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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

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AS THE UNITED States negotiates an ever-expanding set of free trade agreements built upon the pattern created under the North American Free Trade Agreement[1] ("NAFTA") it is important to analyze the successes and failures of the North American Agreement on Labor Cooperation[2] ("NAALC"), the NAFTA Labor Side Agreement and its progeny. The NAFTA/NAALC Parties include the United States and its nearest neighbors, Mexico, and Canada, but an ambitious United States free trade negotiations agenda aims to export this regional integration approach to other countries near and far.

Subsequently concluded free trade agreements ("FTA") with Jordan,[3] Chile,[4] and Singapore,[5] draw upon the NAFTA/NAALC model

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1. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (Parts I–III, Annex 401), 32 I.L.M. 605 (Parts IV–VIII, Annexes I–VII) [hereinafter NAFTA].

2. North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 [hereinafter NAALC]. Together with NAFTA and the North American Agreement on Environmental Cooperation, September 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 [hereinafter NAAEC], the NAALC entered into force on Jan. 1, 1994. *See* 19 U.S.C. § 3311(b) (2000); NAALC *supra*, art. 51, 32 I.L.M., at 1514.

3. *See* Agreement on the Establishment of a Free Trade Area, Oct. 24, 2000, U.S.-Jordan, 41 I.L.M. 63 [hereinafter U.S.-Jordan FTA].

4. *See* Office of the United States Trade Representative, U.S. and Chile Conclude Historic Free Trade Agreement 2 (Dec. 11, 2002) [hereinafter Chile Press Release], *available at* http://www.ustr.gov/releases/2002/12/02-114.htm (last visited Mar. 28, 2003). (as of this writing, the full text of the agreement was not available); Rosella Brevetti, *Vargo Praises Agriculture Provisions in U.S.-Chile Free Trade Agreement*, 20 Int'l Trade Rep. (BNA) 114 (Jan. 16, 2003) (legal scrub of text underway; no date set for public release); Office of the United States Trade Representative, Trade Facts: Free Trade With Chile: Summary of the

of trade— labor rights linkage,[6] albeit with important variations.[7] The administration has already notified Congress of its intent to negotiate additional similar bilateral free trade agreements with Australia,[8] and Morocco,[9] and is consulting with Congress about others.[10]

U.S.-Chile Free Trade Agreement [hereinafter Summary of the U.S.-Chile FTA] (official summary of the agreement), *available at* www.ustr.gov/regions/whemisphere/samerica/2002-12-11-chile_summary.pdf (last visited Jan. 13, 2003). Congressional approval of legislation to implement the agreement is not expected until late 2003, at the earliest. *See also* Christopher S. Rugaber et al., *Grassley to Separate Chile, Singapore Bills; Rep. Thomas Plans to Take Up Bill*, 20 Int'l Trade Rep. (BNA) 210 (Jan. 30, 2003).

5. *See* Office of the United States Trade Representative, Trade Facts: U.S., Singapore Agree on Core Elements of FTA: Agreement Would Spur Trade and Investment (summarizing agreement as "including improvements called for by Congress in Trade Promotion Authority" with respect to labor and the environment), *available at* http://www.ustr.gov/regions/sasia?/2002-12-11-singapore_summary.pdf (last visited Mar. 28, 2003) [hereinafter Summary of the U.S.-Singapore FTA]; Office of the United States Trade Representative, Trade Facts: Free Trade With Singapore: America's First Free Trade Agreement in Asia 9, *available at* http://www.ustr.gov (last visited Mar. 28, 2003) [hereinafter Singapore Trade Facts]. As of this writing, the full text of the agreement was not available. Legislation implementing the Singapore FTA was expected to be adopted in 2003, perhaps before the August Congressional recess. *See* Christopher S. Rugaber, *Envoys Expect Hill to Pass Singapore FTA by Summer, As Business Groups Laud Pact*, 20 Int'l Trade Rep. (BNA) 229 (Jan. 30, 2003).

6. There is voluminous literature about trade-labor linkage, both pro and con. For a recent example, see William B. Gould, IV, *Labor Law for a Global Economy: The Uneasy Case for International Labor Standards*, 80 NEB. L. REV. 715 (2001) (summarizing many of these arguments). This article takes as a given the view that expanded trade should be conditioned upon observance of basic labor standards. This is the policy stated by United States administrations in negotiating agreements such as the NAALC, and free trade agreements with Jordan, Chile and Singapore, and is now enshrined as federal policy in trade promotion authority legislation and in trade preference laws.

7. The most salient of these variations are discussed *infra* text and accompanying notes Part II.C.

8. *See* 148 CONG. REC. H10211 (daily ed. Nov. 22, 2002) (recording arrival of notification from the President that he intends to initiate negotiations for a free trade agreement with Australia); *see also* Office of the United States Trade Representative, USTR Zoellick Notifies Congress of Intent To Initiate Free Trade Negotiations With Australia (Nov. 13, 2002), *available at* http://www.ustr.gov/releases/2002/11/02-110.pdf (last visited Mar. 28, 2003); Letter from Robert B. Zoellick, to Senator Byrd (Nov. 11, 2002)(Notification of Presidential intent to initiate negotiations for a FTA with Australia), *available at* http://www.ustr.gov/releases/2002/11/2002-11-13-australia-byrd.PDF (last visited Mar. 28, 2003) [hereinafter Zoellick Australia Letter]; Christopher S. Rugaber, *USTR Announces Timetable for Australia Trade Talks; Industry Groups List Concerns*, 20 Int'l Trade Rep (BNA) 182 (Jan. 23, 2003).

9. *See* Request for Comments and Notice of Public Hearing Concerning Proposed United States–Morocco Free Trade Agreement, 67 Fed. Reg. 63187 (Oct. 10, 2002); Executive Communication 9677, 148 CONG. REC. H8020 (Daily ed. Oct. 16, 2002) (providing notification of intent to initiate negotiations for a FTA with Morocco); Executive Communication 9172, 148 CONG. REC. H6255 (Sept. 13, 2002) (providing a letter from USTR transmitting an outline of the administration's plans to pursue an FTA with Morocco); *see also* U.S.-Morocco Trade Backgrounder, *at* http://www.ustr.gov/regions/eu-med/middleeast/regonal.shtml (last visited Mar. 28, 2003); Gary G. Yerky, *U.S., Morocco End First*

The U.S.-Jordan agreement, in turn, has provided a model for U.S. trade promotion authority ("TPA") legislation. It links free trade and labor rights as a condition of limiting legislative procedure in consideration of a trade agreement to an up or down "fast-track" vote without possibility of amendment.[11] Pursuant to the Bipartisan Trade Promotion Authority Act ("BTPAA"), sub regional and regional free trade agreements are under negotiation in addition to the bilateral agreements just mentioned. A sub regional agreement, intended to cover Central America,[12] may embrace the NAALC model, the Jordan

Week of FTA Talks, On Target To Finish Negotiations This Year, 20 Int'l Trade Rep. (BNA) 244 (Jan. 30, 2003). The U.S.-Morocco talks include eleven negotiating groups, including one on labor rights.

10. A possible FTA with New Zealand is also under consideration. *See* Zoellick Australia Letter, *supra* note 8. Bills have been submitted which would authorize negotiation of FTAs with Turkey, S.3150, 148 CONG. REC. S10888–10889 (daily ed. Nov. 13, 2002), and with Afghanistan, S.3151, 148 CONG. REC. S 10888–10889 (daily ed. Nov. 13, 2002). Panama and the United States have started discussions about a bilateral FTA. *See* Rosella Brevetti, *U.S., Five Central American Nations Kick Off FTA Talks, Aim To Conclude by End of Year*, 20 Int'l Trade Rep (BNA) 113 (Jan. 16, 2003) [hereinafter *CAFTA Kick Off*]. Other Latin American countries, including Bolivia, Colombia, Peru, and Uruguay, have expressed an interest in negotiating a free trade pact with the United States *See* Rossella Brevetti, *Central American Nations Hope to Produce Free Trade Pact by Year's End*, 20 Int'l Trade Rep (BNA) 138 (Jan. 16, 2003) [hereinafter *CAFTA By Year's End*]. The Bush administration has also proposed to create a network of bilateral FTAs with members of the Association of Asian Nations. *See* Daniel Pruzin, *WTO Tries to Stay the Course for Cancun Ministerial and Beyond*, 20 Int'l Trade Rep (BNA) 126 (Jan. 16, 2003). Charlene Barshefsky, the USTR during the Clinton administration, has urged negotiation of bilateral treaties with other Middle Eastern countries, along with a Middle Eastern regional trade preference program. *See* Charlene Barshefsky, *The Middle East Belongs in the World Economy*, N.Y. TIMES, Feb. 22, 2003, at A35. In addition to FTAs negotiated by the United States, there is a growing network of customs union agreements and free trade areas to which the United States is not a party, among other countries in the region. *See generally, e.g.*, José Manuel Salazar-Xirinachs & Maryse Robert, *Introduction* to TOWARD FREE TRADE IN THE AMERICAS 1, 4 (José Manuel Salazar-Xirinachs & Maryse Robert eds., 2001); José Manuel Salazar-Xirinachs et al., *Customs Unions, in* TOWARD FREE TRADE IN THE AMERICAS 45 (José Manuel Salazar-Xirinachs & Maryse Robert eds., 2001); Maryse Robert, *Free Trade Agreements, in* TOWARD FREE TRADE IN THE AMERICAS 87 (José Manuel Salazar-Xirinachs & Maryse Robert eds., 2001).

11. *See* Bipartisan Trade Promotion Authority Act ("BTPAA") of 2002, 19 U.S.C. §§ 3801–3813 (2002). The up or down voting provisions regarding trade agreement implementation bills may be found at 19 U.S.C. § 2191 (2002). For the opposition view on "fast track," including a short history, see, for example, 148 CONG. REC. S8194 (daily ed. Sep. 4, 2002) (remarks of Senator Sarbanes). Senator Baucus, Senate Finance Committee Chair at the time the BTPAA was enacted and later ranking minority member, has urged that post-BTPAA FTAs track the U.S.-Jordan FTA "exactly" as to labor rights and their enforcement, to ensure conformity with the BTPAA criteria.

12. *See* Executive Communication 9679, 148 CONG. REC. H8019–8020 (daily ed. Oct. 16, 2002) (providing a notification of intent to initiate negotiations for FTA with the five member countries of the Central American Economic Integration System: Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua); Letter from Robert B. Zoellick, to Representative J. Dennis Hastert, *at* http://www.ustr.gov/new/index.shtml (last visited Jan. 13,

variation, the U.S.-Chile template, or in some other way satisfy the labor rights requirements of the BTPAA.[13] Negotiation of a Free Trade Agreement of the Americas ("FTAA"), expected to encompass thirty-four countries—nearly the entire Western Hemisphere—is also in progress.[14] However, the extent to which this agreement should incorporate any of the models[15] tying trade privileges to labor rights obliga-

2003) [hereinafter CAFTA House Letter]; Office of the United States Trade Representative, United States and Central American Nations Launch Free Trade Negotiations, (Jan. 8, 2003) *at* http://www.ustr.gov/releases/2003/01/03-01.htm [hereinafter CAFTA Press Release]; *see also* Office of the United States Trade Representative, Trade Facts: Free Trade With Central America: Strengthening Democracy, Promoting Prosperity, (Jan. 8, 2003) *at* http://www.ustr.gov/regions/whemisphere/camerica/2003-01-08-cafta-facts.PDF [hereinafter CAFTA Facts]. The ministers of the CAFTA countries have established five negotiating groups, including one on labor and environment. *See* Brevetti, *CAFTA By Year's End*, *supra* note 10.

13. Pronouncements that CAFTA will follow the U.S.-Chile template may be found, for example, in California Chamber of Commerce, U.S.-Chile Free Trade Agreement, http://www.calchamber.com/international/international_chile.htm; Letter from William S. Merkin, Executive Director, Labor/Industry Coalition for International Trade/Coalition for Open Trade to Gloria Blue, Office of the U.S.T.R. (Jan. 26, 2001), *available at* http://www.dbtrade.com/licit/chile_us_fta_com.htm. USTR Zoellick has termed the U.S.-Chile FTA "a benchmark" to work from in negotiating a CAFTA. *See* Brevetti, *CAFTA Kick Off*, *supra* note 10; Brevetti, *CAFTA By Year's End*, *supra* note 10 ("formalization of labor and environmental concerns along the lines of the U.S.-Chile FTA" is likely according to one trade consultant).

14. The proposed FTAA would encompass thirty-four countries throughout the hemisphere, including Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Colombia, Chile, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, the United States, Uruguay, and Venezuela. *See* Free Trade Area of the Americas homepage, http://www.ftaa-alca.org/alca_e.asp (last visited Mar. 28, 2003); GENERAL ACCOUNTING OFFICE, Free Trade Area of the Americas: Negotiators Move Toward Agreement That Will Have Benefits, Costs to U.S. Economy, GAO-01-1027, at 14 n.1 (Sep. 2001), http://www.gao.gov/new.items/d011027.pdf (last visited Mar. 28, 2003) [hereinafter GAO FTAA Report]. On the FTAA, see generally Peter F. Allgeier, Speech at the Parliamentary Summit for Hemispheric Integration, Theme: The NAFTA Experience and Hemispheric Integration (Nov. 19, 2002) *available at* http://www.ustr.gov/speech-test/assistant/2002-11-19_Allgeier.PDF; CAFTA Facts, *supra* note 12, at 2 (negotiation of CAFTA is a stepping stone, along with NAFTA and the U.S.-Chile FTA, towards goal of negotiating FTAA by 2005). The official text of the fragmentary second draft agreement is available at http://www.ustr.gov/regions/whemisphere/ftaa2002/secondtext.htm (last visited Mar. 28, 2003) [hereinafter FTAA Second Draft].

15. The Office of the USTR, for example, has recently backed away from acceptance of Chile as a model for other FTAs or the FTAA. *See, e.g.*, Rossella Brevetti, *U.S. Expects Brazil to Miss FTAA Deadline for Services, Procurement, Investment Offers*, 20 Int'l Trade Rep. (BNA) 236 (Jan. 30, 2003) (stating that the U.S.-Chile FTA is not a "precise template" for every agreement that the United States negotiates, according to Deputy USTR Allgeier).

tions is extremely controversial.[16] Negotiation of a separate regional free trade agreement with the South African Customs Union ("SACU"), comprised of South Africa, Namibia, Lesotho, Swaziland, and Botswana, has also commenced.[17]

I. Introduction

Inclusion of effective, enforceable labor rights provisions in a Central American Free Trade Agreement ("CAFTA") or an FTAA is especially imperative. These trade agreements would displace a combination of "carrots"[18] and "sticks"[19] provided in existing trade preference legislation, designed to improve developing country's labor

16. *See, e.g.*, César Gavira, *Integration and Interdependence in the Americas, in* TOWARD FREE TRADE IN THE AMERICAS 303, 314 (José Manuel Salazar-Xirinachs & Maryse Robert eds., 2001) (stating that the chances for concluding an FTAA on schedule by 2005 depend, *inter alia*, on "the prospects for reaching consensus on the treatment of environmental and labor issues in hemispheric dialogue"); José Manuel Salazar-Xirinachs & Maryse Robert, *The FTAA Process: From Miami 1994 to Quebec 2001, in* TOWARD FREE TRADE IN THE AMERICAS 279, 299 (José Manuel Salazar-Xirinachs & Maryse Robert eds., 2001). *See generally* GAO FTAA Report, *supra* note 14, at 45, 48, 50 (summarizing divergent views on inclusion of labor and environment commitments within FTAA).

