimes which allow workers to be sent from one country to another by an employer (which is a service provider) for the temporary provision of services. We also know that this scenario was envisaged back in 1975, insofar as ILO Convention No. 143 on Migrant Workers (Supplementary Provisions) 1975 states the basic principle that migrant workers shall have the same entitlement to labour standards as other workers, but that full equality of treatment will not apply to 'employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited

[36] MARTIN 2006, 4.

[37] For an excellent critique of the recent EU Directive, see Nicola Countouris and Rachel Horton, 'The Temporary Agency Work Directive: Another Broken Promise?' INDUSTRIAL LAW JOURNAL VOL. 38, 329.

and defined period of time, and who are required to leave that country on the completion of their duties or assignments' (Article 11(2)). Yet, at the same time, Article 1 of that Convention does provide the overarching guarantee that: 'Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers'. So, we might expect as a minimum, access to freedom of association (including rights to organise and bargain collectively) for all migrant workers, whether temporarily placed abroad or not.

The difficulty for those workers who are sent abroad in this way is that, even if their basic human rights are formally granted in accordance with ILO and UN instruments and under the ECHR, they are likely to struggle with access to justice. Their experience often consists of isolation both linguistic and geographical, as they may be kept isolated on construction sites or in temporary ad hoc housing. They may be in theory able to form and join trade unions under the laws of their state of origin, but their home trade union is unlikely to be present on site in the host State to assist them. As we shall see, they may not be permitted by an employer to engage with a local trade union, so that their entitlement to freedom of association and collective representation can also be inhibited. The flow-on effects are an inability to enforce those labour standards which do apply to them and barriers to achieving improved terms and conditions. In these ways, the inherent vulnerability of temporary migrant workers enables service providers to keep the costs of labour low.

a. GATS Mode 4 – Movement of 'Natural Persons'

Temporary provision of services abroad by a 'natural person' is the fourth and final mode of trade in services contemplated under the General Agreement on Trade in Services (GATS). The others entail: (1) cross-border supply (such as online services across national boundaries); (2) consumption abroad (such as travel abroad to receive healthcare); and (3) commercial presence, usually taking the form of foreign

direct investment (FDI) insofar as there is creation of infrastructure for service supply.[38]

Under what has come to be known as 'mode 4', 'service providers' may travel as independent contractors (in business on their own account) to provide services in another State (aiding migration and overcoming current restrictions). More frequently, corporate 'service providers' may 'post' workers to another State to perform services therein, often under the terms of their original contract of employment and the labour laws applicable in their home State.

In terms of how negotiations for acceptance of mode 4 work in practice, it has been high income, industrialised countries which have tended to make 'requests' of other States to open their markets to trade in services, at least in particular sectors. If agreement is reached, commitments in respect of a particular service sector will be entered into a Schedule, whereby in relation to certain specifiable 'service sectors', a State can choose a full commitment ('unbound' in terms of limitations) or a commitment which is 'bound' in certain regards, (for example, only in respect of certain skilled professions or linked to mode 3 'commercial presence'). There remains, obviously, the possibility of making no commitment at all. Once a commitment is adopted in the Schedule, a State has to allow such trade in respect of all WTO Members under a 'most favoured nation' (MFN) principle,[39] but exceptions remain possible. These include flexibility regarding 'Economic Integration' 'in accordance with the level of development' (Art. V(3)(a)) and special treatment of agreements between developing countries. (Art. V(3)(b)). Also, all countries may rely on Art. X (Emergency Safeguard Measures) and Art. XXII (Restrictions to Safeguard the Balance of Payments) where domestic service sectors are unexpectedly likely to come under threat from foreign service providers. GATS mode 4 is further governed by an 'Annex on the Movement of Natural Persons Supplying Services under the Agreement', which envisages the imposition of visa requirements in respect of such

[38] GATS, Article I(2).

[39] GATS, Article II.

workers, but does not specify how long a temporary placement or visa may be. There is a risk that workers will be sent abroad under limited visas which may be periodically reviewed for an indefinite period, but that ultimately they will acquire no rights of residence in the State in which they have spent a considerable portion of their adult lives.

