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Michael O'Donovan
Boston College Law School, Class of 2007

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Michael O'Donovan

INTRODUCTION

In 1992, presidential candidate Ross Perot famously warned of a "giant sucking sound" if Congress passed the North American Free Trade Agreement (NAFTA).[1] According to Perot's admonition, companies attracted to the cheaper labor of Mexico would pour across the southern border, shuttering American factories and leaving America's workers out in the cold. President George H. W. Bush and a long line of liberal economists assured the American public that the issue was more complicated, but the emotion and intuition behind the charge proved too powerful. Caught between the seemingly black and white approaches of Perot and Bush, then-candidate Bill Clinton took full advantage of the opportunity to appeal to partisans of both sides, reassuring free-traders that he was one of them while acknowledging the legitimate fears of workers. His solution was to renegotiate the NAFTA to provide for a dramatic increase in the enforcement of labor laws in Mexico, thus raising the cost of labor in that country. The result, it was hoped, would dissuade U.S. employers from closing factories in the United States and relocating across the border. Following Clinton's election, the U.S. negotiated a side agreement to NAFTA, called the North American Agreement on Labor Cooperation (NAALC), by which each member state was held responsible for effectively enforcing labor protections.[2] For the first time, reciprocal worker protections were included in an American free trade pact.

Perhaps as a result of its twin impulses of free trade and protectionism, the NAALC has proven ineffective as a method of slowing the pace of trade and the mobility of industry. And while the NAALC's origins lay in the deep insecurities -- and perhaps, to some degree, in the underlying racial tensions -- of the American workforce, those more unsavory impulses were soon rewritten in the language and rhetoric of human

[1] *THE 1992 CAMPAIGN: Transcript of 3d TV Debate Between Bush, Clinton and Perot*, N.Y. TIMES, Oct. 20, 1992, at A20

[2] North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 13, 1993, 32 I.L.M. 1499 (1993).

rights. The morality of "labor protections for foreign workers" has largely replaced the darker, more self-interested expressions of the early 1990's. Now the legal super-structure it created, the precedent it set, and the humanitarian rhetoric it borrowed, may yet hold promise. Increasingly core labor rights, such as the freedom of association, are understood as basic human rights. By opening the door of a free trade agreement (FTA) to labor protections, the NAALC as a model may still serve to improve conditions for workers in foreign countries – as well as to enhance the economic stability and diversity of less developed countries (LDC) – enormously valuable, if unintended, purposes.

Since the NAALC was signed, the United States has concluded trade deals with Australia, Jordan, Chile, Singapore, Morocco, and the Central American nations (including the Dominican Republic).[3] Each trade deal expressly includes labor provisions and, with some variation, has been largely based on the NAALC.[4] Passage of the most recent trade deal, the Central America Free Trade Agreement (CAFTA), has not only reaffirmed the emergence of a consistent American framework for linking trade and labor,[5] but has also served to refocus attention on an ambitious trade agenda, including regional trade agreements with the Andean nations, Southeast Asia, and the Middle East.[6] A Free Trade Agreement of the Americas (FTAA) remains a priority of the Bush Administration, and the upcoming WTO ministerial meeting in Hong Kong underlines the importance of America's bilateral and regional trade accords in its strategy of "competitive" or "parallel liberalization." The uniformity of recent labor chapters suggests a paradigm that has been replicated with a diverse group of nations, and may continue to serve as a template for future regional trade agreements. If, as seems likely, the framework is replicated in trade deals throughout the hemisphere,[7] the emerging

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[3] Edward Alden & Holly Yeager, *CAFTA Victory Revives Bush's Ambitions for US Trade Deals*, FIN. TIMES, July 29, 2005, at 9.

[4] *See* Marley S. Weiss, *Two Steps Forward, One Step Back – Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 689-90 (2003).

[5] *See Developments in the Law – Legal Tools for Altering Labor Conditions Abroad*, 118 HARV. L. REV. 2202, 2213 (2005); Thomas J. Manley & Luis Lauredo, *International Labor Standards in Free Trade Agreements of the Americas*, 18 Emory Int'l L. Rev. 85, 103-04 (2004).