17. Executive Communication 10064, 148 CONG. REC. H9022 (Nov. 14, 2002) (transmitting notification of Presidential intent to initiate negotiations for an FTA with the five member countries of the South African Customs Union). The ministers established five working groups, including one on labor and the environment. Congress has also declared a policy favoring negotiation of FTAs with sub-Saharan African countries and urged the administration to develop a plan and timetable for negotiations. *See* 19 U.S.C. § 3723 (2002).

18. "Carrots" refers to positive incentives for countries to comply with international labor, human rights, or other standards. Besides trade-related programs, there are several bodies of United States "carrot" legislation, conditioning foreign aid or other benefits upon a developing country, *inter alia*, ensuring basic labor rights to its labor force. The Foreign Assistance Act, for example, conditions certain United States Agency for International Development (USAID) funding for economic development on the applicant country satisfying labor rights and other criteria. *See* 22 U.S.C. § 2151 (2002). United States delegates to the World Bank, International Monetary Fund (IMF), and other international financial institutions are required by law to condition United States support for projects on the host country committing to ensure minimum labor rights protections. *See id.* § 1621. Products manufactured by bonded child labor may not be legally imported into the United States. *See* 19 U.S.C. § 1307 (2002). These provisions, being unrelated to tariff and non-tariff barriers to trade, would be less affected by the negotiation of new FTAs. Trade-related legislation which might survive negotiation of new FTAs is discussed *supra* note 17.

19. "Sticks" refers to negative responses to a country's failure to comply with international labor, human rights, and other norms. Some legislation incorporates both carrots and sticks, the offer of advantageous trade treatment upon satisfaction of labor rights conditions, plus the "stick" of a threat of withdrawal if those domestic labor rights are not maintained.

rights performance.[20] Unilateral American measures offer the "carrot" of trade benefits to induce countries to improve their labor policies as a condition[21] of being designated a beneficiary country.[22] These laws then provide the "stick" of the threat of withdrawal of trade preferences if the country's labor rights and other conditions fail to maintain the statutorily set standards, or fail to improve any further.[23]

20. Some United States legislation provides for trade-related carrots and sticks that would be less affected by free trade agreement developments than the trade preference provisions discussed above. The most important of these is section 301 of the Omnibus Trade Act of 1988, which permits the United States to take retaliatory trade action against a trading partner which commits "unfair trade practices," including labor rights violations. 19 U.S.C. § 2411 (2002). The United States may take retaliatory trade action "[i]f the [USTR] determines . . . that (1) an act, policy or practice of a foreign country is *unreasonable* . . . and burdens or restricts [United States] commerce, and (2) action is appropriate. . . ." *Id.* § 2411(b) (emphasis added). A policy or practice may be "unreasonable," even if it does not violate international legal rights of the United States, if it is "otherwise unfair and inequitable." *Id.* § 2411(d)(3)(A). Such acts, policies, or practices include those which

> constitute a persistent pattern of conduct that—(I) denies workers the right of association, (II) denies workers the rights to organize and bargain collectively, (III) permits any form of forced or compulsory labor, (IV) fails to provide a minimum age for the employment of children, or (V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers.

Id. § 2411(d)(3)(B)(iii). However, such acts are not to be treated as "unreasonable," if the USTR determines that

> (I) the foreign country has taken, or is taking actions that demonstrate a significant and tangible overall advancement in providing throughout the foreign country . . . the rights and other standards described [above], or (II) such acts, policies, and practices are not inconsistent with the level of economic development of the foreign country.

Id. § 2411(d)(3)(C)(i). Section 301 is unlikely to be affected by negotiation of new FTAs because Congress has strongly instructed the USTR to treat preservation of unilateral United States trade retaliation authority as a major bargaining objective in negotiations for any free trade agreement. *See* BTPAA, 19 U.S.C. § 3802(b)(14) (2002). A second trade-related scheme which new FTAs would probably leave unaltered is the Overseas Private Investment Corporation program ("OPIC"). OPIC insures overseas investment of United States businesses against loss owing to war, revolution, expropriation, and similar risks, provided that the country meets eligibility criteria including labor requirements. *See* 19 U.S.C. § 2191 (2002). The availability of insurance encourages foreign direct investment in these countries, a major incentive to improve their labor rights adoption and implementation.

21. Each of these laws involves several conditions in addition to labor rights conditions.

22. On non-reciprocal preferential trade arrangements in the Western Hemisphere, see generally Karsten Steinfatt, *Preferential and Partial Scope Trade Arrangements, in* TOWARD FREE TRADE IN THE AMERICAS 108 (José Manuel Salazar-Xirinachs & Maryse Robert eds., 2001)

23. On unilateral trade preference measures with labor conditionality, see generally Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review,* 22 COMP. LAB. L. & POL'Y J. 199 (2001); Lance Compa, *Exceptions and Conditions: The Multilateral Agreement on Investment and International labor Rights: A Failed Connection,* 31 CORNELL INT'L L.J. 683, 689 (1998). It is the threat of loss of trade preferences that would be

Based on their level of development,[24] most of the countries which would be covered by these FTAs are currently eligible for trade preference beneficiary designation[25] under the United States Generalized System of Preferences[26] ("GSP") and an alphabet soup of regional trade preference legislation, including the Caribbean Basin Economic Recovery Act[27] ("CBERA"), the U.S.-Caribbean Basin Trade Partnership Act[28] ("CBTPA"), the African Growth and Opportunity Act[29] ("AGOA"), the Andean Trade Preference Act[30] ("ATPA"), and the Andean Trade Promotion and Drug Eradication Act[31] ("ATPDEA").

CBERA-eligible countries include thirty Caribbean Basin countries, of which twenty-four have currently been designated benefi-

displaced by FTA coverage, so the proposed expansion of the free trading regime most implicates these types of linked labor rights provisions. Other United States programs, discussed *supra* note 22, offer incentives to countries to meet labor criteria. These would be unaffected by the negotiation of new trade agreements, because the incentives of these programs are not dependent on trade relations.

24. However, to become fully eligible for these preferences, countries must also satisfy additional qualifications which some of them do not meet. *See generally* Lance Compa, *supra* note 23, at 699.

25. After meeting the prerequisites for eligibility, countries still must satisfy additional criteria, including, *inter alia*, labor rights criteria, for beneficiary designation under each of these statutes.

26. 19 U.S.C. §§ 2461–2467 (1999 & Supp. 2002). The GSP provision defining "internationally recognized worker rights," Section 507(4) of the Trade Act of 1974, appears at *id.* § 2467(4). A 2002 amendment adding to the minimum age provision a prohibition on "worst forms of child labor" is found at 19 U.S.C. § 2467(4)(D). The GSP and regional trade preference legislation apply to "developing" countries. By various estimates, as many as twenty-five of the thirty-four FTAA countries could be considered to be smaller or developing economies. GAO FTAA Report, *supra* note 14, at 78.

27. 19 U.S.C. §§ 2701–2707 (1999 & Supp. 2002). Criteria for designation as a beneficiary country appears in § 2702(b),(c).

28. *Id.* §§ 2701–2707. Criteria for designation as a beneficiary country appear in §§ 2702(b),(c), 2703(b)(5)(B). On the operation of the CBTPA and CBERA, including their designation criteria, see generally Office of the United States Trade Representative, Fourth Report to Congress on the Operation of the Caribbean Basin Economic Recovery Act (December 31, 2002), *available at* http://www.ustr.gov/reports/2002CBI-final.pdf (last visited Mar. 28, 2003) [hereinafter CBERA Report]. CBTPA and CBERA are part of the broader Caribbean Basin Initiative ("CBI") program. A summary of the CBI programs may be found in Steinfatt, *supra* note 22, at 109–12.

29. 19 U.S.C. §§ 3701–3741 (1999 & Supp. 2002). Criteria for designation as a beneficiary country appear in § 3707(a).

30. 19 U.S.C. §§ 3201–3206 (1999 & Supp. 2002). Criteria for designation as a beneficiary country appear in § 3202(c),(d). A summary description of the ATPA program, prior to its 2002 amendment, may be found in Steinfatt, *supra* note 22, at 112–14.

31. Title XXXI of Act of Dec. 6, 2002, Pub. L. No. 107–210, amending, *inter alia*, the ATPA, 19 U.S.C. §§ 3201–3206 (2002). Criteria for beneficiary designation appear in §§ 3202(c),(d); 3203(b)(6)(B).

ciaries.[32] The list includes all five potential CAFTA countries, and over two-thirds of the thirty-four countries participating in the FTAA negotiations. ATPA and ATPDEA countries include Bolivia, Colombia, Ecuador, and Peru.[33]

Each of these unilateral United States trade preference programs includes its own criteria for designation as a beneficiary country. However, all take into account whether a country is "taking steps to afford internationally recognized worker rights"[34] within its borders. Some also assess the extent to which the country is actually providing such rights as a factor in attaining beneficiary status.[35] The definition of

32. *See* 19 U.S.C. § 2702(b) (2002) (listing countries eligible for designation). The twenty-four designated beneficiary countries are Antigua and Barbuda, Aruba, the Bahamas, Barbados, Belize, the British Virgin Islands, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, Panama, Saint Kitts and Christopher-Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad, and Tobago. *See* CBERA Report, *supra* note 28, at 3, 5–6. However, implementation of certain customs procedures is required as an additional condition of CBTPA designation. As of 2001, only fourteen of the CBERA countries had met these further requirements and been designated as CBTPA beneficiaries. *See id.* at 6. All five CAFTA countries are among the CBTPA beneficiaries. *See id.*

33. 19 U.S.C. § 3202(b)(1)(2002).

34. The GSP includes "taking steps to afford to workers . . . internationally recognized worker rights" both as an "exclusionary," 19 U.S.C. § 2462(b)(2)(G)(2002), and as a "permissive" criterion. 19 U.S.C. § 2462(c)(7)(2002). Both the ATPA and the CBERA follow the GSP pattern with similar language. *See* 19 U.S.C. § 3202(c)(7) (exclusionary) (ATPA); 19 U.S.C. § 2702(b)(7) (exclusionary) (CBERA); 19 U.S.C. § 3202(d)(8) (permissive) (ATPA); 19 U.S.C. § 2702(c)(8) (permissive) (CBERA). A country which is taking no steps, and does not afford these worker rights to the workers of that country is to be excluded from the program under the "exclusionary" provision. Beyond that, under the permissive provision, the President *may* (but need not) take account of whether the country is taking such steps, along with other factors, in deciding whether it should be designated a beneficiary. *See generally* CBERA Report, *supra* note 28, at 15. On the deliberate ambiguity of the provision, affording the President maximum discretion in applying the law to serve geopolitical and foreign policy interests, *see* Compa & Vogt, *supra* note 23, at 203–04.

35. The ATPDEA and the CBTPA go farther than the ATPA and the CBERA. The ATPDEA requires ATPA designation as a prerequisite to designation, 19 U.S.C. § 3203(b)(6)(B), and CBTPA requires CBERA designation as a prerequisite to designation, 19 U.S.C. § 2703(b)(5)(B)(2002). Both ATPDEA and CBTPA, as a condition of the enhanced trade benefits they provide, each add identical, additional criteria, including "the extent to which the country provides workers internationally recognized worker rights . . . ." The GSP, ATPDEA, and CBTPA common definition of "internationally recognized worker rights" is a bit stronger than the language provided under Section 301. They transmute the final Section 301 criterion, "(V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers," 19 U.S.C. § 2411(d)(3)(B)(iii)(V), into "acceptable conditions of work with respect to minimum wage, hours of work, and occupational safety and health." 19 U.S.C. § 2467(4)(E) (GSP); 19 U.S.C. § 3203(b)(6)(B)(iii)(V) (ATPDEA); 19 U.S.C. § 2703(b)(6)(B)(iii)(V) (CBTPA). In addition, the ATPDEA and CBTPA add a separate, additional labor criterion, "[w]hether the country has implemented its commitments to eliminate the worst forms of

"internationally recognized worker rights" in the regional trade preference laws is cross-referenced from the GSP provision.[36]

An FTAA or CAFTA would most likely displace the trade preferences of these programs, vitiating the vitality of the labor rights conditions required under the GSP statutes even if they remain on the books. As a result, absent strong and enforceable labor rights provisions in these proposed FTAs, the FTAs would represent a significant step *backwards* in the protection of labor rights as a condition of trade.

Some of the post-NAFTA free trade agreements take key steps forward toward vindicating basic labor principles as a condition of reducing trade barriers. They add international norms as a measure of domestic labor rights. They incorporate labor obligations into the body of the main free trade agreement. They expand applicability of trade sanctions as a stringent penalty for violations.[37]

At the same time, however, the labor rights provisions of subsequent trade agreements may, in other respects, be characterized as taking steps sideways or even backwards. Beneath a façade of progress, these agreements may actually decrease the scope of the substantive national commitments to provide labor protections for workers, the strength of those commitments, and their overall enforceability. In ad-

child labor," *id.* § 3203(b)(6)(B)(vi) (ATPDEA), § 2703(b)(5)(B)(vi) (CBTPA), drawn from an analogous GSP provision, rendering a country ineligible for designation as a beneficiary if it "has not implemented its commitments to eliminate the worst forms of child labor." 19 U.S.C. § 2462(b)(2)(H). *Compare* 19 U.S.C. §§ 2462(b)(2)(H), 2467(4)(D), 2467(6) (GSP), *with* § 3203(b)(6)(B)(iii)(VI), 3203(b)(6)(B)(iv) (ATPDEA), *and* § 2703(b)(5)(B)(iii)(VI), 2703(b)(5)(B)(iv) (CBTPA). On the eligibility criteria for CBERA and CBTPA, see generally CBERA Report, *supra* note 28, at 15–18.

36. The GSP definition includes:

> (A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children, and a prohibition on the worst forms of child labor, . . .; (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

19 U.S.C. § 2467(4) (2002). The GSP definition of "internationally recognized *worker* rights" is incorporated by reference in the regional trade preference legislation. 19 U.S.C. § 3202(c)(7) (ATPA, ATPDEA); § 2702(b)(7) (CBTPA, CBERA) (emphasis added). In addition, CBTPA and ATPDEA contain separate definitional provisions that are nearly identical to the GSP language. *See supra* notes 35, 36. The GSP and CBTPA/ATPDEA definitions are virtually identical with the definition of "internationally recognized *labor* rights" used in the U.S.-Jordan FTA, as well as in the definition of "core labor rights" used in the BTPAA. *See* 19 U.S.C. § 3813(6) (2002).