The politics of GATS is complicated. On the one hand, it is common ground that it was in the interests of States in the North to seek WTO recognition and regulation of this medium of trade. GATS facilitates expanded markets for services on which their corporations rely.[40] The determination of these high income States to enable their multinational corporations to enter developing countries, especially in respect of provision of financial and telecommunications services,[41] might seem to aid development by providing infrastructure on which domestic manufacture and public governance can rely. In this sense, cross-border supply and commercial presence may be needed, alongside skilled workers from developed countries who can ensure that the services are delivered effectively. Yet, it goes without saying that the dominance of European and US corporations could inhibit and even prevent domestic providers from entering those same service sector markets, which would also have led to enhanced economic opportunities for the South. The temporary placement of skilled workers from the North in Southern States can further (unless local training programmes are established), prevent local workers from acquiring skilled work. Training programmes for the domestic workforce have, therefore, unsurprisingly become a factor in scheduled commitments regarding 'commercial presence' and 'movement of natural persons'. In this sense, the scope of exceptions provided for in GATS regarding development and safeguards may prove significant.

Those countries which define themselves as 'developing' have also sought to take advantage of the opportunities that GATS offers by sending their own skilled workers

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[40] On this, see even the more conservative LOWENFELD 2008, ch. 6.

[41] See the Annex on Financial Services and the Telecommunications Annexes discussed extensively in LOWENFELD 2008, 129-137.

abroad to high income States (and even low income States where Western multinational companies are present), in reliance on the commitments made under GATS. Such labour can be supplied via agencies or simply direct recruitment. This has the capacity to ensure that shortages in skilled labour in the domestic 'developed' or 'emergent' State labour market can be temporarily met without any (politically controversial) long term migration taking place. It can also provide benefits for the individual worker which have development aspects, insofar as it can provide a worker with a job they might have not had otherwise and also allow wages (which could be higher than those that could have been received in the domestic labour market) to be sent home to support a family or saved for the purposes of education and further training.

Marion Pannizon points to the very limited utilisation of this method of migration to date, estimating this at 5% of world trade and 0 - 4% of GATS commitments to date, with over 60% of all commitments in Mode 4 'adjunct to foreign direct investment'. She therefore argues for expansion to include low-skilled workers and promote growth. [42] Indeed, this seems to be the general objective of developing countries, although it can also be observed that 'there is considerable overlap in interests between developing countries that are supplying labour and business communities of industrialized states that are demanding labour'.[43]

Business communities see opportunities for profit that the lower labour costs that GATS mode 4 has to offer. While wages for workers sent temporarily by service providers may be higher than they would be had they remained at home, they are typically less than would normally be available in a developed (and possibly even an emergent economy) host State to workers with entitlement to residence. Also, since

[42] MARION PANIZZON, TRADE AND LABOR MIGRATION: GATS MODE 4 AND MIGRATION AGREEMENTS (Friedrich-Ebert-Stiftung, 2010) available at: http://library.fes.de/pdf-files/iez/global/06955.pdf

[43] Laura Ritchie Dawson, 'Labour Mobility and the WTO: The Limits of GATS Mode 4' LABOUR MIGRATION vol. 4 (2012) available: http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2435.2012.00739.x/pdf.

the contracts under such workers are hired are usually governed by their country of origin, under Conflicts of Laws rules, they may not be covered by the full remit of labour laws and social security applicable otherwise in the State to which they are sent. This practice of sending workers to provide services abroad, then, although it remains small scale under GATS, is highly controversial. There is clear scope here to take jobs from host State workers, or undercut their wages as well as other terms and conditions; and this seems most likely at a time of recession in high income countries.

An interesting question arises as to whether this constitutes 'social dumping' in the host State. Magdalena Bernaciek in her study of 'Social Dumping' for the ETUI has commented that:

> it is important to point out that an inflow of migrant workers from low-wage countries does not automatically imply social dumping… migrants often perform tasks that indigenous workers are not willing to undertake. In addition, their presence enables companies to extend their operations during periods of economic upswing, thereby contributing to the enhanced performance of the host economy as a whole. It is legitimate to speak of social dumping… when foreign or local companies employ their workers at conditions inferior to those laid down in the host country's employment regulations or collective agreements. Such firms, and in the short-term their workers, profit from dumping strategies, whereas those adhering to the existing conditions constitute the short-term losers. In the long run, however, dumping practices do not only lead to the erosion of employment protection systems in the host states, but might also hinder the gradual improvement of wages and working conditions in the poorer sending countries.[44]

In other words, she seems to be advocating an equality principle (familiar to us from ILO migrant worker Conventions), which may have particular pertinence in times of recession. That equality principle, however, poses problems in terms of access to