[6] *See* IAN F. FERGUSSON & LENORE M. SEK, CONG. RESEARCH SERV., TRADE NEGOTIATIONS DURING THE 109TH CONGRESS, Summary (Aug. 3, 2005), *available at* http:// fpc.state.gov/ documents/organization/52677.pdf.

[7] *See*, Marisa Anne Pagnattaro, *The "Helping Hand" in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. INT'L L. 845, 891.

American approach linking trade and labor will become too prevalent for global trade actors to ignore. Standing at the verge of dramatic changes in the global trading order, the current U.S. Administration has an important opportunity to maximize the benefits of free trade and improve both labor rights and living standards for people in developing countries.[8] While the American model – first articulated in the NAALC and shaped by subsequent FTAs – is substantively and procedurally thin, it does provide a culturally and developmentally sensitive approach that can evolve into meaningful protection. A theoretical study of the framework's effect in Central America suggests that, while a number of alternative approaches are available – from muscular unilateralism to international institutionalism – the American approach strikes a pragmatic balance between effective standards and the realities of state sovereignty. By extending and strengthening this model in a future Western Hemispheric trade agreement, the U.S. can help build a more stable and prosperous trade regime worldwide.

BACKGROUND

A. The NAALC

Every successive trade agreement since NAFTA has been fundamentally based on the approach taken in the NAALC. The central tenet of the NAALC is that a country's own internal labor laws become binding standards to which the state may be held by its trading partners. Within the NAALC, however, a member may change its labor laws at any time and for any reason – either increasing or decreasing the amount of protection it affords its own workers.

Substantively, the NAALC covers eleven specific areas of labor law including three union protections – the freedom of association and the right to organize; the right to collective bargaining; and the right to strike -- and eight so-called "technical labor standards," such as compensation in cases of illness. Claims involving the eleven areas of law are heard in a three-tiered, graduated dispute settlement process involving consultation, evaluation and arbitration. However, the three union rights may only be

[8] *See* KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 2 (Inst. for Int'l Econ. 2003).

heard at the consultation stage, and only three of the technical standards – minimum wage, child labor, and safety and health laws – may be heard at the arbitral stage. If a member state is unwilling to resolve a claim after the lengthy consultation and evaluation process, the arbitral panel may ultimately assign and impose a monetary assessment. The offending state may agree to pay the money, which it must use to improve its own deficient enforcement of labor laws, or it may choose to endure trade sanctions by the aggrieved state, up to the amount of the monetary assessment.

B. Jordan

The Jordan Free Trade Agreement (Jordan FTA), signed in 2000, largely follows the NAFTA/NAALC model in requiring the enforcement of domestic labor laws, but includes some significant differences.[9] First, the labor provisions are included in the text of the agreement itself, rather than relegated to a side agreement. The agreement also commits the parties to "strive to ensure" that certain internationally recognized labor rights are "recognized and protected by domestic law," thus referencing international labor standards as a presumed domestic benchmark. The agreement additionally includes an expressed recognition that it is inappropriate to relax labor laws in order to encourage trade. Thus while Mexico was free to change its laws under NAALC, Jordan is -- if not "locked in" to existing labor standards -- at least somewhat constrained from any relaxation of labor protections. Finally, unlike the NAALC's tiers and gradations of rights, a single consultation and dispute resolution process applies to all violations of the US Jordan FTA, so that labor standards have the same access to the dispute settlement mechanism (DSM) as any commercial dispute.

While the U.S.-Jordan FTA significantly improved procedural access to the DSM, the agreement replaced the eleven substantive rights of the NAALC with a narrower list of five rights, previously articulated by Congress as requirements for less developed countries (LDC) to receive preferential tariff treatment under the Generalized System of Preferences (GSP).[10] Of the NAALC's eleven areas of fundamental rights, the Jordan

[9] *See* Agreement on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 ILM 63, art 6, at 70-71.
[10] *Compare* Jordan FTA, *supra* note 10, art. 6(6), at 71 *with* Trade Act of 1974, 19 USCS § 2467 (2005) (using substantially identical language).

FTA omits employment discrimination, equal pay for men and women, protection of migrants, and compensation for injury.