37. The Clinton administration consciously articulated these latter two developments as U.S.-Jordan FTA advances over NAFTA/NAALC, to be negotiated into a U.S.-Chile FTA. *See* J.F. Hornbeck, CRS Issue Brief: The U.S.-Chile Free Trade Agreement, *at* http://fpc.state.gov/6123.htm (last visited January 13, 2003).

dition, essential steps to improve the institutional operation of any labor rights regime have been ignored.

Assessment of the NAFTA Parties' experience interpreting, applying and enforcing the NAALC is particularly instructive regarding the design elements necessary to make labor rights provisions enforceable when they are negotiated in conjunction with free trade arrangements.[38]

Much of the criticism of the NAALC has focused on its lack of supranational standards,[39] the negotiated rather than adjudicated nature of the application and enforcement process,[40] the absence of trade sanctions penalties against a Party country found to have engaged in many types of systemic violations of the Agreement,[41] and the preclusion of any penalties directed at employers whose blatant violations of workers' rights establish the Party country's systematic breach of its obligations.[42] Some of these criticisms are misguided, others have merit, but they miss the main point.

38. In addition to the free trade agreements mentioned above, the United States has entered into bilateral FTAs with Israel, Canada, and Vietnam. None of these agreements, however, fits the NAFTA/NAALC or U.S-Jordan pattern. The agreement with Israel was negotiated in 1985, long before NAFTA set a new pattern for addressing labor (and environmental) issues in conjunction with free trade. *See* Agreement on the Establishment of a Free Trade Area, U.S.-Israel, April 22, 1985, 24 I.L.M. 653. The U.S.-Canada Free-Trade Agreement, H.R. REP. No. 216, at 297541 (1988), *reprinted in* 27 I.L.M. 281 (1988), done at Ottawa, December 22, 1987 and January 2, 1988, and at Washington, D.C. and Palm Springs, December 23, 1987, preceded NAFTA, and in many respects, laid the foundation for it. The Bilateral Trade Agreement to Normalize Relations with Vietnam was negotiated by the Clinton administration, after NAFTA but before the U.S.-Jordan FTA, as a means to reopen economic relations with a former adversary, at that time undergoing a transition from traditional communism in the direction of a market economy. *See generally* Background on the U.S.-Vietnam Bilateral Trade Agreement, http://www.ustr.gov/regions/asia-pacific/vtnmbackgrounder.htm. The agreement itself is available at http://www.ustr.gov/regions/asia-pacific/text.pdf.

39. *See, e.g.*, Jack I. Garvey, *A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*, 5 UCLA J. INT'L L. & FOREIGN AFF. 1, 19 (2000).

40. *See, e.g.*, Jack I. Garvey, *Current Development: Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L. L. 439, 442–43 (1995); Garvey, *supra* note 39, at 11. In my view, the lack of a permanent adjudicative tribunal creates significant problems beyond these.

41. *See, e.g., id.*

42. *See, e.g.*, Compa, *supra* note 23, at 710, citing as "representative" criticism Jerome I. Levinson, *NAFTA's Labor Side Agreement: Lessons from the First Three Years, in* INSTITUTE FOR POLICY STUDIES AND INTERNATIONAL LABOR RIGHTS FUND. Founded on a view which assimilated international treaty obligations into directly enforceable domestic law, this naïve view has since been abandoned for the most part.

It would be most apt to say that the NAALC fails to meet its own articulated standards regarding domestic labor law: of transparency,[43] access for private actors to appropriate tribunals to redress violations,[44] due process,[45] and effective enforcement.[46] The NAALC labor commitments themselves, while seemingly simple and clear, upon examination, are extremely difficult to interpret and apply.[47] The procedures for raising claims that a Party country has violated the NAALC are diplomatic and negotiatory, rather than adjudicatory,[48] failing rudimentary criteria for transparency and due process. Both in terms of procedures and in terms of remedies, the NAALC seems designed to thwart effective enforcement.[49]

The NAALC is analogous to a simple truth in advertising law regarding Party countries' labor laws. Its main promise is that as to labor rights, "what you see is what you get." But with the NAALC itself, citizens do not get what they believe they see: the tri-national commitment to fully effectuate domestic labor legislation is sabotaged by an emphasis on soft law and by the deceptive nature of the enforcement mechanisms and remedies. If strengthened labor rights are part of the consideration for enhanced free trade arrangements, then lack of definiteness, enforceability, and remedy render this consideration illusory; the apparent "obligations" undertaken become voluntary rather

43. NAALC, *supra* note 2, arts. 5–7, 32 I.L.M. at 1504.

44. *See id.* art. 4, 32 I.L.M. at 1503–04.

45. *See id.* art. 5, 32 I.L.M. at 1504.

46. *See id.* art. 3, 32 I.L.M. at 1503.

47. *See, e.g.*, Marley S. Weiss, *Foreword: Proceedings of the Seminar on International Treaties and Constitution Systems of the United States, Mexico, and Canada: Laboring in the Shadow of Regional Integration*, 22 MD. J. INT'L L. & TRADE 185 (1999). The legal uncertainties manifest in the seminar conducted as part of the ministerial implementation agreement in resolution of the Fisheries Ministry case, U.S. NAO 9601, particularly well illustrate this problem. *See Proceedings of the Seminar on International Treaties and Constitutional Systems of the United States, Mexico and Canada: Laboring in the Shadow of Regional Integration*, 22 MD. J. INT'L L. & TRADE 221 (1999) [hereinafter *NAALC Seminar Proceedings*].

48. *See, e.g.*, Garvey, *supra* note 39, at 12 ("essentially directed to achieving intergovernmental consultation and political compromise").

49. *See, e.g.*, Garvey, *supra* note 39, at 12 ("The amount of time, number of steps, and multiple provisions for consultation, leave no likelihood that sanctions will ever be imposed. . . . The Sanctions, as sanctions, are worthless."); MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE 200 (2000) (quoting a Mexican negotiator of the NAALC as saying "the system is not worth a damn. . . . Lots of public discourse, nothing more. This is the result we wanted."). This characterization of the intractable clumsiness of the protracted NAALC enforcement scheme has been made since the earliest days of the agreement, and may well reflect the intent of at least some of its framers.

than binding. Yet newer FTA labor rights provisions continue to suffer from this defect.

The U.S.-Jordan and U.S.-Chile trade agreements, supposedly the "gold standard" for incorporating labor rights,[50] epitomize the superficial solution of adding externally-set international labor standards to the supranational enforceability of domestic ones, and incorporating labor provisions in the main body of the agreement.[51] The inclusion of international labor norms was hoped by proponents to add clarity and certainty to the Party countries' labor commitments. Instead, they may add further complexity and opaqueness.[52] Labor rights advocates seem to be riveted on the threat of trade sanctions as a powerful stick to induce countries to maintain and domestically enforce labor standards. However, analogous domestic United States experience, as well as results under other United States legislation providing for trade sanctions, suggest that while nominally available, sanctions will virtually never be applied.[53]

This article suggests that deepening of the NAFTA/NAALC model should accompany any widening, particularly in the context of a trade area encompassing several Central American countries or the Western Hemisphere.[54] Only in the context of more stable institutional arrangements can one envisage labor provisions which fulfill the goals of the initial negotiation of the NAALC: to preserve existing labor laws; to protect against a downward spiral of labor laws and practices competitively intended to encourage expanded trade and for-

50. *Compare, e.g.*, 148 CONG. REC. S9933–9943 (daily ed. Oct. 4, 2002) (remarks of Senator Baucus, complaining that U.S.-Chile FTA may not meet the "Jordan standard" incorporated into the BTPAA), *with* 148 CONG. REC. S9107 (daily ed. Sept. 24, 2002) (remarks of Senator Grassley protesting that "labor officials plan to hold future agreements to standards set in . . . Jordan [FTA], which they consider a model of backing up labor . . . provisions with enforceable sanctions," that "some members of Congress are even arguing that future agreements must follow the 'Jordan Standard,'" and decrying the "public remarks of the Chairman of the Senate Finance Committee who urged the administration to follow the model of the Jordan Free Trade Agreement 'exactly' in implementing the labor and environmental provisions of the [BTPAA], contending instead that flexibility was intended under the BTPAA because "one size does not fit all" trading partner countries).

51. *See infra* text accompanying notes 122–124 (U.S.-Jordan); 152–157 (U.S.-Chile).

52. *See infra* text accompanying notes 177–178.

53. *See infra* text accompanying notes 103–106.

54. Starting with Mexican President Vicente Fox, many have cited a need to deepen institutional arrangements. *See, e.g.*, ROBERT A. PASTOR, TOWARD A NORTH AMERICAN COMMUNITY: LESSONS FROM THE OLD WORLD FOR THE NEW (2001); Robert A. Pastor, *NAFTA Is Not Enough: Steps toward a North American Community*, *in* THE FUTURE OF NORTH AMERICAN INTEGRATION 87 (Peter Hakim & Robert E. Litan eds., 2002); Andrés Rozental, *Integrating North America: A Mexican Perspective*, *in* THE FUTURE OF NORTH AMERICAN INTEGRATION 73, 79–82 (Peter Hakim & Robert E. Litan eds., 2002).

eign direct investment; to foster effective enforcement of each Party's domestic labor laws; and, ultimately, to result in a leveling upwards of labor rights and living standards.[55] In particular, unless the agreements incorporate their own labor standard-setting mechanism, two institutional elements are critical: a monitoring and enforcement agency, and a permanent, impartial tribunal. The substance of the "effective enforcement" commitment must be improved. In addition, remedies must be rethought to ensure more certain applicability as well as deterrent effect.

The following section of this article summarizes the main elements of the NAALC labor rights regime, and compares them to the approaches taken thereafter in the U.S.-Jordan FTA, the U.S.-Chile FTA, the U.S.-Singapore FTA, the labor requirements of the BTPAA, and the bargaining positions taken in the negotiations for a CAFTA and for an FTAA. The third section outlines the enforcement procedure and remedies provided under the NAALC, and presents a statistical analysis of the NAALC cases processed so far through the public communications/submissions procedure. It identifies deficiencies in the operation of the NAALC, made apparent through this examination of the nature of cases contested, as well as their resolution. The fourth section questions whether in later FTAs, progress in negotiating effective, enforceable labor rights provisions is in fact being made. It also presents conclusions about future development of agreements effectively conjoining labor rights and free trade arrangements.

II. Labor Rights Elements in the NAALC and Its Progeny

A. NAFTA and the NAALC: An Introductory Overview

As is detailed extensively elsewhere,[56] the labor and environmental provisions of NAFTA were an afterthought. The administration of

55. On the underlying goals behind negotiation of the NAALC, *see* FREDERICK W. MAYER, INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS (1998); *see also* NAALC, *supra* note 2, at 1502–03, stating

> improv[ing] working conditions and living standards in [each country], . . . *protect[s]*, enhance[s] and enforce[s] basic workers' rights; . . . *promoting* higher living standards as productivity increases; . . *fostering* investment with due regard for the importance of labor laws and principles; encouraging employers and employees in each country to comply with labor laws . . . .

Likewise, "(a) improve working conditions and living standards. . .; (b) promote, to the maximum extent possible, the [eleven] labor principles. . . ; and (f) promote compliance with and effective enforcement by each Party of its labor law . . . ." *Id.*

56. There is a very large area of literature on the negotiation and implementation of NAFTA, the NAAEC, and the NAALC. *See generally, e.g.*, MAYER, *supra* note 55; CAMERON & TOMLIN, *supra* note 49.

President George H.W. Bush negotiated the original free trade agreement, and during the 1992 presidential election campaign, the impact of free trade on the jobs and labor rights of Americans became a major campaign issue. Third party presidential candidate Ross Perot inveighed about the "great big sucking sound" that would be caused United States workers' jobs heading south to Mexico if NAFTA were ratified. United States Presidential Candidate Bill Clinton, caught between his commitment to expansion of free trade and the pressure from his political allies in the United States labor and environmental movements, crafted a compromise position: he would support NAFTA subject to the inclusion in side agreements of provisions protecting against a downward spiral in both labor and environmental protections.[57]

After his election, President Clinton attempted to make good on these campaign promises. It was not feasible to reopen the main agreement; both Canada and Mexico heavily resisted even negotiating side agreements including labor and the environment, regarded by many as independent of, if not at odds with, free trade. The eventual compromise was the negotiation of two weak side agreements.[58]

Several factors distinguish the negotiations for the North American agreements from other regional integration schemes. The economically,[59] militarily, and culturally[60] dominant position of the

57. *See, e.g.*, Garvey, *supra* note 39, at 9; CAMERON & TOMLIN, *supra* note 49, at 180–81.

58. *See generally, e.g.*, MAYER, *supra* note 55; CAMERON & TOMLIN, *supra* note 49, at 181–207. It has also been suggested that this made it easier for the Clinton administration to gain Congressional approval and to avoid an environmental impact review. *See, e.g.*, Garvey, *supra* note 40, at 440 & n.8.

59. Mexico's economy is less than one twentieth the size of that of the United States. *See* Office of the United States Trade Representative, Report on the Operation and Effect of the North American Free Trade Agreement, at 5, *available at* http://www.ustr.gov/reports.index.shtml [hereinafter NAFTA Effects Study]. Canada's is one-tenth. *See* Peter Hakim & Robert E. Litan, *Introduction*, *in* THE FUTURE OF NORTH AMERICAN INTEGRATION 1, 28 (Peter Hakim & Robert E. Litan eds., 2002); *see also, e.g.*, Perrin Beatty, *Canada in North America*, *in* THE FUTURE OF NORTH AMERICAN INTEGRATION 31, 53 (Peter Hakim & Robert E. Litan eds., 2002) ("Despite wide differences in the sizes of European countries' populations and economies, no one country is so dominant that the rest of the continent has to do business with it on its terms.").

60. As to Canada, see, for example, Lars Osberg & Teresa L. Cyrus, *Poverty Impacts of Trade, Macroeconomic and Social Policy—Canada and the United States in the 1990s*, *in* COMMISSION FOR LABOR COOPERATION, NORTH AMERICAN AGREEMENT ON LABOR COOPERATION, INCOMES AND PRODUCTIVITY IN NORTH AMERICA: PAPERS FROM THE 2000 SEMINAR 53, 54 (2001), *available at* http:// www.naalc.org/english/publications/seminar2000_papers.htm (last visited Mar. 27, 2003) (Canadians are "concern[ed] about national identity and cultural distinctiveness. The vast majority of Canadians live within 100 kilometers of the United States border and experience a daily inundation of American popular culture. Distinguishing ourselves from 'the Americans' has therefore long been a preoccupation of

United States relative to its two neighbors; Mexico's particular history of colonization, military, and economic subordination;[61] the enormous disparities in political development, economic development, and the standard of living between Mexico and the two northern countries[62] all combined to counteract ambitions for market unification with strong pressures to retain maximum political autonomy.[63] Different levels of entrenchment of the rule of law, and its antithesis, corruption and cronyism, among the three countries, reinforced opposition to deeper forms of regional integration.[64]

Throughout the negotiation of NAFTA, as well as during negotiation of the side agreements, Canada, Mexico, and the United States all evinced great concern that every aspect of the agreements maximize preservation of national sovereignty.[65] Each country had somewhat

many Canadians."). Both Mexican and Canadian concern about American dominance operate to discourage them from enthusiastically supporting possible future deepening of NAFTA into a customs union or economic community. *See, e.g.*, Hakim & Litan, *supra* note 59, at 26–27.