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[44] MAGDALENA BERNACIAK, SOCIAL DUMPING? POLITICAL CATCHPHRASE OR THREAT TO LABOUR STANDARDS ETUI WP 2012/06, at 26.

jobs for workers from developing countries; the question being whether they would be given these economic opportunities at all unless their labour was cheap. It may be easier to assert that social dumping truly arises where fundamental human rights, such as access to trade union representation (which constitutes a violation of freedom of association), is prevented by employers in this temporary migration. This might prevent a demand for parity of wages which has a detrimental effect on workers in the South; although while collective bargaining will not necessarily secure parity of wages it may also raise labour costs sufficiently to act as a deterrent to migrant labour.[45]

Commentators disagree as to whether usage of GATS mode 4 offers a 'virtuous' or 'vicious' circle for the developing countries. Martin suggests that recent experience suggests caution. While Indian IT workers abroad gained relevant expertise that they could bring back to assist in building their own dynamic home economy, he also points to the brain drain caused by mass posting of African healthcare workers in Western Europe. There seem to be more costs to developing countries if it is skilled rather than unskilled workers who spend significant periods of time 'temporarily' placed in high income markets,[46] which might seem an argument for supporting the Northern lobby for greater access of low skilled workers to entry under GATS mode 4. On the other hand, Martin notes the downward pressure on wages brought about by such posting arrangements seem greater in respect of low-skilled workers, making workers globally more vulnerable and also suggesting that the economic gains for those workers and their home States may be negligible.[47]

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[45] See MARTIN RUHS, MIGRANT RIGHTS, IMMIGRATION POLICY AND HUMAN DEVELOPMENT Human Development Research Paper 2009/23 (UNDP, 2009) available at: http://hdr.undp.org/en/reports/global/hdr2009/papers/HDRP_2009_23.pdf: who argues that there may be a trade off between the numbers of migrant workers who will gain entry to a country and their employment rights.

[46] MARTIN 2006, 11-13; arguably their immigration status compounding the problem, see BRIDGET ANDERSON, US AND THEM: THE DANGEROUS POLITICS OF IMMIGRATION CONTROL (Oxford University Press, 2013).

[47] IBID., 14.

In my view, it would be an error to draw definitive conclusions on the basis of the present tentative experimentation with movement of natural persons under GATS. The potential for evasion of labour standards without corresponding benefits in terms of development can arguably be seen in the context of EU 'posting of workers' by service providers under EU law.

b. Posted Workers – Free Movement of Services

Under the Treaty on the Functioning of the European Union (Art. 56) on free movement of services and by virtue of the Posted Workers Directive 96/71/EC (PWD), EU service providers may 'post' workers from one Member State to another.[48] Those workers (like those moving as 'natural persons' under GATS mode 4) remain subject to the terms of the employment contract and national labour laws in their state of origin, but this is subject to the host State being able to impose a very limited set of restrictions listed in Article 3(1) of the PWD. That limited list means that the minimum terms and conditions of posted workers can intentionally be set by their employer at a lower level than local workers by a host State. Further, it has emerged from subsequent case law that 'posted workers' do not acquire rights to collective bargaining as members of a host State.[49] They are not, however, subjected to immigration controls in the same way as GATS mode 4 workers.

The posting of workers has become controversial as the EU has been enlarged to encompass newer lower income member States. In order to achieve accession, the

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[48] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (PWD), OJ L 18, 21.1.1997. Note also the adoption of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] O.J. L.376/36 (the Services Directive) aimed at further liberalising trade in the EU, but which is stated not to have any effect on the treatment of posted workers – see Preamble, recital (86).

[49] Unless the employer (that is, the service provider) consents to collective bargaining, see Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 (hereafter *Laval*).

twelve more recent members had to agree to an EU *acquis*, which included the Regulations and Directives that make up 'Social Europe', but this arguably exposed the limited requirements imposed through EU law.[50] That *acquis* did not, for example, include any commitments regarding access to freedom of association or the right to strike, as these are not subject to EU legislative powers, but they had to acknowledge the significance of such entitlements under an EU Charter of Fundamental Rights 2000 and become parties to the European Convention on Human Rights.