C. Chile/Singapore

With the election of a new president in 2000, Congress passed the Bipartisan Trade Promotion Authority Act of 2002.[11] The Act granted the new Administration the broad authority to negotiate trade pacts, but required U.S. trade negotiators to include worker rights under any pact, and limited the new Administration's ability to deviate too far from the precedents set by NAALC and Jordan. Thus, the Chile and Singapore Trade Agreements, both completed in 2003, closely follow the language of the Jordan FTA in many respects. The significant difference in the Chile and Singapore approach is that the dispute resolution mechanism is only available in disputes over the "effective enforcement" of domestic laws within the five protected areas. In the Jordan FTA, the mechanism could be triggered by virtually any dispute.

Finally, the Chile and Singapore FTAs take a more restrictive approach to sanctions.[12] While Jordan provides equitable treatment of labor and commercial disputes, and the NAALC allows sanctions up to any unpaid economic damage, the Chile and Singapore agreements establish initial monetary penalties at only half the level of the economic injury and cap the assessment at $15 million per year. Non-compliance still triggers sanctions, but only up to the amount of the assessment – i.e. half the level of the economic injury -- rather than the full measure of the economic harm as in the NAALC.

D. CAFTA

CAFTA's labor chapter again follows the NAALC tradition: it is built around the effective enforcement of domestic labor laws, and like Singapore and Chile, resort to its dispute mechanism is limited solely to the "effective enforcement" clause.[13] The CAFTA also references the same broad international labor commitments and its member

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[11] Bipartisan Trade Promotion Authority Act of 2002, 19 USC §§ 3801-3813 (2005)
[12] *See* Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy on the U.S.-Chile Free Trade Agreement (Feb. 28, 2003), at 6, *available at* http://www.ustr.gov/assets/ Trade_Agreements/Bilateral/Chile_FTA/Reports/asset_upload_file280_4926.pdf.
[13] *See* Dominican Republic-Central America-United States Free Trade Agreement art. 16, Aug. 5, 2004, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/ Section_Index.html [hereinafter CAFTA].

parties agree to "strive to ensure" that such principles are "recognized and protected by its (domestic) law." CAFTA includes the lock-in language of Jordan and includes the same list of labor rights noted in Jordan, Chile, and Singapore.

CAFTA's opponents, however, note that the agreement is qualitatively different than those concluded with Chile and Singapore, due to the lower level of labor protections in Central America.[14] Laws in Central America are viewed by some as inadequate, and enforcement throughout the region is widely regarded to be ineffective.[15]

Furthermore, the CAFTA agreement will supplant the existing GSP, under which Central American states currently enjoy preferential access to U.S. markets. By threatening to withdraw GSP preferences, the U.S. has been able to significantly influence domestic policy in recipient countries.[16] Replacing the unilateral system with the reciprocalism of CAFTA will eliminate that source of U.S. influence.

DISCUSSION

The reliance on the enforcement of domestic laws means that any labor linkage is only as strong as the trade partner's own standards. While this "enforce your own" model was criticized by labor advocates in its earlier formulations as essentially reducing labor standards to a tautology, it has come under the most intense strain in Central America, where labor protections are perceived as especially weak. The application of the model in Central America therefore represents the best test yet for the American model: if the approach holds promise for the future it must be both rigorous enough to be effective and flexible enough to adjust to the diversity of economies in the region.

As a matter of positive law, labor rights in Central America vary significantly.[17] Using international labor rights as a barometer, Central America would seem to boast

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[14] Bruce Stokes, *Trade: Labor Loses in Central America*, NATIONAL JOURNAL, Vol. 35, No. 9, at Trade, Mar. 1, 2003.
[15] *See* Juan Forero, *Report Criticizes Labor Standards in Central America*, N.Y. TIMES, July 1, 2005, at C2.
[16] *See* Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy on the U.S.-Central America Free Trade Agreement (March 19, 2004)[hereinafter CAFTA LAC], at V(B); *see also* HENRY J. FRUNDT, TRADE CONDITIONS AND LABOR RIGHTS: U.S. INITIATIVES, DOMINICAN AND CENTRAL AMERICAN RESPONSES 100 (1998)
[17] *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (Feb. 28, 2004) (describing worker protections in the Western Hemisphere), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/c14138.htm.

extraordinarily strong labor protections. With the exception of El Salvador, all of the Central American countries have ratified all eight core conventions of the International Labor Organization (ILO).[18] El Salvador has ratified six. The U.S., on the other hand, has ratified two. (Canada, though not a party to CAFTA, has ratified five of the eight.)