61. "Heroic opposition to American aggression is a central theme of Mexican history." MAYER, *supra* note 55, at 32. On the development of the Calvo doctrine, requiring foreign direct investors to abide by the same domestic laws and justice system as local residents, and to exhaust domestic law prior to invoking international remedies, and the impact upon this principle of NAFTA, see Bernardo Sepulveda Amor, *International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction*, 19 HOUS. J. INT'L L. 565 (1997). Canada has similar fears of being swallowed by its neighbor to the north, economically and culturally, if not politically. *See, e.g.*, Beatty, *supra* note 69, at 33–35, 56 ("Creating Canada required an act of conscious political will to overcome the strong pull of the United States, and maintaining its uniqueness requires similar determination.").

62. As Hakim & Litan put it, "The major members in the EU are more equal in size, whereas NAFTA is defined by its asymmetry." Hakim & Litan, *supra* note 59, at 16. These disparities have persisted through the present. *See, e.g., id.* at 20, 22–23, 25–26.

63. Mexican President Salinas, for example, announced that Mexico would seek "free trade with the U.S. . . . but not a common market like . . . Europe," after his Senate "consultation forum" urged him to negotiate an FTA with the United States that "would preserve the country's political and economic sovereignty and leave Mexico free to establish its trade policy with the rest of the world." MAYER, *supra* note 55, at 44 (quoting *Mexican President Calls for Free Trade with U.S.*, May 22, 1990).

64. Flaws in Mexican democracy, the rule of law, and the prevention of corruption remain through the present as key impediments to deepening the NAFTA regional integration arrangement. *See, e.g.*, Hakim & Litan, *supra* note 59, at 23, 25–26. However, it is far from clear why, if Mexican courts are not transparent, honest, fair, and reliable enough for NAFTA foreign investors, requiring instead availability of an international arbitral tribunal, *see* Sepulveda Amor, *supra* note 61, at 588–89, they are nevertheless good enough to ensure labor rights, domestic or international, to Mexican workers.

65. *See generally* CAMERON & TOMLIN, *supra* note 49; MAYER, *supra* note 55. As to the United States, *see also* Garvey, *supra* note 40, at 447–48 (adoption of ad hoc arbitration rather than a permanent tribunal under NAFTA "was recognition that the U.S. Congress would resist this additional loss of sovereignty on international trade issues"). Sepulveda Amor has gone so far as to argue that NAFTA's protections for United States and Canadian

different motives for adopting this position, and each emphasized different aspects, but this unifying concern is evident in both the structural arrangements and the substantive commitments of both NAFTA[66] and the NAALC.

The Parties' near-obsession with the preservation of sovereignty is immediately apparent in the NAALC text itself. The Preamble "affirm[s the Parties'] continuing respect for each Party's constitution and law."[67] The general commitment to maintain and strive "to provide for high labor standards," commences by "[a]ffirming full respect for each Party's constitution and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations."[68]

The parties to the NAALC were especially concerned with full preservation of the sovereignty of each Party in establishing or changing its own labor policy, legislation, and regulation. On the Mexican side in particular, retaining unaltered its corporatist system of industrial relations was deeply intertwined with the preservation of political hegemony for the dominant political party, the Revolutionary Institutional Party ("PRI"). Potential outside intervention in this area was a deal-breaker.[69]

As a result, the NAALC provides no content for substantive labor law other than the general commitment to maintain high standards in each of eleven covered labor law areas.[70] Promises to promote compliance with and provide effective enforcement of domestic labor laws, along with procedural guarantees regarding domestic law, constitute the only firm commitments in the agreement. The undertaking of these obligations is expressly made dependent upon the domestic political choices in each country as to the substantive provisions enacted and maintained in domestic labor law.[71] The listing of eleven mutually

investors violates the Mexican constitution both by delegating adjudicatory sovereignty to international institutions and by disfavoring Mexican investors compared to those from the two trading partner countries. *See* Sepulveda Amor, *supra* note 61, at 573.

66. *See, e.g.*, Hakim & Litan, *supra* note 59, at 18, 19; Beatty, *supra* note 59, at 53. "With the exception of dispute settlement provisions and NAFTA environmental and labor side agreements, the existing North American structure was built solely on international legal texts—often subject to differing interpretations." Rozental, *supra* note 54, at 79. *See generally* MAYER, *supra* note 55.

67. NAALC, *supra* note 2, at 1502–03.

68. *Id.* at 1503.

69. *See, e.g.*, CAMERON & TOMLIN, *supra* note 49, at 188–89, 191, 195–200, 204–07.

70. *See* NAALC, supra note 2, art. 2, at 1503.

71. Each Party's art. 3(1) obligation to "promote compliance with and effectively enforce its labor law," *id.* art. 3(1), at 1503, is subject to art. 42, *id.* at 1513, which excludes the

accepted labor principles in Annex 1 is preceded by the reservation that "[t]he following are guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law."[72] The insistence on sovereignty underlies the negotiators' failure to adopt any transnational labor standards in the NAALC and their refusal to provide any tri-national mechanism for their subsequent adoption.[73]

The sovereignty imperative also underlies the Parties' refusal to create stable, well-articulated tri-national institutions to implement and develop the Agreement.[74] The only tri-national structure is the Commission on Labor Cooperation[75] (the "Commission"). One component of the Commission, the Ministerial Council, is simply the labor ministers of each of the three Parties, rather than a true tri-national body.[76] The Ministerial Council is the governing body of the Commission, hence of the NAALC,[77] and operates by consensus.[78]

The Secretariat, which reports to the Ministerial Council, is the one permanent, tri-national body. The Secretariat management and staff owe their allegiance to the tri-national organization as a whole, rather than to their home countries which nominated them.[79] However, the Secretariat's functions are too limited for it to serve significant institutional purposes. It provides administrative support to the Ministerial Council, and conducts, sponsors, and publishes research on tri-national comparative labor law, industrial relations, and labor economics subjects.[80]

At the domestic level, each country has established a National Administrative Office ("NAO"). The NAOs serve as the contact point

possibility of one Party undertaking labor law enforcement activities in the territory of another Party. Art. 49, *id.* at 1513, excludes from actionable failures to effectively enforce domestic labor law the reasonable exercise of prosecutorial, investigatory, regulatory, or compliance discretion, as well as decisions about prioritization for enforcement purposes.

72. *Id.* annex 1, 32 I.L.M. at 1515–16.

73. To further make this point clear, "[t]he setting of all standards and levels in respect of minimum wages and labor protections for children and young persons by each Party," as opposed to enforcement of those standards set by each Party, is expressly excluded from "technical labor standards" the Parties commit to effectively enforce, at least with regards to the scope of potential enforcement proceedings at the higher levels. *Id.* art. 49(1), 32 I.L.M. at 1513–14.

74. *See, e.g.*, CAMERON & TOMLIN, *supra* note 49, at 183–85, 188–93, 198–99.

75. *See* NAALC, *supra* note 2, arts. 8–19, at 1504–07.

76. *See id.* arts. 8(2), 9(1), at 1504–05.

77. *See id.* art. 10(1), at 1505.

78. *See id.* art. 9(6), at 1505.

79. *See id.* art. 12(5), at 1506.

80. *See id.* arts. 13–14, at 1506–07.

within each government regarding the NAALC, as well as maintaining contacts between the three governments.[81] The NAOs are strictly national, rather than tri-national organs. In practice, they have been the main actors in turning the NAALC into an operational document. They organize and conduct "cooperative activities,"[82] and administer the public communications process, which initiates interpretation and enforcement of the agreement.[83]

The emphasis on safeguarding sovereignty underlies the failure to provide in any of the three agreements—NAFTA, the NAALC, and the NAAEC—for a permanent judicial or arbitral tribunal, for any tri-national prosecutorial arm to investigate and pursue claimed violations, for any firm method of enforcing and remedying violations apart from diplomacy, and for a realistically proportional remedy which would assist rather than further injure those already suffering because of their country's violations of its NAALC obligations.[84] The "hard" remedies of monetary assessments and trade sanctions apply to only a small fraction of the binding commitments in the NAALC. The remainder of the obligations, although binding, are only subject to investigation, reporting, and negotiation of a settlement for the violation, with the sunshine effect of publicity as the only real sanction.[85]

Complementing the "soft law" approach to enforcement are provisions for "cooperative activities." These are tri-nationally sponsored programs designed to enhance mutual understanding of the other countries' labor law regimes, industrial relations systems, the workings of their labor markets, and their prevalent personnel customs and practices.[86] They are no substitute for "hard law" mechanisms with meaningful deterrent effect to discourage breach of Party obligations. Nevertheless, NAALC cooperative activities have served important purposes.

81. *See id.* art. 16, at 1507.

82. *See* discussion *infra* Part III.A.

83. *See* discussion *infra* Part III.A.

84. *See, e.g.*, Garvey, *supra* note 40, at 447–48 (adopting ad hoc arbitration rather than a permanent tribunal under NAFTA); Rozental, *supra* note 54, at 79; CAMERON & TOMLIN, *supra* note 49, at 183–85, 188–93, 195, 198–99. The NAALC procedures and remedies have been castigated by many commentators. *See, e.g.*, Clyde Summers, *NAFTA's Labor Side Agreement and International Labor Standards*, 3 J. SMALL & EMERGING BUS. L. 173 (1999); Mark J. Russo, *NAALC: A Tex-Mex Requiem for Labor Cooperation*, 34 U. MIAMI INTER-AM. L. REV. 51 (2002).

85. Along with related flaws in the institutional arrangements, the procedures and remedies of the NAALC are discussed in greater detail in discussion *infra* Part II.B.1.

86. *See* NAALC, *supra* note 2, at 1505–06.

Cooperative activities have expanded and deepened the reservoir of comparative labor law and industrial relations expertise among the three countries.[87] "[T]o enhance mutually beneficial understanding of the laws and institutions governing labor in each Party's territory"[88] was an explicit objective of the NAALC, both in its own right and as a means to achieve other goals, including enhanced productivity and improved labor law design and enforcement. By facilitating increased contacts among the labor unions, NGOs, employers, and government officials, cooperative activities have encouraged development of a tri-national web of contacts.

Both the expertise and the contacts have proven essential in spawning a modicum of utilization of the NAALC's creaky enforcement machinery. Worker rights advocates, both NGOs and trade unions, have drawn upon their strengthened network of cross-border relationships and their broadened expertise in each other's labor law and practices, to jointly assemble public communications/submissions challenging each country's failure to effectively realize labor principles they purport to have enacted into domestic law.[89]

The major innovation of the NAALC is its solution to the competing demands of preservation of sovereignty, on the one hand, and adoption of internationally enforceable law rights obligations on the other: the NAALC transposes domestic law into the tri-lateral agreement, rendering it an international obligation.[90] This labor rights innovation has been carried forward in every FTA into which the United States has entered since NAFTA. The underlying premise of this approach is that domestic labor law is adequate to fulfill mutually agreed upon fundamental labor principles, so long as it is fully and effectively enforced. A review of the interpretation, application, and dispute res-

87. *See generally* Commission on Labor Cooperation, The Ministerial Council's Review of the North American Agreement on Labor Cooperation, *at* http://www.naalc.org/english/publications/review.htm (last visited Mar. 28, 2003) [hereinafter Four Year Review Report]; U.S. National Advisory Committee, Report of the United States National Advisory Committee Reviewing the First Four Years of Operation of the North American Agreement on Labor Cooperation, *reprinted in* 1998 Daily Lab. Rep. (BNA) No. 89, at D33 (May 8, 1998), [hereinafter NAC Four Year Report]. A summary of pre-1998 activities may be found in the Ministerial Council's Review of the North American Agreement on Labor Cooperation, http://www.naalc.org/english/publications/review.htm (last visited Mar. 28, 2003). Information about more recent activities may be found on the U.S. NAO website, *at* http://www.dol.gov/ilab/public/programs/nao/main.htm (last visited Mar. 28, 2003), and the Canadian NAO website, http://www.labour-travail.hrdc-drhc.gc.ca/doc/ialc-cidt/eng/e/listnaalc.html (last visited Mar. 28, 2003).

88. NAALC, *supra* note 2, at 1503.

89. *See* discussion *infra* Part II.B.2c.

90. *See generally* Weiss, *supra* note 47, at 185.

olution processes established by the NAALC, along with the public communications/submissions processes thereunder, however, suggests that the sovereignty-driven institutional architecture undercuts the potential of this approach to accomplish these aims.[91]

B. Nature, Scope, and Strength of the Labor-Related Obligations in the NAALC

The labor rights obligations provided in conjunction with a free trade agreement may be analyzed in four respects: (1) the substantive areas made subject to labor guarantees; (2) the sources of law, domestic and international, made subject to the commitments, including the interrelation between commitments about domestic and international law, as well as problems of clarity in determining the norms to which the Parties commit; (3) the strength of the commitment, measured both in terms of the promise, and in terms of the violation which may trigger enforcement measures; and (4) procedural obligations, such as transparency of process, due process, and rule of law in the country's provision of labor rights to its labor force. This section will analyze the NAALC in terms of these four obligations.

Consider the NAALC as the starting point for comparison. A fundamental objective of the Agreement is to "promote, to the maximum extent possible," eleven labor law principles mutually embraced by each of the Parties.[92] The eleven principles include:

(1) freedom of association and the right to organize;
(2) the right to bargain collectively;
(3) the right to strike;
(4) the prohibition of forced labor;
(5) labor protections for children and young persons;
(6) assurance of minimum labor standards;
(7) elimination of employment discrimination;
(8) equal pay for women and men;
(9) prevention of occupational injuries and illnesses;
(10) compensation in cases of occupational illnesses and injuries; and
(11) protection of migrant workers.[93]

91. *See* discussion *infra* Part III.
92. NAALC, *supra* note 2, art. 1(b), at 1503.
93. *Id.* annex 1, 32 I.L.M. at 1515–16.