The case that came before the European Court of Justice in *Laval* exemplifies the difficulties that emerged regarding free movement of services post-enlargement of the EU to include the so-called 'accession States'. Sweden did not impose any transitional restrictions on free movement in respect of workers from these new States; these workers could voluntarily enter the country for the purposes of finding work without visa requirements. Nor were any formal legislative restrictions placed on entry of service providers from accession States. In this context, a Swedish construction firm, Baltic, carrying out building in Sweden decided to subcontract the supply of 'building services' at a Swedish site to a Latvian company, Laval un Partneri. This was a clever use of the corporate veil, for the major shareholder in both countries was actually the same person. Rather than hiring workers (from an accession State like Latvia) who entered the country by exercising their entitlement to free movement of workers and who would then be covered by Swedish contracts, Swedish collective bargaining and Swedish labour law, Baltic explored a different opportunity. Through the subcontracting arrangement, Baltic agreed that Laval (as a service provider exercising a right to free movement of services) would 'post' Latvian workers to Sweden for the purpose of carrying out the construction. The result was that their contracts would be covered by Latvian law and only subject to minimum standards which the host State Sweden could require under the PWD. Moreover,

[50] Noémi Lendvai, 'The Weakest Link? EU accession and enlargement: dialoguing EU and post-communist social policy' JOURNAL OF EUROPEAN SOCIAL POLICY vol.14 (2004), 319; DANIEL VAUGHAN-WHITEHEAD, EU ENLARGEMENT VERSUS SOCIAL EUROPE? THE UNCERTAIN FUTURE OF THE EUROPEAN SOCIAL MODEL (Edward Elgar, 2003).

when the Swedish trade union sought to engage Laval in collective bargaining over these workers' terms and conditions, Laval promptly concluded an agreement with a Latvian trade union for considerably lower terms and conditions. The Swedish trade unions took industrial action aimed at bringing Baltic and Laval to the bargaining table. This action is described in the Court's judgment as a 'blockade' which obstructed access to the site; this is not strictly accurate, rather union members refused delivery of key supplies to the building site.

The response of the European Court of Justice here was interesting. 2007 marked the year in which, for the first time,[51] the Court acknowledged a 'right to strike'. Yet, this was not to be a right of great effect. It was declared unlawful under EU law (in terms of what is now Article 56 TFEU and the PWD) for a union to 'force' an employer to enter into negotiations on rates of pay,[52] which were characterised by a lack of 'sufficiently precise and accessible' provisions, rendering it 'impossible or excessively difficult in practice' for the employer to determine the obligations with which it was required to comply as regards minimum pay.[53] The union could therefore be held liable for inducing industrial action which interfered with the employer's entitlement to free movement of services.[54] The Court's intention seems to have been to render the obligations (and costs) of service providers clear and readily accessible before they enter a country, thereby facilitating their access to markets of other EU Member States.

This principle has since been further elaborated in subsequent cases, such that collective agreements must be declared universally applicable through legislation in order to limit the terms of which service providers bid for public procurement

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[51] *Laval*, at para. 91.See also Case C-438/05 *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v Viking Line* [2007] ECR I-10779.

[52] *Laval*, at para.111.

[53] *Ibid.*, at para.110.

[54] JONAS MALMBERG, SANCTIONS FOR 'EU-UNLAWFUL' COLLECTIVE ACTION , FORMULA Working Paper No. 37 (2012).

contracts,[55] and the capacity of the State to legislate on the terms and conditions of posted workers is restricted to the matters listed as a bare minimum in the PWD.[56] It appears that trade in services is prioritised under EU law and the capacity of workers to associate freely, bargain freely or take industrial action is curtailed accordingly.[57] The cases to date relate to the actions of home State unions from high income countries seeking to defend the interests of their members, leading some commentators to defend the findings of the European Court of Justice.[58] We do not know what the response of the Court would be where posted workers themselves sought to organise and bargain collectively – would they be considered to be justifiably prevented by an employer on the basis that this could lead to unpredictable liabilities and costs for a service provider under EU law? There is a still a possibility that this scenario will arise, as is illustrated by one UK case in the UK where Polish agency workers did attempt to join trade unions, were sacked as a result and received no protection under UK law.[59]

The current position of EU law would seem to violate established ILO standards regarding freedom of association, as noted by the ILO Committee of Experts. This is

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[55] Case C-346/06 *Rüffert v Land Niedersachsen* [2008] ECR I-1989 (hereafter *Rüffert*), at paras 64-88.