Observers, however, describe domestic Central American labor laws as meaningful, but badly under-enforced.[19] It is unsurprising that Costa Rica, with its relatively developed economy and infrastructure, boasts labor protections as strong as those in the world's most advanced countries, but Honduras, Guatemala, and Nicaragua -- among the poorest of the Central American countries – also include detailed and stringent labor protections in their labor codes and Constitutions. In all of the Central American economies, enforcement is identified as the real and persistent problem.

Additionally, in all of the nations of Central America, sizable informal economies pose a significant obstacle to realizing strong labor protections. By reducing standards that people come to expect in the workplace, and increasing the perceived costs of "formal" business, the informal economy undermines the internalization of cultural norms that can help self-police labor standards. Thus, the large informal economies of Central America serve to undermine enforcement measures and have contributed to a kind of "dual economy" of formal, trade-related businesses covered by law, and the informal, extra-legal bustle of the Central American market. Liberal economics suggests that the informal economy will diminish in size – for better or worse – as investment protections and private property reforms reduce the costs of entry to the formal market. However, the same theories also acknowledge that trade related structural shifts may well degrade established local economies (e.g. subsistence agrarian communities), and increase rates of urbanization, thus augmenting the informal, sub-legal labor pool. The informal economy is not "trade related," and therefore is not directly affected by CAFTA's labor chapter. But by creating a mechanism to spur national governments to focus enforcement resources on trade related industries, CAFTA may reduce protections that would otherwise be available in the informal economy, thus exacerbating the dualist,

[18] INT'L LABOUR ORG., RATIFICATIONS OF THE FUNDAMENTAL HUMAN RIGHTS CONVENTIONS BY COUNTRY, at http://www.ilo.org/ilolex/english/docs/declAM.htm (last visited Nov. 13, 2005) [hereinafter ILO Conventions].
[19] *See*, e.g., U.S. Dep't of State, *supra* note 59, Honduras, §6(e).

formalistic nature of the market, further deteriorating labor conditions in the informal economy, and ultimately undermining labor norms economy-wide.

While U.S. influence over Central American laws is reduced by the disappearance of GSP sanctions, the lack of enforcement resources in those countries had already significantly diminished the supposed effectiveness of the unilateral option. While U.S. threats to restrict access to its market have proven effective at changing the laws on the books in foreign countries, national governments have often refused, or been unable to enforce those laws, rendering the statutory change ineffective. Violations of the new codes are no more feared in the workplace than violations of the old code. Thus the effectiveness of the GSP and other unilateral tools may be overestimated. Perhaps given U.S. frustrations with previous experiences, the focus of U.S. efforts in the labor chapter appears to have shifted from statutory change to "effective enforcement."

Furthermore, even without access to the GSP, the U.S. continues to wield a number of powerful unilateral tools to restrict access to the U.S. market and investment.[20] For example, the guarantees of the Overseas Private Investment Corporation (OPIC),[21] and – most famously - Section 301 of the Trade Act of 1974 continue to represent potent options for influencing foreign laws.[22] Section 301 has historically been disfavored by trade advocates because it has generally required draconian trade sanctions; however, recent amendments suggest that it may be utilized more flexibly. Labor groups in the United States have begun to advocate for the more muscular use of Section 301 in the labor context. Without recourse to GSP, and with pressure mounting from labor and Congress, the Administration may ultimately find it hard to resist invoking the provision in the labor context (though it is unlikely to do so against the background of a free trade agreement).