The term "labor law" is defined in subject matter terms equivalent to these eleven principles.[94] Two additional objectives of the NAALC are to "promote compliance with, and effective enforcement" of each Party's labor law by that Party,"[95] and to "foster transparency in the administration of labor law."[96]

The three Party countries assume six binding obligations, which amplify and transform into more executable form the NAALC objectives. Five of the six are specific obligations whose scope is defined as encompassing the same eleven areas of "labor law."[97] These five obligations may all be regarded as promoting the rule of law in the domestic labor law arena, with the term "labor law" referring to the eleven areas addressed in the labor principles listed previously.

The core specific obligation is the broad and central commitment to "promote compliance with and effectively enforce its [domestic] labor law through appropriate government action."[98] Other specific obligations establish conditions necessary to mobilize the participation of private actors in promoting compliance and enforcement of domestic labor law by meeting basic standards of due process. One requires each country to include provisions in its domestic law which will ensure access to enforcement procedures for all persons bearing rights under domestic labor law.[99] Another obligates each country to ensure that its domestic labor law procedures are "fair, equitable, and transparent" through a series of detailed due process-related requirements.[100] A fourth specific obligation is for each country to publish or

94. *Compare* annex 1, 32 I.L.M. at 1515–16 (listing the eleven labor principles), *with* art. 49 (defining "labor law"), 32 I.L.M. at 1513–14.

95. *Id.* art. 1(f), 32 I.L.M. at 1503.

96. *Id.* art. 1(g), 32 I.L.M. at 1503.

97. The sixth is a "general commitment" to establish and maintain "high labor standards, consistent with high quality and productivity workplaces, and . . . [to] continue to strive to improve those standards in that light." *Id.*

98. *Id.*

99. This includes not only an ability to invoke the procedures, but also access to whatever tribunals are designated under domestic law as competent to handle such matters, whether they be "administrative, quasi-judicial, judicial or labor tribunals." *Id.* art. 4, at 1503–04. However, each Party is free, as it chooses, to establish a separate labor law tribunal system, or to handle such matters within its judicial system for enforcement of laws in general. *Id.* at art. 5(8).

100. *Id.* art. 5(1), 32 I.L.M. at 1504. Procedures must comply with due process of law; proceedings must be open to the public "except where the administration of justice otherwise requires;" the parties to the proceedings must be entitled to present evidence or information and to support or defend their positions; the proceedings may not involve unreasonable costs, time limits, or unwarranted delays, and must not be unreasonably complicated. *Id.* Final decisions must be in writing, available without delay to the parties, and to the extent consistent with domestic law, to the public, and must be based on the evidence

otherwise make available to interested persons and Parties its domestic laws, regulations, procedures, and administrative rulings of general application.[101] This obligation, too, is aimed at promoting transparency. The final obligation is to promote public education and awareness and ensure public availability of information about the Party's labor laws, including substantive rights, enforcement, and compliance procedures; in addition to contributing to transparency, this obligation is also related to promoting enforcement by mobilizing the complaints of affected citizens.[102]

All of these are binding obligations, although enforcement mechanisms in some aspects of the agreement are stronger than others. All are strong obligations with few limiting conditions, violation of which would seem to the uninitiated observer to be readily adjudicable were an adjudicatory enforcement process available.[103] However, in the enforcement section, additional conditions and limitations are added that sharply curtail enforceability of these formally binding obligations. At higher stages of the implementation and enforcement procedure, a claim of failure to effectively enforce domestic law must be both "trade related" and involve a "persistent pattern of practice."[104] Moreover, only eight of the eleven labor law principles may be the subject of higher level procedures, excluding the three pertaining to union organizing, bargaining, and the right to strike.[105] Only three of the eleven labor law subject areas may reach the final stage of the

submitted by the parties, or as to that which the parties had the opportunity to be heard during the proceedings. *See id.* art. 5(2), 32 I.L.M. at 1504. There must be an appropriate right to seek review and a correction of final decisions. *See id.* art. 5(3), 32 I.L.M. at 1504. Both first instance and appellate tribunals must be "impartial and independent and . . . not have any substantial interest in the outcome of the matter." *Id.* art. 5(4), 32 I.L.M. at 1504. Finally, appropriate remedies must be available to litigants in these labor law proceedings, which may include, "as appropriate," fines, penalties, imprisonment, injunctions, emergency workplace closures, orders, and compliance agreements. *Id.* art. 5(5), 32 I.L.M. at 1504.

101. *See id.* art. 6(1), 32 I.L.M. at 1504. If the Party country's law so requires, it must also publish in advance, and afford interested persons a reasonable opportunity for comment on measures proposed for adoption. *Id.* art. 6(2), 32 I.L.M. at 1504.

102. *See id.* art. 7, 32 I.L.M. at 1504.

103. *See* discussion *infra* Part III.B.

104. NAALC, *supra* note 2, arts. 23, 27(1) 29(a), 49(1), 32 I.L.M. at 1508–09, 1514.

105. *See id.* art. 23(2), 32 I.L.M. at 1508 (limiting coverage of Evaluation Committee of Expert stage to "occupational safety and health or other technical labor standards); *see also* art. 49(1), 32 I.L.M. at 1515 (defining technical labor standards so as to exclude freedom of association, collective bargaining, and the right to strike).

dispute resolution process, where fines or trade sanctions are available.[106]

The NAALC neither incorporates international labor law standards nor sets any of its own to apply to domestic labor law. Rather, the negotiators analyzed the domestic laws of the other two parties in advance of entering into the agreement, concluding that they met "high labor standards."[107] On that basis, they opted to transform the domestic labor law regimes of each Party into the basis for their international commitments under the NAALC, minimizing external intrusion into their respective sovereignties. While the countries generally commit to maintain and "strive to improve" their high labor standards,[108] they reserve the right, at any time, to modify their laws in any way they deem appropriate.[109]

To summarize, in the NAALC scheme, (1) there are eleven covered substantive subject areas of labor law; (2) the only sources of law formally made subject to NAALC commitments are domestic law; (3) the strength of the labor law commitment is relatively high, including "promot[ing] compliance" and "effective[ly] enforce[ing]" domestic labor law; however, for higher stages of the enforcement process, this standard is weakened by requiring that the country have engaged in a systematic "pattern of practice" of violation and narrowed by requiring that the pattern demonstrably be "trade-related" in its effects if not in its intent; the Achilles heel is the reservation of each country's right to make changes in their labor laws, downward as well as upward; as to eight of the eleven labor principles, it is further weakened by their exclusion from higher steps of the enforcement process; and (4) due process and other procedural commitments are extensive and stringent and apply to all eleven covered substantive labor law areas; however, higher stages of the enforcement process are of questionable applicability to the procedural commitments.

106. *See id.* art. 29(1), 32 I.L.M. at 1509 (limiting arbitral panel dispute resolution matters to claims of persistent non-enforcement of occupational safety and health, child labor, and minimum wage laws).

107. *Id.* art. 2, at 1503; annex 1, at 1515.

108. *See id.* art. 2, 32 I.L.M. at 1503.

109. *See id.; see also* art. 49, 32 I.L.M. at 1514 (defining "technical labor standards," and excluding from obligations of the NAALC "the setting [as opposed to enforcing] of all standards and levels in respect of minimum wages and labor protections for children and young persons").

C. Labor Provisions in Later FTAs

1. Canadian Bilateral FTAs Arising from Stalled United States Talks Due to a Lack of Fast Track Authority

At the time NAFTA, the NAAEC, and the NAALC went into effect, Chile and the United States were already in negotiations over potential Chilean accession to the North American agreements. However, after expiration of "fast track" authority and Congressional refusal to renew it, the Clinton administration found itself unable to conclude an FTA with Chile, or for that matter, with any other country, until nearly the end of the second Clinton administration.

In the interim, Canada negotiated its own free trade agreement with Chile, originally intended to fill the gap until Congress conferred fast track authority on the United States President so that Chile could accede to NAFTA.[110] The Canada-Chile FTA,[111] parallel to NAFTA, is accompanied by the Canada-Chile Agreement on Labour Cooperation ("CCALC"), along with an environmental side agreement.[112] The subsequently negotiated Canada-Costa Rica FTA labor and environmental side agreements[113] also follow the approach of a main FTA plus two side agreements.

For the most part, the commitments and the institutional arrangements of the two Canadian bilateral labor side agreements, follow the NAFTA/NAALC model. Effective enforcement of domestic labor law is the main commitment,[114] coupled with transparency, ac-

110. *See, e.g.*, Robert, *supra* note 10, at 103.

111. Canada-Chile Free Trade Agreement, Dec. 4, 1996, 36 I.L.M. 1067 [hereinafter CCFTA]. Chile and Mexico negotiated an FTA in 1998. *See, e.g.*, Robert, *supra* note 10, at 104. Chile is already a party to an agreement with the five Central American countries with whom the United States is seeking to negotiate a CAFTA. *See, e.g., id.* at 105–06; *see also* California Chamber of Commerce, *supra* note 13. In addition, Chile recently entered into a bilateral FTA with South Korea. *See* Chile-U.S. Free Trade Agreement FTA News: Chile and Korea Reach Free Trade Agreement (Oct. 24, 2002), *at* http://www.chileinfo.com/fta/fta_news.html?news_id=3db87441375696c8_14166 (last visited Jan. 13, 2003).

112. *See* Canada-Chile Agreement on Labour Cooperation, Feb. 6, 1997, 36 I.L.M. 1213, [hereinafter CCALC], *available at* http://labour.hrdc-drhc.gc.ca/psait_spila/agreement/index.cdoc/english (last visited Mar. 28, 2003); Canada-Chile Agreement on Environmental Cooperation, Feb. 6, 1997, 36 I.L.M. 1193 (1997).

113. Free Trade Agreement, Canada-Costa Rica, *available at* http://www.sice.oas.org/Trade/cancr/English/cancrin.asp (last visited Mar. 28, 2003); Agreement on Environmental Cooperation, *available at* http://www.sice.oas.org/Trade/cancr/English/env.asp (last visited Mar. 28, 2003); Agreement on Labor Cooperation, Canada-Costa Rica [hereinafter Canada-Costa Rica ALC], *available at* http://www.sice.oas.org/Trade/cancr/English/labore.asp (last visited Mar. 28, 2003).

114. *Compare* CCALC, *supra* note 112, art. 3, 36 I.L.M. at 1217 ("promote compliance with and effectively enforce its labour law"), *and* Canada-Costa Rica ALC, *supra* note 113,

cess to a suitable tribunal to enforce rights, and other due process obligations.[115] Weak bi-national institutions,[116] NAOs relabeled "contact points,"[117] and an emphasis on cooperative activities[118] are likewise drawn from the NAALC model.

The Canada-Costa Rica Agreement on Labour Cooperation ("Canada-Costa Rica ALC"), does improve upon the labor commitments by mandating a firmer minimum standard, drawn in part from international labor instruments, against which to measure domestic labor legislation.[119] However, the agreement virtually eliminates meaningful enforcement sanctions as to *all* labor rights commitments.[120]

One step forward, one step back.

2. U.S.-Jordan FTA

The core labor rights provision of the U.S.-Jordan FTA is a NAALC-like obligation for each Party to effectively enforce its domestic labor laws, although this "effective enforcement" obligation is narrow compared to the scope of coverage of the obligation under the NAALC.[121] On the other hand, the U.S.-Jordan FTA expands upon the NAFTA/NAALC pattern in four important respects, each responsive to widespread critical reaction to the NAFTA/NAALC scheme.

First, unlike the NAFTA Labor Side Agreement, the labor provisions of the U.S.-Jordan free trade arrangement are contained within the text of the main trade agreement,[122] setting an important prece-

art. 4 ("promote compliance with and effectively enforce its labour law"), *with* NAALC, *supra* note 2, art. 3, 32 I.L.M. at 1503.

115. *Compare* CCALC, *supra* note 112, arts. 4–7, 36 I.L.M. at 1217–18, *and* Canada-Costa Rica ALC, *supra* note 113, arts. 5–8 *with* NAALC, *supra* note 2, arts. 4–7, 32 I.L.M. at 1503–04.

116. *Compare* CCALC, *supra* note 112, arts. 8–16, 36 I.L.M. at 1218–21 (institutional mechanisms, including Council composed of labour ministers or their designees), *and* Canada-Costa Rica ALC, *supra* note 115, art. 9 (ministerial council), *with* NAALC, *supra* note 2, arts. 8–16, 32 I.L.M. at 1505 (institutional mechanisms, including Council composed of labor ministers or their designees).

117. *Compare* CCALC, *supra* note 112, arts. 13–14, 36 I.L.M. at 1220–21 (National Secretariats as national points of contact), *and* Canada-Costa Rica ALC, *supra* note 113, art. 10 (national points of contact), *with* NAALC, *supra* note 2, arts. 15–16, 32 I.L.M. at 1507 (National Administrative Offices as national points of contact).

118. *Compare* CCALC, *supra* note 112, art. 11, 36 I.L.M. at 1220–21 (cooperative activities), *and* Canada-Costa Rica ALC, *supra* note 113, art. 12, *with* NAALC, *supra* note 2, art. 11, 32 I.L.M. at 1505 (cooperative activities).

119. *See* Canada-Costs Rica ALC, *supra* note 113, art. 2.

120. *See id.* arts. 11, 13–23.

121. *See* discussion *infra* Part III.A.

122. U.S.-Jordan FTA, *supra* note 3, art. 6, 41 I.L.M. at 70–71.

dent for future trade agreements.[123] Second, the U.S.-Jordan FTA commits the Parties to "strive to ensure" that internationally recognized labor rights on specified topics "are recognized and protected by domestic law."[124] Third, these provisions are coupled with an express recognition that "it is inappropriate to encourage trade by relaxing domestic labor laws," and a promise to "strive to ensure that it does not waive or otherwise derogate from" its labor laws as a means of attracting trade or investment.[125] I refer to this as the "anti-relaxation" commitment. Fourth, a single consultation and dispute resolution process applies to all violations of the U.S.-Jordan FTA, whether trade-, environmental-, or labor-related, culminating in the possibility that the "affected Party" will exercise its "entitle[ment] to take any appropriate and commensurate" trade sanction measure.[126] This parity of treatment of violations and sanctions was a major goal of labor rights advocates, particularly the AFL-CIO,[127] although its prospects for achieving the underlying objective of improved labor rights compliance by employers in trading partner countries are cloudy.

Measured on the same criteria as the NAALC, the U.S.-Jordan FTA (a) covers a narrower range of substantive labor law than the NAALC; (b) incorporates both international and domestic labor law norms, unlike the NAALC's incorporation only of domestic norms; (c) strengthens the commitment for the enforcement of domestic labor laws, and is in some respects greater and in other respects lesser than in the NAALC, but the strength of the commitment as to other

123. The United States administration has trumpeted this inclusion of labor provisions in the main body of the free trade agreement as being "the first time ever." United States Embassy in Amman, Jordan, FTA Frequently Asked Questions 1 [hereinafter US-Jordan FTA FAQs], *at* http://usembassy-amman.org.jo/FTA/FTA.html (last visited January 13, 2003). However, the United States Trade Representative more carefully characterizes this approach as "the first time in a U.S. trade agreement." Office of the United States Trade Representative, The U.S.-Jordan Free Trade Agreement: Fact Sheet 2, http://www.ustr.gov/releases/2000/10/factsheet.html (last visited Mar. 28, 2003).