[56] Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323 (hereafter *Luxembourg*).

[57] Note also the attempt to extend this model to third country nationals discussed in Lydia Hayes, Tonia Novitz and Petra Herzfeld Olsson, 'Migrant Workers and Collective Bargaining: Institutional isomorphism and legitimacy in a resocialized Europe' in NICOLA COUNTOURIS and MARK FREEDLAND (EDS), RESOCIALIZING EUROPE (Cambridge: Cambridge University Press, 2013, forthcoming).

[58] See for a view that, on balance, considers that the Court was correct, Roger Blanpain, 'LAVAL AND VIKING: Who Pays the Price' in ROGER BLANPAIN AND ANDRZEJ SWIATKOWSKI (EDS), THE LAVAL AND VIKING CASES: FREEDOM OF SERVICES AND ESTABLISHMENT V INDUSTRIAL CONFLICT IN THE EUROPEAN ECONOMIC AREA AND RUSSIA (Bulletin of Comparative Labour Relations/Kluwer, 2009), xix.

[59] On the spurious ground that they were independent contractors and therefore ineligible for protection from discrimination on grounds of trade union membership, despite the findings of fact at first instance to the contrary. See C*onsistent Group Ltd v Kalwak and others* [2008] IRLR 505 CA. See Lizzie Barmes, 'Learning from Case Law Accounts of Marginalised Working' in JUDY FUDGE, SHAE MCCRYSTAL AND KAMALA SANKARAN, CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION (Hart, 2012), 303.

presumably exactly the type of finding to which the ILO employers' group takes exception.[60] But there are also more palpable extra-legal effects which deserve attention.

In the context of recession, service providers from older EU-15 Member States have established subsidiaries in accession States (often 'letter-box companies') from which they can return with a cheaper posted workforce, so as to bid more competitively for service contracts, particularly in the maritime field and in the area of construction.[61] This is seldom an initiative led by the lower-income State companies and workers. There is also considerable evidence that even those who would lawfully be able to be hired on the basis of free movement entitlements to work and reside in the host State, are instead being hired through agencies as posted workers and through complex choice of laws contractual arrangements. This scenario is perhaps best illustrated by the Olkiluoto construction site in Finland. Polish workers were employed by an Irish employment agency to work on temporary assignments in Finland. The workers complained that the agency had fraudulently deducted 30% of their wages on the grounds it was a 'tax' which had to be paid to the government of Cyprus. Once the Finnish construction workers union warned the

[60] See ILO Committee of Experts, *Observation 2009 (United Kingdom)*, http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2314990; ILO Committee of Experts, *Observation 2010 (United Kingdom)*, http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:232247; and most recently, ILO Committee of Experts, *General Survey, supra*, para. 128 cited in EWING 2013, at 163.

[61] See discussion of this emerging trend in Editorial 'Mobility of Services and Posting of Workers in the Enlarged Europe – Challenges for Labour Market Regulation' TRANSFER vol. 12(2) (2006) 137, at 138; and Charles Woolfson and Jeff Sommers, 'Labour Mobility in Construction: European Implications of the Laval un Partneri Dispute with Swedish Labour' EUROPEAN JOURNAL OF INDUSTRIAL RELATIONS vol. 12(1) (2006) 49 at 50-51. Reviewed also in Tonia Novitz, 'Labour Rights as Human Rights: Implications for Employers' Free Movement in an Enlarged European Union' CAMBRIDGE YEARBOOK OF EUROPEAN LAW vol. 9 (2006-7) 357 at 358-361; and more recently JAN CREMERS, IN SEARCH OF CHEAP LABOUR IN EUROPE: WORKING AND LIVING CONDITIONS OF POSTED WORKERS (CLR/EFBWW/International Books, 2011), 37 - 48.

employer of secondary strike action aimed at improving the conditions of the Polish workers, it emerged that, without their knowledge, the Polish workers had been posted via employment contracts governed by Cypriot law. Since the wage deductions were therefore legal, the union would not risk taking action which might expose them to liability under EU law. The precedent set by *Laval* loomed large as a 'chilling effect' on potential industrial action.[62]

The Flamanville situation is likewise illustrative of the difficulties faced by posted workers, cut off from access to collective representation. It emerged, only after a visit from the French health and safety inspectorate relating to deaths caused by industrial accidents, that the treatment of posted workers at the nuclear power plant at Flamanville was unacceptable. These posted workers experienced unsafe working conditions, but also it was found that unauthorised deductions had been made from their pay, allegedly in relation to social security protection, which had then disappeared without a trace. Additionally, there was found to be non-compliance with French minimum wage requirements, non-payment of overtime and non-observance of statutory rest periods.[63] A question was put before the European Parliament to ask how this had been allowed to happen.[64] The answer,

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[62] N. Lillie and M. Sippola, 'National Unions and Transnational Workers: the case of Olkiluoto 3, Finland' WORK, EMPLOYMENT AND SOCIETY vol. 24 (2011) 292, at 302-303.