However, actually imposing these restrictions continues to be controversial. These unilateral tools cut off trade between trading partners, therefore reducing employment in the partner country. By forcing workers out of work, the unilateral

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[20] *See, e.g.,* Pub. L. No. 93-618, §301, 88 Stat. 2041 (codified as amended at 19 U.S.C. 2411 (2005)).
[21] 22 U.S.C. 2191 (2005)
[22] *See* Jonathan P. Hiatt & Deborah Greenfield, *The Importance of Core Labor Rights in World Development*, 26 MICH. J. INT'L L. 39, 52-53 (2004); *See also Developments in the Law -- Legal Tools for Altering Labor Conditions Abroad*, 118 Harv. L. Rev. 2202, 2216 (2005).

sanctions have the perverse effect of hurting the very people they are trying to help.[23] Additionally, the unilateral use of trade sanctions would seem to undermine the very purpose and meaning of the trade pact and domestic labor protections. If the purpose of the labor chapter is to make domestic labor laws more meaningful, this kind of paternalistic legislation by the U.S. may actually be counterproductive by undermining its meaning and relevance. By exacerbating the "gap" between the law and the practice, and imposing an inorganic standard, the U.S. may be diminishing respect for the rule of law, thus working at cross purposes to the more recent "effective enforcement" goal. Finally, unilateral trade tools such as Section 301 simply suggest "bullying" by the United States. Besides the drawbacks for diplomatic relations, the perception will serve to reduce the attractiveness of the U.S. as a trading partner, and reduce the effectiveness of the U.S. as the chief representative for the liberal world order founded on free trade, self-determination, and the rule of law.

Another approach is to hold each of the member states to truly supranational standards. The International Labor Organization (ILO) has already developed such standards, and proponents of this approach note that the ILO is practiced in formulating labor standards that are culturally appropriate as well as developmentally flexible.[24] However, the approach is politically difficult in the U.S. due to the U.S. Senate's refusal to ratify more than two of the organization's eight core conventions.[25] Furthermore, as signatories to the ILO's Declaration on Fundamental Principles and Rights at Work, all member states are already bound to the four broad commitments outlined in the Declaration.[26] And as signatories to the core conventions, almost all of the Central American nations are already bound to the eight core conventions of the ILO. Despite the willingness of most states to ratify the conventions, the approach has proven

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[23] Interestingly, Frundt notes that the unilateral sanctions are generally perceived positively by workers in Central America.

[24] *See* Jean-Michel Servais, *Universal Labor Standards and National Cultures*, 26 COMP. LAB. L. & POL'Y J. 35, 37.

[25] *See* Kimberly Ann Elliot, *Labor Standards and the FTAA*, in INTEGRATING THE AMERICAS: FTAA AND BEYOND 641, 653 (Antoni Estevadeordal et al. eds., 2004).

[26] The Declaration includes: the freedom of association and effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labor; effective abolition of child labor; and elimination of discrimination in respect of employment and occupation. International Labour Organization, Declaration on Fundamental Principles and Rights at Work, June, 1998, 37 I.L.M. 1233, 1237 (1998), *available at* www.ilo.org.dyn/declaris/declarationweb.indexpage (last visited Dec. 9Nov. 13, 2005).

impractical due to the lack of any meaningful enforcement mechanism at the ILO, and the lack of political will to invest the organization with any such powers.[27] While the World Trade Organization (WTO) offers such a sanctioning mechanism, it has pointedly refused the task, and referred the subject back to the ILO.[28] Additionally, while the WTO has been noted for its effective dispute resolution mechanism in the commercial context, it is not clear that the organization has the expertise, resources, or structure necessary to police social disputes, such as labor violations.

Aside from the structural and procedural challenges to enforcing labor protections, there are cultural and ethical problems as well. Observers, for example, have noted that free trade agreements create integrationist forces in which national policies tend to harmonize over time.[29] Given the liberal and efficient business environment in the United States, these free trade agreements may tend to "Americanize" foreign law by stressing competition in the market and rewarding traditionally "rational" economic actors. Thus cultural norms may be subtly shifted simply as a matter of freer trade itself and not as a result of the labor chapter. The NAALC/CAFTA "enforce your own" approach with its intense focus on national sovereignty may be, in fact, the method best able to maintain diverse cultural norms in the face of harmonization.

While core labor rights, such as the right to organize and bargain collectively, are capable of creating and enforcing other labor protections, many nations have a history of corporatism that undermines the effectiveness of the labor movement. This problem was particularly acute in Mexico where the PRI had been in power for three quarters of a century. Large, established labor unions come to rely on sympathetic governments to intervene on their behalf, and long established governments come to rely on the labor machinery to keep them in office and quell dissent. The result is a distortion of the

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[27] *See Developments in the Law -- Legal Tools for Altering Labor Conditions Abroad*, *supra* note 66, at 2207; *see also* Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 607-10 (2005).