124. U.S.-Jordan FTA, *supra* note 3, art. 6(1), 41 I.L.M. at 70; *see also* art. 6(3), 41 I.L.M. at 70 ("Each Party shall strive to ensure that its laws provide for labor standards consistent with the [specified] internationally recognized labor rights and shall strive to improve those standards in that light.").

125. U.S.-Jordan FTA, *supra* note 3, art. 6(2), 41 I.L.M. at 70.

126. U.S.-Jordan FTA, *supra* note 3, arts. 16, 17, 41 I.L.M. at 76–78. However, as a condition of bringing the agreement to the floor for a vote, the leadership of the United States House of Representatives insisted on assurances that the two countries would not rely on trade sanctions to respond to violations of the labor and environmental provisions of the agreement. In response, the two countries exchanged letters stating that they would seek methods to "help to secure compliance without recourse to traditional sanctions."

127. *See, e.g.*, 148 CONG. REC. S9107 (daily ed. Sept. 24, 2002) (remarks of Senator Grassley) (AFL-CIO plotting to ensure that future FTAs provide rigid parity of treatment).

labor provisions is uncertain; and (d) provides no procedural or due process commitments whatsoever.

The U.S.-Jordan FTA defines "labor law" in terms of its listing of "internationally recognized labor rights."[128] The shortness of the U.S.-Jordan list—compared to that of the NAALC—significantly limits the substantive labor law fields covered by each of the four commitments. Of the NAALC's eleven areas of fundamental labor rights, the U.S.-Jordan FTA's "internationally recognized labor rights" list entirely omits (1) elimination of employment discrimination on grounds such as race, religion, age, and sex; (2) equal pay for men and women; and (3) protection of migrant workers.[129] It fails to expressly include the right to strike, but it includes the right of freedom of association, and the right to organize and to bargain collectively as developed under international labor law.[130] The relevant ILO conventions have been authoritatively interpreted by ILO supervisory bodies as incorporating the right to strike,[131] so that right may be covered by implication. The U.S.-Jordan list also omits compensation for occupational injuries and illnesses. By a farther stretch, that might be comprehended within the covered right to "acceptable conditions of work with respect to . . . occupational safety and health."[132] The U.S.-Jordan labor law list appears to have been drawn from GSP and regional trade preference legislation, rather than from the NAALC. These rights include "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health," along with freedom of as-

128. U.S.-Jordan FTA, *supra* note 3, 41 I.L.M. at 71.

129. *Compare* U.S.-Jordan FTA, *supra* note 3, art. 6(6), 41 I.L.M. at 71 (defining covered labor rights), *with* NAALC, *supra* note 2, art. 49, 32 I.L.M. at 1513–14 (defining covered labor law); *and* annex 1, 32 I.L.M. at 1515–16 (identifying labor principles the Parties are committed to promoting through their domestic labor laws).

130. U.S.-Jordan FTA, *supra* note 3, arts. 6(6)(a)– 6(6)(b), at 71.

131. *See, e.g.*, ILO Committee on Freedom of Association No. 1543, 74 Official Bull., Ser. B, No. 2, 278th Rep., 15 (1991), *available at* http://www.ilo.org (last visited Mar. 28, 2003) (concluding that United States *MacKay Radio* doctrine permitting employers to permanently replace economic strikers violated the right to strike, protected under ILO conventions concerning freedom of association, the right to organize, and the right to collective bargaining as necessary to effectuate these rights). The relevant conventions are Convention No. 87, concerning Freedom of Association and Protection of the Right to Organize, April 7, 1950, *available at* http://www.ilo.org/ilolex/english/convdispl.htm (last visited Mar. 28, 2003) [hereinafter Freedom of Association Convention]; ILO Convention No. 98, concerning the Right to Organize and Collective Bargaining, June 8, 1949, *available at* http://www.ilo.org/ilolex/english/convdispl.htm (last visited Mar. 28, 2003) [hereinafter Collective Bargaining Convention].

132. U.S.-Jordan FTA, *supra* note 3, art. 6(6)(e), at 71.

sociation, the right to collective bargaining, a minimum age for child labor, and the prohibition against forced labor.[133]

Not only does the U.S.-Jordan FTA cover fewer areas of substantive domestic labor law than the NAALC, but as to the effective enforcement and anti-relaxation obligations of the United States, it omits state law. Perhaps these obligations cover only positive law, such as statutes and regulations but not judicial or administrative precedent. In terms of sources of law, the U.S.-Jordan FTA incorporates international as well as national domestic labor law. International law, however, is only incorporated as a floor for substantive norms, which should be provided under domestic law. Domestic law provides the benchmark for effective enforcement and anti-relaxation, the two most readily enforceable obligations.

In terms of commitment stringency, only the "effective enforcement" obligation mandates actual performance: it is both binding and enforceable. Even so, the commitment is very narrowly defined. It addresses only a small set of systemic violations that affects trade relations between the Parties and is not exempted as the product of policy choices about enforcement or compliance, nor excluded as the result of enforcement priorities among labor rights. Inclusion of commitments to "strive" to fully incorporate international labor rights standards into domestic laws in the United States and Jordan is not as great an advance as it might appear. The NAALC provides a general commitment to "provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light."[134] While the NAALC does not expressly include reference to internationally recognized labor standards as the benchmark for "high" labor standards, this may be because a country's legislation already facially incorporates a level of

133. *Id.* (the quoted language also appears in the GSP, ATPDEA, and CBTPA, *see supra* notes 35, 36). Some commentators count these as "five" labor rights. *See, e.g.*, Compa & Vogt, *supra* note 23, at 202. This article, however, will avoid counting, since other bodies of international labor law, including the NAALC, aggregate and count labor rights differently. For example, separately treating minimum wages as opposed to occupational safety and health. On the GSP and regional trade preference provisions, see *supra* notes 18–36 and accompanying text.

134. NAALC, *supra* note 2, art. 2, 32 I.L.M. at 1503. Art. 49 further affirmatively states that setting of all standards regarding minimum wages and regarding labor protection of young persons by each county "shall not be subject to obligations under" the NAALC, and that "[e]ach Party's obligations under [the NAALC] pertain [solely] to enforcing the level of the general minimum wage and child labor age limits established by that Party." NAALC, *supra* note 2, art. 49, at 1514 (defining "technical labor standards").

labor rights which is "higher."[135] Both the NAALC and the U.S.-Jordan FTA reserve to each country the right to modify their labor laws as they see fit.[136] Nevertheless, inclusion of all covered labor rights in the full U.S.-Jordan FTA consultation and dispute resolution process is a big advance over the NAALC; a move toward entrenchment of labor rights within FTAs and parity of treatment for them in terms of enforcement and remedies.

Read together, the incorporation of international labor rights standards, the recognition that a Party should not use relaxation of its labor laws to attract foreign trade, and the prohibition on derogating from those labor laws as a means of increasing trade are intended to serve as a response to widespread criticism of the NAALC. Many contended that long after entering into NAFTA and the NAALC, Mexico systematically avoided enforcement of its labor laws as a means of encouraging additional foreign direct investment and export of its manufactures to the United States.[137] These actions might provide the basis for a claimed "pattern of practice" or systematic non-enforcement with demonstrable effects on trade, which could be remediable under the NAALC enforcement provisions, even in some cases, by trade sanctions. However, Mexico remains completely free under the NAALC to establish its own labor laws, and could, for example, repeal all legislation regarding occupational safety and health without violating any NAALC provision except the hortatory general commitment

135. *Cf.* Garvey, *supra* note 40, at 441 (suggesting GATT requirement that environmental provisions be internationally recognized to avoid being deemed "camouflaged trade barriers," is a means to accept only least common denominator standards).

136. *See* U.S.-Jordan FTA, *supra* note 3, art. 6(3), 41 I.L.M. at 70; NAALC, *supra* note 2, art. 2, 32 I.L.M. at 1503; *see also* NAALC, *supra* note 2, art. 49(1), at 1514 (excluding "setting of all standards and levels in respect of wages and labor protections for children and young persons by each Party" from NAALC obligations).

137. *See, e.g.*, Russo, *supra* note 84. *But see, e.g.*, Enrique Hernández-Laos, *The Growth of Real Salaries and Productivity in Mexico" A Microeconomic Approach, in* COMMISSION FOR LABOR COOPERATION, NORTH AMERICAN AGREEMENT ON LABOR COOPERATION, INCOMES AND PRODUCTIVITY IN NORTH AMERICA: PAPERS FROM THE 2000 SEMINAR 215, 218–19, 235, 239, 241–42, *available at* http://www.naalc.org/english/publications/seminar2000_papers.htm (attributing manufacturing sector wage growth in parallel with increased labor productivity in the 1988–1993 period in part to effective trade union collective bargaining and productivity pacts with employers to share the gains); Rogelio Ramírez, *What Has Changed in the Performance of Employment and Wages in Mexico after NAFTA? in* COMMISSION FOR LABOR COOPERATION, NORTH AMERICAN AGREEMENT ON LABOR COOPERATION, INCOMES AND PRODUCTIVITY IN NORTH AMERICA: PAPERS FROM THE 2000 SEMINAR 119, *available at* http://www.naalc.org/english/publications/seminar2000_papers.htm (attributing poor performance of Mexican wage rates to unduly high wage levels prior to opening of markets to international competition and integration, massive restructuring of Mexican industry, and lingering hangover effects of poor macroeconomic policies).

to "ensure that its labor laws and regulations provide for high labor standards . . . and . . . continue to improve those standards."[138] Its agents could lawfully issue waivers or derogations from laws on the books for the purpose of expanding trade with the United States. This is often alleged about the maquiladoras. This would, perhaps, fall outside the scope of "failure to effectively enforce" its labor laws. The three U.S.-Jordan "strive to ensure" commitments are aimed at closing those gaps, although the mortar may be too thin and watery to do the job.

As far as NAALC-type due process, access to the tribunal, and other labor law procedural commitments, there are none in U.S.-Jordan, except to the extent such commitments are implicit in making a labor law "effectively enforceable." Nor does the agreement provide for regular cooperative activities, despite the undoubtedly high level of mutual ignorance of each others' labor laws and practices among employer and worker representatives, as well as government officials. Despite the ballyhoo that the U.S.-Jordan agreement was two steps forward, it is probably more accurately characterized as three steps forward, two steps back, and a few steps sideways, when compared to the NAALC.

These FTA labor obligations are significant in transforming existing requirements—either under domestic labor law or International Labor Organization-related soft law international labor instruments—into firmer international obligations, thereby mutually binding the parties to the free trade arrangement, and in theory, subject to adjudicatory review, analysis, and public exposure, with the ultimate risk of trade sanctions. Nevertheless, the substantive labor obligations assumed by each party are, at least ostensibly, the status quo, which becomes the floor for domestic labor rights in light of the FTA. As the United States embassy in Jordan put it, "There are no new labor commitments in the FTA."[139]

Three steps forward, two steps back.

138. NAALC, *supra* note 2, art. 2, 32 I.L.M. at 1503.

139. U.S.-Jordan FTA FAQs, *supra* note 123. The FAQ sheet further minimizes the substance of the FTA obligation to "strive to ensure" that "internationally recognized labor rights . . . are recognized and protected by domestic law" by treating the clause regarding "commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up" as the exclusive source of "the internationally recognized labor rights set forth in paragraph 6." *Id.* This approach to construction of the agreement, however, flies in the face of the usual maxims of construction of legal documents, since the language of the paragraph 1 provision lists "such principles" set forth in the ILO Declaration in the conjunctive with the paragraph 6 "internationally recognized labor rights." *See* U.S.-Jordan FTA, *supra* note 3, art. 6, para. 1 (citing ILO Declaration).

3. Fast Track—Trade Promotion Authority

With some modification, these four new elements from the U.S.-Jordan FTA, together with the NAFTA/NAALC based requirement that each Party observe and effectively enforce its own domestic labor laws, have become basic labor rights criteria for newer free trade arrangements to which the United States is a party. The labor criteria for "fast track" treatment in the BTPAA include: (1) inclusion of labor rights in the main FTA; (2) effective enforcement of domestic labor law; (3) recognition and protection of internationally recognized labor rights through domestic law; (4) a prohibition against relaxing domestic labor law for the purpose of expanding trade; (5) promoting ratification and implementation of ILO Convention No.182, the Worst Forms of Child Labor Convention; and (6) parity in enforcement procedures and remedies among labor rights and other rights, including commercial.[140] However, the parity objective may be limited to the effective enforcement obligation and the Worst Forms of Child Labor Convention vigorous enforcement obligation.[141] Additional labor priorities pertain to the negotiation. Furthermore, there is a related provision of reports and information to Congress and the public.[142]

Compliance with these labor rights conditions, together with similar provisions as to other criteria, including among others, commercial, environmental, and intellectual property, ensures that legislation to implement a free trade agreement will be subject to a straight up or down vote in Congress, excluding the possibility of amendment and renegotiation.[143] The extent to which each labor element must be satisfied, and how rigorously, as a condition of fast track treatment, is, however, sharply contested.[144] The resolution of this domestic United

140. *See* 19 U.S.C. §§ 3802(a)(6), (7), (b)(11), (b)(12)(G), (b)(17) (2002).

141. *See id.* § 3802(b)(12)(G) (setting forth the parity objective as to "principle negotiating objectives;" labor principle negotiating objectives are all contained in § 3802(b)(11), but all are hortatory or restrictive conditions on labor rights clauses, except the effective enforcement provision in § 3802(b)(11)(A), and the worst form of child labor provision in § 3802(b)(17)).

142. *See id.* § 3802(c).

143. *See* 19 U.S.C. §§ 2191, 3803(b)(3)(A), 3805 (2002).

144. *Compare, e.g.*, 148 CONG. REC. S7768 (daily ed. Aug. 1, 2002) (remarks of Senator Baucus) (advocating vote for bill reported out from conference committee on BTPAA because it adopts the U.S.-Jordan model as a "floor" for future FTA labor rights provisions), *and* 148 CONG. REC. S9933, 9943 (daily ed. Oct. 4, 2002) (remarks of Senator Baucus) (complaining that U.S.-Chile FTA may not meet the "Jordan standard," incorporated into the BTPAA), *with* 148 CONG. REC. S9107 (daily ed. Sept. 24, 2002) (remarks of Senator Grassley) (complaining that "some members of Congress are even arguing that future

States legal question has important implications for the conclusion of future trade agreements, particularly regional arrangements.