[63] Sarah Clarkson, GMB Brussels, 'Why free movement of labour must guarantee equal treatment for workers: the case of posted and seasonal workers' presentation delivered at IER Seminar, Developments in European Employment Law, 21.3.12.

[64] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+OQ+O-2011-000168+0+DOC+XML+V0//EN: 'It has come to our attention that a large number of posted workers from different Member States hired by the Atlanco company, seconded to the construction site of a plant in Flamanville for the Bouygues client company, which is a subcontractor of the EDF company, are suffering abusive and hazardous living and working conditions and a lack of social protection, and that, despite the intervention of national and European trade unions, there might be infringements of EU and national labour and social legislation. Posted workers of different nationalities are hired in one Member State by Atlanco (a recruitment agency based in Ireland), seconded to a third Member State (France) and paid through a sister company based in Cyprus. As a result of this unclear situation, they do not know to which Member State the payment of their taxes and social contributions goes, or to which type of social protection they are entitled, if indeed contributions are paid. Is the Commission

fairly obviously, was lack of access to any legal protections or union intervention from the home State due to geographical isolation and legally constructed isolation from access to host State trade union representation (alongside only the most minimal coverage and protection under national labour laws in France). This undercutting of the most fundamental labour rights, then, has palpable effects, probably exacerbated at a time of recession. Certainly, the 'posted workers' system operates to liberalise trade in services within the EU, but its capacity for abuse by employers (as service providers whose corporate initiatives tend to originate in high income States) does not suggest that this legal mechanism boosts development for the most impoverished workers or low-income economies.

Conclusion

One can see why governments of the North and South might seek to liberalise service markets and in so doing, heed employers' demands regarding the relaxation of transnational labour laws, including freedom of association rights. This spells an imminent end to a long-term political accommodation which underlines transnational labour law, previously established regarding trade in goods.

There may be opportunities here for lower income countries which did not have a say, at the outset, in the standards set by higher income States in ILO and EU settings. There does also seem to be scope for the content of transnational labour law to be reshaped and applied in ways which reflect their objectives and needs. Yet, one might question, when looking at the specifics of the WTO services regime and the EU posted workers mechanism, whether it is the Southern and emergent

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aware of these problems? How is the Commission ensuring that France implements the Posting of Workers Directive and that workers enjoy the full rights they are entitled to, including social security payments and equal treatment? What is the Commission planning to do in order to ensure that the Posting of Workers Directive is not used as an instrument to mistreat workers and undercut labour and social conditions? What can the Commission do to make sure social and labour legislation is respected when the employment relationship involves four different Member States at the same time?'

economies (whether in Europe, South America or Africa) which have so very much to gain from these recent legal initiatives. Rather, it remains the corporate entities emanating from the North, whose economic interests lie in extending markets for services while keeping labour costs low, which seem most likely to benefit.

It could be that trade in services is somehow qualitatively different from trade in goods. This paper has sought to explain how some distinctions between the two can sensibly be drawn. Nevertheless, those differences do not suggest that labour and human rights laws should be weakened in the context of transnational delivery of services, but rather that they may need to be strengthened, given the greater vulnerability of the workforce and the economic incentives for employers to exploit such labour (where 80% of employer costs are those of labour). It is suggested that the legal initiatives that have emerged around trade in services have emerged for other reasons, namely a shift in the balance of power internationally between employers, labour and government following the Cold War combined with a high level of competition for jobs at a time of recession in some countries and great financial uncertainty in others.

Indeed, it is arguable that the treatment of workers posted from one State to another under WTO and EU 'services' regimes indicate that employers in the North are now achieving the potential bypass (if not collapse) of previously accepted rules for protection of workers under EU and international labour law. It is difficult to see how this can promote development, but it is time to examine this claim more rigorously as well as critically.