[28] *See* World Trade Organization, Ministerial Declaration of Dec. 13, 1996, WT/MIN (96)/DEC, Para. 4, 36 I.L.M. 218, 221 (1997), *available at* http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm.

[29] *See e.g.*, Stephen Zamora *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 4 LAW & POL'Y INT'L BUS. 391, 395 (1993)

instruments of political representation, giving rise to an authoritarian and paternalistic system of governance.[30]

Finally, the very concept of "the rule of law" may mean something very different in the U.S. and in Central America. It has already been noted that most Central American nations have freely ratified all eight core labor conventions of the ILO and have included substantive labor protections in their labor codes and constitutions. On the other hand, in the U.S. health and safety protections are often viewed as police powers left to the States under the federal system. National labor regulations are generally controversial, and international obligations are viewed with deep suspicion. Yet conditions in the American workplace are policed thoroughly and with exaction. The American common law approaches its object with the pragmatism of an independent and empowered judiciary isolated from the populism of democratic politics. Central America, on the other hand, seems guided by its history of formalism. There is a significant disjuncture between what the law says and how it is applied. Thus the "law" is less a statement of rules that govern society – as in the United States – and more a set of aspirational guidelines of an idealized society. Law remains important as an articulation of national goals, but it may be seen as less clearly relevant to life "on the ground". If there is such a divergence in the understanding of law, it would have a significant impact on the contractual nature of free trade treaties. For while the United States commits itself to enforce policies that are already enforced, Central America may have committed itself to enforce stringent laws unreflective of reality. It is not clear whether this divergence is due to the difference in economic development, the difference in legal systems (i.e. civil vs. common), or the difference in colonial histories. But if the U.S. should increasingly rely on the labor chapter to improve labor conditions abroad, it must approach the negotiations with a better understanding of this divergence; otherwise the different understandings of the treaty's requirements may create more tensions than they purport to solve and the unrealistic standards set for the U.S.'s trading partners will only undermine the credibility of the law.

[30] *See, generally,* STEPHEN ZAMORA, (forthcoming) Chapter 13 "Labour Law, Agrarian Reform, and Social Welfare"

ANALYSIS

While labor provisions in trade agreements have been most forcefully advocated by protectionists,[31] stronger protections for foreign workers are not necessarily motivated by self-interest.[32] Trade agreements promote growth and improve living conditions overall, but rapid development can result in dramatically unequal gains in wealth, thereby exacerbating social inequality.[33] By protecting basic human rights, developing human capital, and ensuring a broader distribution of gains throughout an economy, labor protections in trade agreements can help protect markets from economic shocks, ensure broader participation and accountability in society, spur domestic economic demand, and shore up support for more and freer trade.

The NAALC centerpiece – transposing domestic law into a supranational legal construct – was a significant innovation, and remains an attractive option for future agreements. The approach is politically acceptable to sovereign nations and is uniquely tailored to the culture and level of development in each member state.

The loudest procedural criticisms of the more recent agreements have been that the dispute resolution mechanism is unavailable for any but the most narrow and obvious violations, and that sanctions based on trade are virtually impossible to secure. But the importance of sanctions can be overstated. As demonstrated by the lack of any evaluation or arbitration proceedings under the NAALC,[34] states have proven reluctant plaintiffs for workers, and in the end, access to sanctions may be less important than subjecting member states to lengthy and embarrassing procedures. Simply by opening the door to talks and establishing guidelines for gradual escalation to a neutral, credible third party, these consultative processes can result in significant integration and reform.[35]

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[31] *See* Jagdish Bhagwati, *An Opportunity for Democrats to Denounce Protectionism*, FIN. TIMES, Aug. 10, 2005, at 17.
[32] *See* Jagdish Bhagwati, Symposium, *The Boundaries of the WTO: Afterword: The Question of Linkage*, 96 AJIL 126, 130 (2002)
[33] *See* KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 16 (Inst. for Int'l Econ. 2003).
[34] Weiss points out that no case has ever been appealed beyond the NAALC's consultative phase.
[35] *See* Harry Arthurs, *Reinventing Labor Law for the Global Economy*, 22 BERKELEY J. EMP. & LAB. L. 271, 287; *See also*, Weiss *supra* note 6, at 745.