The BTPAA also contains important provisions governing executive branch procedures for initiating and concluding negotiations for a covered trade agreement.[145] After completing the talks, the President must provide Congress with a report explaining how to implement the agreement, along with the text of the agreement and implementing legislation. The report must, *inter alia*, identify how and to what extent the agreement makes progress in achieving the applicable "purposes, policies, priorities and objectives" of the Trade Act, including those relating to labor rights.[146]

The BTPAA specifies a series of negotiating objectives on trade, the environment, investment, transparency, corruption, and other topics, in addition to labor, which are to guide United States trade representatives in seeking to enter into new trade agreements.[147] Fast-track voting treatment is conditioned, on the free trade agreement "*making progress in meeting the applicable objectives.*"[148] The President's report on the nature and extent of progress toward meeting the objectives provides assistance to Congress in assessing Presidential compliance with TPA requirements. Should Congress determine that the executive branch failed to meet these criteria as to a particular FTA, that is, either failed to notify or consult with Congress, or "*the agreement . . . fail[s] to make progress in achieving the purposes, policies, priorities, and objectives*" of the Trade Act, it may adopt a procedural disapproval

agreements must follow the 'Jordan Standard,'" and objecting to the public remarks of Senator Baucus who urged the administration to follow the model of the Jordan Free Trade Agreement "exactly" in implementing the labor and environmental provisions of the [BTPAA], contending instead that flexibility was intended under the BTPAA because "one size does not fit all" trading partner countries).

145. 19 U.S.C. §§ 3804(a), (d), 3805(a)(1) (2002). For those agreements already under negotiation prior to enactment of the BTPAA, a truncated set of procedures apply, requiring that the President, as soon as possible after enactment of the trade promotion authority legislation, notify Congress of the negotiations as to each covered FTA, United States objectives in the negotiations, and both before and after providing this notice to Congress, consult with the appropriate legislative committees and Congressional Oversight Group. *See id.* § 3806(b). Among the list of already in progress free trade agreements subject to this abbreviated set of procedures are the bilateral FTAs with Chile and with Singapore, and the proposed FTAA. *See id.*

146. *Id.* § 3803 (emphasis added).

147. *Id.* § 3802.

148. *Id.* § 3803(b)(2) (emphasis added); *see also id.* § 3803(b)(3) (conditioning fast track voting on implementing legislation on the agreement meeting this standard, cross referencing trade authorities procedures provision); *id.* § 2191 (providing trade authorities procedures regarding implementing legislation for agreements meeting the requirements of § 3803(b)(2)).

resolution.[149] This renders fast-track procedures inapplicable to the trade agreement.[150]

The inclusion of labor objectives among the trade agreement negotiating priorities is an extremely important development. One step forward: The direction of other steps is as yet indiscernible.

4. Finalization of the U.S.-Chile and U.S.-Singapore FTAs

Negotiation of a U.S.-Chile FTA has been completed pursuant to the BTPAA, as has a U.S.-Singapore FTA. Congress has been officially notified of the President's intent to enter into each of these agreements.[151]

The official summaries suggest that U.S.-Chile and U.S.-Singapore provisions largely track U.S.-Jordan on four key measures: inclusion of labor rights within the main FTA; scope of labor law subject areas covered; international as well as domestic sources of labor rights; strength of the labor rights commitments; and procedural labor rights commitments.[152] The labor provisions are within the main agreement. Like U.S.-Jordan, the Chile and Singapore FTAs incorporate both domestic labor law and international labor law norms in roughly the same terms, and include anti-relaxation language akin to that of U.S.-Jordan. However, only the commitment to effectively enforce domestic labor laws appears to be covered by the dispute resolution provisions of the agreements.[153] This arguably takes a step backward from the U.S.-Jordan FTA, which textually covers all disputes over interpretation of the agreement.[154] It may, however, satisfy the BTPAA objective of enforcement parity for all principal objectives, since the other

149. *Id.* § 3805(b)(1)(B) (emphasis added). Such a resolution requires a separate majority vote by each House of Congress, the second house voting within sixty days of the first, § 3805(b)(1)(A), an extremely unlikely occurrence.

150. *Id.*

151. *See* Transmittal of Report on the Intent to Enter Into a Free Trade Agreement ("FTA") with the Government of Chile, 149 CONG. REC. S1809 (daily ed. Jan. 30, 2003) [hereinafter Intent to Enter Into U.S.-Chile FTA]; Transmittal of Report on the Intent to Enter Into a Free Trade Agreement (FTA) with the Government of Singapore, 149 CONG. REC. S1808 (daily ed. Jan. 30, 2003) [hereinafter Intent to Enter Into U.S.-Singapore FTA]. The notification starts the running of a ninety day minimum period before the President can actually enter into the agreement.

152. *See* Summary of the U.S.-Chile FTA, *supra* note 4; Summary of the U.S.-Singapore FTA, *supra* note 5.

153. The summaries both affirmatively state that the effective enforcement commitment is so covered, but are silent as to enforcement procedures for the other labor rights commitments. *See* Summary of the U.S.-Chile FTA, *supra* note 4; Summary of the U.S.-Singapore FTA, *supra* note 5.

154. *See* U.S.-Jordan FTA, *supra* note 3.

BTPAA labor rights objectives are "general," rather than "principal."[155] In any event, with regard to enforceability, these new FTAs still constitute progress compared to the NAALC, which omitted eight of eleven covered labor rights from all higher stages of the enforcement process.[156] The administration's summary makes no mention of any additional language regarding ratification and implementation of ILO Convention No. 182 concerning the Worst Forms of Child Labour.[157] Compliance with this requirement of the BTPAA is therefore in doubt.

The Chile summary, but not the Singapore summary, includes procedural obligations regarding labor rights akin to those of the NAALC. In this respect, the U.S.-Chile agreement goes farther than the U.S.-Jordan agreement and farther than required under the BTPAA. In addition, the Chile FTA, unlike the Singapore and Jordan FTAs, also includes NAALC-like provisions for cooperative activities.

In lieu of trade sanctions, both the U.S.-Chile and the U.S.-Singapore agreements provide for imposition of monetary penalties, which the government has labeled "an innovative enforcement mechanism" for responding to non-compliance.[158] The penalties are apparently somewhat different from those provided for in the NAALC. They will continue to be assessed so long as the offending country is in non-compliance, so in theory their coercive effect is ongoing. Workers rights organizations, trade unions, and human rights NGOs are bitterly protesting what they regard as a retreat from the trade sanctions remedy of U.S.-Jordan and, in a more limited sphere, that of the NAALC.

The administration has conclusorily asserted that these FTAs "meet the labor . . . objectives provided by the Congress in the Trade

155. *See supra* note 141 and accompanying text.

156. *See supra* notes 93–106 and accompanying text.

157. As of this writing, the text of the agreements with Chile and with Singapore were not yet available. Characterization of these agreements is therefore drawn from secondary sources, particularly the official government descriptions, Summary of the U.S.-Chile FTA, *supra* note 4, and Summary of the U.S.-Singapore FTA, *supra* note 5. For background on the history of efforts to incorporate Chile in NAFTA and its side agreements during the Clinton administration, the negotiation of the Canada-Chile FTA which contemplated Chile's accession to NAFTA, and the eventual turn in the Bush administration toward negotiating a bilateral U.S.-Chile FTA, see Hornbeck, *supra* note 37.

158. *See* Summary of the U.S.-Chile FTA, *supra* note 4; Singapore Trade Facts, *supra* note 5; *see also* Brevetti, *supra* note 4 ("labor and environment provisions of the [U.S.-Chile FTA] use fines in an innovative way to address situations where a signatory country is not enforcing its own labor or environmental laws, [Assistant USTR for the Americas Regina] Varga said").

Act."[159] Whether the text of each agreement is actually in compliance with the BTPAA labor rights objectives and priorities, however, is extremely unclear, as is how to evaluate the text relative to the level of NAFTA/NAALC or the U.S.-Jordan TPA.

Thus, the direction of movement appears to be more backward than forward, despite steps taken in both directions.

5. CAFTA

Negotiations have commenced for a Central American Free Trade Agreement ("CAFTA"), between the United States and five Central American countries—Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.[160] The negotiations are in too early a stage to hazard much of a guess as to the substance of either labor rights provisions or institutional arrangements.[161] The United States, in an apparent effort to comply with the trade promotion authority statute, has proposed an approach along the lines of the U.S.-Jordan and U.S.-Chile free trade agreements.[162] None of the Central American countries has expressed willingness to incorporate labor rights within the main agreement; however, Costa Rica has indicated receptiveness to following the NAFTA-NAALC model, with labor rights acknowledged in a separate side agreement. Costa Rica is already a party to a free trade agreement with Canada, which follows this model.[163] None of the other would-be CAFTA countries has gone even this far on the record.

On the other hand, in early 2003 the parties agreed on a structure for negotiations, including five negotiating groups, one of which will cover labor and environment.[164]

No steps forward yet.

159. *See* Intent to Enter Into U.S.-Chile FTA, *supra* note 151; Intent to Enter Into U.S.-Singapore FTA, *supra* note 151; *see also* Summary of the U.S.-Chile FTA, *supra* note 4 (agreement "fully meets the labor objectives set out by Congress in TPA"); Singapore Trade Facts, *supra* note 5.

160. *See* CAFTA Press Release, *supra* note 12.

161. Published documentation provides no information on this subject. *See, e.g.*, CAFTA sources cited *supra* note 12.

162. *See, e.g.*, Brevetti, *CAFTA Kick Off*, *supra* note 10; Brevetti, *CAFTA By Year's End*, *supra* note 10.

163. *See supra* notes 11–12, 114–121 and accompanying text; *see also* 19 U.S.C. § 3806(a) (2002) (recognizing that the FTAA negotiations had already commenced prior to enactment of the BTPAA, and on that ground, according them special treatment).

164. *See* CAFTA Press Release, *supra* note 12, at 1.

6. FTAA

A hemisphere-wide Free Trade Agreement of the Americas ("FTAA") is likewise underway.[165] The nascent FTAA negotiations have produced a partial second draft of the treaty that recognizes the need to bolster institutional arrangements beyond the bare bones NAFTA model, in a treaty designed to cover thirty-four countries.[166] However, the measures taken in the current draft fall far short of what is required to provide a sound multi-lateral implementation system for the proposed agreement. Moreover, the draft document thus far omits all mention of labor rights. The efforts of the United States and Canada to accomplish their inclusion has been a source of intense controversy.[167] The negotiations themselves have been organized without a separate working group on labor and environment.[168] Complaints are rampant that efforts to incorporate "civil society," for the most part, have been limited to inclusion of input from business interests in the talks.[169]

Therefore, there have been an indeterminate number of steps backward, although the process is far from complete.

D. Problems in Making Labor Rights "Progress"

The later FTAs incorporate labor rights within their main agreements, meeting the minimum precondition for satisfying the BTPAA labor rights objectives. They add references to international labor rights, although as a very soft constraint on domestic labor law. They include anti-relaxation language, although its enforceability beyond the scope of the effective enforcement commitment is narrow, if not non-existent. While the Jordan agreement omitted due process obligations and cooperative activities, the Chile FTA seems to have restored these important elements of the NAALC.

The core innovation of the NAALC, however, remains intact, now enshrined in successive FTAs and in the principal negotiating objectives of the BTPAA: effective enforcement of domestic labor law as the supranational obligation. The scope of coverage has been narrowed in some important respects, but that is the most readily rectifiable aspect of an effective enforcement obligation; future agreements could be

165. *See supra* note 14 and accompanying text.

166. *See* FTAA Second Draft, *supra* note 14, chapter on dispute settlement.

167. *See, e.g.*, GAO FTAA Report, *supra* note 14, at 7.

168. *See* http://www.ftaa-alca.org/alca_e.asp_(last visited Mar. 28, 2003) (identifying working groups for the FTAA negotiations).

169. *See, e.g.*, GAO FTAA Report, *supra* note 14.

negotiated to restore the full eleven labor principle scope established in the NAALC. The internationalization of the domestic standard has the virtue of minimizing intrusion into national sovereignty and maximizing retention of flexibility and discretion by national governments. However, despite its seeming success in resolving very serious sovereignty problems, there are some intractable, practical problems with this approach.

In the NAFTA/NAALC situation, the effective enforcement solution was natural in light of the widespread contemporaneous perception that Mexico had labor legislation which was more than adequate to guarantee workers' rights in the priority labor law subject areas identified, if only Mexico would effectively enforce its own law.[170] Mexican law appeared to provide workers with statutory rights considerably more extensive than those provided by Canada as well as the United States, and to give many labor rights constitutional protection.[171]

With the Jordan agreement, however, the limitations of this model have begun to become apparent, and in future FTAs, the problems are likely to worsen. When a country starts out lacking adequate legislation to cover the appropriate substantive labor law subject areas, the treaty negotiators are likely to cut back on the inclusion of those labor law subjects or principles which are targets of the labor obligations. Moreover, where there *is* legislation but it is weak and not up to international standards, a promise to "effectively enforce" that law, however binding, is not very meaningful, unless the promise is buttressed by one to implement an international labor law standard.

Similarly, buttressing commitments regarding due process and the rule of law, procedures, and remedies are necessary. If one merely asks a trading partner to effectively enforce domestic labor law without regard to structural defects in the labor tribunal system, prosecutorial system, procedural context, and remedies, these elements will sabotage meaningful implementation of any labor norms incorporated in domestic law, even if the country devotes large sums of money and immense amounts of effort to enforce its flawed regime. However, in many potential trading partner countries, defects

170. *See, e.g.*, MAYER, *supra* note 55; *see also, e.g.*, Garvey, *supra* note 40, at 442 ("The principal complaint about Mexico has been not its lack of health and environmental laws, but the lack of enforcement of its law and the related endemic corruption of its legal system.").

171. *See generally, e.g.*, Russo, *supra* note 84, at 83–86.

in the real rule of law as applied to the entire political and legal order are a well known fact.

Conceptually, effective enforcement poses a series of problems: non-uniformity, perverse incentives, lack of pressure for an upward spiral, comparative law, and ambiguity in the notion of effective enforcement itself.

Non-uniformity and resultant inequity among trading partners is an obvious result of keying a commitment to existing domestic legislation. There will be many situations in which different trading partners are subject to different actual burdens regarding their labor law commitments. The burdens will not necessarily be commensurate with the country's level of economic and social development. Rather, they will be commensurate with each country's existing labor legislation, along with political constraints on their weakening existing labor laws prior to entry into an FTA with the United States. For example, those whose labor legislation on a given topic contains exemptions which exclude the informal sector will be much better positioned than those whose laws do not contain such exemptions, yet have similarly large informal sectors in their economies. As Lance Compa has pointed out, this effectively "rewards countries with already low standards."[172] If all countries functioned at their best and highest level, or were fully democratic and reflected true political choices in their domestic labor law, these differences could be legitimate. However, acting as if that were the case, as free trade advocates are wont to do, does not make it so.