But the relative unimportance of sanctions should not justify the severe limitations on access to the DSM. The significant drawback in CAFTA, Chile, and Singapore is that *any* access to dispute settlement is limited to the "effective enforcement" of domestic law. Jordan, by comparison, offers significantly more latitude for governments to engage in dialogue over the meaning of international labor obligations. Future labor agreements should incorporate the broader reach of the Jordan FTA in order to maximize opportunities to strengthen labor standards through consultation.

As a substantive matter, it is clear that that there is a significant gap between the law and enforcement in many states. Nevertheless, due to the lack of enforcement resources, it is not clear that application of different standards – e.g. ILO conventions – would significantly improve Central American – or any region's -- labor conditions.[36]

Rather than imposing external standards on sovereign states, the U.S. can help ensure that foreign workers are empowered to negotiate their own standards. When pressing claims or negotiating future substantive protections, U.S. negotiators must be mindful that some rights, such as the right to organize and bargain collectively, are in themselves capable of creating and enforcing all other standards. Indeed, building the capacity of labor organizations would dramatically expand the enforcement capacity of less developed countries (LDC) without significant state expenditure. And despite the anxieties of LDC governments, empirical studies have demonstrated that observance of core labor rights do not significantly reduce the comparative advantage of cheap labor.[37]

U.S. negotiators must keep in mind the history and political culture of trading partners when pressing these core labor rights. Trading partners with a history of corporatism, such as Mexico or – to a lesser extent – Nicaragua, may boast strong labor rights on paper, but in fact strictly constrain workers' rights. By focusing on the expansion and development of small, independent labor unions, the U.S. can help to dismantle corporatist systems of governance and provide greater political representation.

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[36] *See* Rob Portman, U.S. Trade Representative, Remarks to the Hispanic Alliance for Free Trade (June 9, 2005), *available at* http://www.ustr.gov/assets/Document_Library/USTR_Speeches/2005/asset_upload_file307_7781.pdf

[37] *See* Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61, 68-69.

The chief method by which the U.S. can advocate for these core standards is through expanded access to the DSM. While a reduction in sanctions will be seen by some to "de-claw" the DSM, chief purpose and benefit of the DSM so far has been to force governments into politically embarrassing discussions. In this context, daylight is eminently more acceptable to member states and may prove more effective as a disinfectant in the context of national social policies than monetary or trade sanctions.

Another step that the U.S. can take to improve labor protections in trade agreements is to maximize the resources, experience, and political sensitivity of the ILO.[38] Once governments have exhausted bilateral consultations, unsettled labor disputes should be referred to the ILO for neutral, third-party declaratory judgment. The procedural change would be made stronger still if the ILO were given the power to assess monetary penalties that would be spent on building labor's organizational capacity in the offending state.

Finally, while it is widely acknowledged that law in Latin America suffers from legal formalism, it is not widely understood how that different understanding may affect those nations in treaties with common law or highly developed countries such as the United States. More must be done to understand the intersection of these aspirational and pragmatic legal systems if future agreements are to be effective and credible.

Conclusion

The emerging U.S. approach linking free trade to domestic labor protections is a practical framework on which to base substantive and procedural rights. Nevertheless, much more can be done in future agreements to improve these safeguards for workers in a way that will maximize the gains from trade and reduce the most harmful effects of development. In order to improve future agreements, the U.S. should expand access to consultations within the dispute resolution mechanism, focus complaints on core rights such as organization and bargaining, encourage the development of small independent unions in corporatist cultures, and incorporate the ILO into the dispute settlement

[38] *See* Michel Hansenne, *Emerging Labour Standards: Strengthening the ILO and Cooperation with WTO*, *in* ESSAYS ON THE FUTURE OF THE WTO: FINDING A NEW BALANCE 65, 71 (Van der Borght ed., 2003)

process. Finally, the civil law systems of Central America and the Anglo-American common law system may have fundamentally different understandings of the rule of law. This difference in understanding may pose a significant disadvantage for developing or civil law systems entering treaties with the U.S., and should be better understood by both sides in order to maintain the credibility of the law and the effectiveness of the treaty.