This naturally leads to the second problem with effective enforcement as the main labor rights commitment: perverse incentives. Reliance on domestic labor laws, together with pressure to incorporate strong anti-relaxation language in trade agreements, risks creating perverse incentives in trading partner countries to weaken or repeal present labor laws prior to entering into an FTA with the United States. In those countries that are at best weak democracies, countervailing political pressure may offer little resistance to such government strategies.[173]

Overemphasis on domestic labor law as the benchmark undercuts pressure for upward harmonization, whether to a newly-created, mutual standard, or to one incorporated from the ILO or another source of "recognized international labor rights."[174] While avoiding relaxa-

172. Compa, *supra* note 23, at 689.
173. *See id.* at 689.
174. *See id.* at 710.

tion is a good minimum goal, it takes no account of those countries with virtually no protective labor legislation, nor does it encourage upward aspirations. In the long run, trade will only be successful if it promotes upward harmonization of labor standards, as well as the standard of living. Because other labor commitments, such as effective enforcement, may otherwise discourage raising the formal standards, it is essential that provisions be included in FTAs which strongly counteract this predictable tendency.

A further problem is the comparative law problem. It is often very difficult to know exactly what the trading partner's domestic labor law is, which one must know before one can effectively enforce it. By way of illustration, does the United States effectively enforce its prohibition against sex discrimination in employment in the area of sexual harassment? Given the complex jurisprudence about reasonable victims and about imputing liability to the employer for the acts of supervisory personnel and rank and file workers,[175] it is extremely difficult for competent United States practitioners to fully discern the details of the law in this area, and is a severe problem for foreign practitioners attempting to assess United States law.

Fully comprehending the United States law is a prerequisite to evaluating it for conformity to the effective enforcement (or international labor rights) standard, and that evaluation also depends upon a judgment about how law works and the acceptable range of variation in degree of effectiveness. Ascertaining how the standard works in a variety of factual contexts is a difficult prerequisite to assessing the law's effectiveness in enforcing the basic rights. This is itself a contentious matter of judgment by domestic practitioners, Supreme Court justices, and NLRB members, let alone for foreign legal experts who stand outside the United States legal and industrial relations culture.

Non-uniformity exacerbates the comparative law problem, with difficulty increasing in direct proportion to the number of trade agreement signatories. Experience with the NAALC has amply illustrated how difficult it is to sufficiently master a few countries' domestic labor laws sufficiently to fairly assess whether they are being

175. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 791–92 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755 (1998); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986). *See generally, e.g.*, Marley S. Weiss, *The Supreme Court 1997–1998 Labor and Employment Law Term (Part I): The Sexual Harassment Decisions*, 14 THE LAB. LAW. 261 (1998).

effectively enforced.[176] Application of a uniform, international norm like that of the ILO involves an extremely difficult comparative law activity. One must properly interpret the international standard, and then assess both the facial domestic labor law language and the practice and enforcement thereunder, in order to monitor and assess compliance.[177] Doing this by first understanding the domestic law norm raises the level of difficulty by an order of magnitude. Compounding this difficulty by many countries simultaneously may simply be beyond the capability of the United States and other trading partners in this hemisphere at the present time. Lacking a thorough understanding of another country's domestic labor law renders the "effective enforcement commitment" itself effectively unenforceable, quite apart from problems with procedures, remedies, and institutional arrangements. Neither the negotiators of these agreements, nor the business and NGO leaders attempting to provide input, have displayed enough awareness of these difficulties.

The final problem is yet a tougher nut to crack. The negotiators of the NAALC, and those who have followed in their wake, seem to have missed the ambiguity in the notion of "effective enforcement." On the one hand, a domestic statute can provide a substantive right or command, and one can ask whether the statutory scheme as a whole effectively enforces that command. On the other hand, one can take the statutory scheme as a given, even though the scheme as a whole renders illusory the formal grant of the substantive right, by precluding its meaningful implementation or excluding from coverage large categories of persons who should be among the law's intended beneficiaries. It is all very well for a government agency to make sure every worker who complains will have legal recourse and a day in court on the worker's charge. If workers are unprotected against employer reprisals, blacklisting, and exclusion from future employment for filing

176. *See, e.g.*, Report of Review in U.S. NAO 9601 (1997) (Fisheries Ministries/SUTSP) (reviewing uncertainty over whether under Mexican constitutional law duly ratified international conventions, including those of the ILO, are automatically incorporated into domestic law and if so, whether previously or subsequently enacted domestic legislation may withstand challenge in the event of conflict with the international norm); *NAALC Seminar Proceedings*, *supra* note 47; Report of Review in U.S. NAO 9701 (1998) (Pregnancy Discrimination in the Maquiladoras) (reviewing uncertainty over coverage of prohibition of sex discrimination extending to pregnancy and applicants for hire, as opposed to incumbent employees).

177. *See* Marley S. Weiss, Monitoring to Maximize Implementation and Compliance with International Labor Agreements, *available at* www.national-academies.org/internationallabor (last visited Mar. 28, 2003).

with the government, however, few workers will invoke the governmental complaint process.

A minimum condition of future progress, therefore, is to revise the effective enforcement provision to clarify it. Effective enforcement should cover not "domestic labor laws" but the substantive commitments of domestic labor laws, which must themselves recognize and protect specified international labor rights. If FTA labor rights provisions along the NAALC model are largely to be "truth in advertising" requirements, the substantive promise of domestic labor laws ought to be what the domestic law actually provides. Fine print, in either exclusions, defenses, procedures, or remedies, should not undermine the delivery in practice of the substantive right, or the FTA labor rights provision should be deemed to have been systemically violated. The importance of this point will become clearer after an examination of the enforcement provisions and experiences under the NAALC and subsequent FTAs.

III. Enforcement and Remedies from the NAALC Through U.S.-Chile: Progress or Regress?

This section first outlines the NAALC procedures for enforcement of the agreement and resolution of violations. Next, it analyzes the submissions cases under the NAALC to conclude which aspects of the NAALC enforcement system function well, and which do not. Finally, it compares the NAALC arrangement to the scheme created by the U.S.-Jordan FTA, the requirements of the BTPAA, the announced approach of the U.S.-Chile and U.S.-Singapore FTAs, and the implications of this analysis for future FTAs.

The BTPAA requires the President to provide Congress with a statement as to each trade agreement he submits to Congress for approval and implementation, that the agreement "makes progress in achieving the applicable purposes, policies, priorities, and objectives" of the Trade Act, and spelling out how and to what extent the agreement does so.[178] An agreement that fails to make such progress fails to satisfy the conditions for applicability of the BTPAA fast track procedures,[179] and is grounds for Congress to adopt a procedural disapproval resolution declining to apply the up or down voting rule to the FTA in question.[180] It is doubtful whether much progress was made

178. 19 U.S.C. § 3805(a) (2002).
179. *See* 19 U.S.C. § 3803(b)(2) (2002).
180. *See* 19 U.S.C. § 3805(b)(1)(B)(ii)(IV) (2002).

from Jordan to Chile and Singapore, and even more unclear whether a future CAFTA or FTAA will make further progress.

A. The NAALC Scheme

The NAALC has three distinct enforcement stages: consultation, evaluation, and dispute resolution. Consultations are divided into two steps: NAO-to-NAO consultations,[181] and ministerial consultations.[182] Any dispute over any aspect of interpretation or application of the NAALC may be raised in consultations.[183] If, after investigation, information sharing, and consultation, neither the NAOs nor the ministers can resolve the dispute, a Party complaining of another Party's violation may take the matter to the second stage: the evaluation stage.

While the process can, in theory, be initiated by any of the three governments, in practice it has been driven entirely by submissions initiated by private actors. Each NAO is required under the NAALC to provide for public communications,[184] often referred to as submissions,[185] regarding "labor law matters arising in the territory of another Party."[186] It is the NAO that initially reviews such public submissions.[187] While it is technically possible for a private actor to file a non-adversarial submission, in practice every submission filed thus far has involved an allegation of a Party government's systematic noncompliance with one or more obligations of the NAALC, arising in the context of one or more concrete legal disputes occurring in the charged Party's territory.[188] Thus, while the process at this stage is intended to be "cooperative" between the Party governments,[189] the

181. *See* NAALC, *supra* note 2, at 1507–08.

182. *See id.* art. 22, at 1508.

183. *See id.* arts. 21, 22, at 1507–08.

184. Each country has developed its own procedural rules for handling submissions. For the U.S. Procedural Guidelines, see 59 Fed. Reg. 16,660, 16,661–62 (Apr. 7, 1994), *available at* http://www.dol.gov/dol/ilab/public/programs/nao/submiss.htm (last visited Mar. 28, 2003). For the Canadian Procedural Guidelines, see http://www.labour-travail.hrdc-drhc.gc.ca/doc/ialc-cidt/eng/e/guidlns-e.html (last visited Mar. 28, 2003) [hereinafter Canadian NAO Procedural Guidelines].

185. Both terms have their origin in the provision that requires each NAO to "provide for the *submission* and receipt and [to] periodically publish a list, of *public communications* on labor law matters arising in the territory of another Party [and to] review such matters, as appropriate, in accordance with domestic procedures." NAALC, *supra* note 2, at 1507 (emphasis added).

186. NAALC, *supra* note 2, art. 16 at 1507.

187. *See id.*

188. The allegations are summarized in Summary of Submissions, *available at* http://www.naalc.org/ /english/publications/review_annex1_3.htm (last visited Apr. 1, 2003).

189. NAALC, *supra* note 2, art. 20, at 1507.

members of the public invariably file submissions alleging wholesale breach of obligations to provide a decent, fair, transparent, and impartial labor law system, with allegations that are highly adversarial.[190]

The NAO first makes a preliminary determination that the matter is within the scope of NAO authority and otherwise warrants review. The United States Procedural Guidelines spell out official policy regarding the preliminary decision to accept a submission for review: "In general, the Secretary shall accept a submission for review if it raises issues relevant to labor law matters in the territory of another Party and if a review would further the objectives of the Agreement."[191]

The NAO then investigates the matter, usually requesting information from the Party country against whom the submission is directed. The United States NAO often holds a hearing at this juncture to gather additional information; the other two NAOs have done so less frequently.[192] Based upon its investigation, the NAO issues a "public report of review" of the submissions case, summarizing the facts and the law. The NAOs attempt to settle the case, but usually fail, in which case they refer the case onward to ministerial consultations. If the ministerial consultations do not resolve the matter, it can be taken to the next stage of the procedure: the evaluation stage. However, in practice, every case so far has ended either in dismissal, withdrawal by the filers, or issuance of a ministerial implementation agreement.

The evaluation stage includes consultative steps before and after its centerpiece: nonadversarial presentation of the matter to an Evaluation Committee of Experts ("ECE") for nonbinding fact-finding on the parallel laws and practices of the complaining and complained against countries with respect to the labor law obligation at issue.[193]

190. *See* U.S. National Administrative Office, Status of Submissions, *available at* http://www.dol.gov/ilab/programs/nao/status.htm (last visited Mar. 28, 2003) [hereinafter Status of Submissions].

191. 59 Fed. Reg. at 16,661.

192. *See* Independent Experts' Report, Annex 1 to the Four Year Review Report, *supra* note 87, *available at* http://www.naalc.org/english/publications/review_annex1.htm (last visited Mar. 28, 2003).

193. NAALC, *supra* note 2, arts. 23(2). 25(1)(a) at 1508–09. *See also* Rules of Procedure for ECEs, http://www.naalc.org/english/publications/Rules%20of%20Procedure%201E.htm (last visited Mar. 28, 2003)[hereinafter ECE Rules]. "The Council considers that the primary purpose of an ECE is to provide an independent, expert analysis of an important area of labor law enforcement on a comparative, tri-national basis for the mutual benefit of all the Parties. The Council believes that such a process can be a useful way of obtaining a new analytical perspective in important areas of mutual interest." Four Year Review Report, *supra* note 87, at 2.

The report is to provide more than just a "comparative assessment," however. It is also to include conclusions about "patterns of practice" and "where appropriate, practical recommendations that may assist the parties in respect of the matter."[194]

Matters relating to the three collective labor principles—the right of freedom of association, the right to organize and bargain collectively, and the right to strike—are excluded from the ECE level of the process. In addition, the violation must be a systemic pattern of practice, involving a regular or recurring course of action or inaction, and it must have trade-related effects.[195]

Whether claims based on binding obligations regarding procedural due process and the rule of law can be presented to an ECE, at least as to cases involving one of the eight labor principles covered at that level, is an open question. Indeed, nearly everything about the ECE stage is unresolved, because no case has ever been appealed beyond the ministerial consultations step. The question is not a purely academic one. Submissions cases have alleged, for example, that the composition of tri-partite Mexican Conciliation and Arbitration Boards, which often include a representative of the "traditional" trade union confederation, satisfies the procedural guarantee that labor tribunals be "impartial and independent and . . . not have any substantial interest in the outcome of the matter,"[196] when an independent union is contesting entitlement to represent workers at the firm.[197]

If the Parties cannot settle the matter on the basis of the ECE's report, the complaining Party may take the matter to the third and final stage: dispute resolution. Only claims about three areas of labor rights—occupational safety and health, child labor, and minimum wage laws—may be raised at this level, however.[198] This stage also contains many steps, including: additional consultations; proceedings before an arbitral panel which, if it finds a persistent pattern of non-enforcement, it may recommend a suitable remedial action plan; further negotiations on the basis of the arbitral panel report; possible resubmission to the panel; and absent settlement, eventual award of a monetary enforcement assessment to redress the violation.[199]

194. NAALC, *supra* note 2, art 25(1) at 1508–09.

195. *See id.* arts. 23, 49(1), annex 23 at 1508, 1513–14, 1516.

196. *Id.* art. 5(4) at 1504.

197. *See* U.S. NAO 9601 (1997) (Fisheries Ministries/SUTSP).

198. *See* NAALC, *supra* note 2, arts. 27, 29(1) at 1508–09.

199. *See id.* arts. 27–41, annexes 41A–41B, at 1509–1513, 1516–17.

The monetary assessment, if paid, however, is to be used to bolster labor law enforcement in the complained against country's area of deficiency.[200] If the country is so foolish as not to pay, it may be subjected to trade sanctions by the complaining country in an equivalent value to the amount of the assessments.[201] This means that instead of the financial penalty being used to support the country's labor law enforcement processes, the funds are absorbed in the form of trade sanctions. If the complained against country is Canada, however, instead of trade sanctions, the monetary penalty becomes domestically enforceable as a judgment in the Canadian courts.[202]

The process, as presented on paper, has been heavily criticized not only for its narrowing scope of coverage, but for its multiple, interminable steps, which in theory could take several years. In practice, neither of these defects have mattered much, since nothing has gone beyond the ministerial consultations step to reach higher procedural stages in the process.

A lack of deadlines, however, has proven important at the initial consultations stage of the process, both at the NAO-to-NAO step and at the ministerial step. Several cases have dragged on unresolved for many months,[203] because there is little to pressure governments to promptly settle cases. The lack of meaningful enforcement measures as to most cases clearly limits the leverage of one country in negotiating a settlement with another. It is hard to devise suitable endpoints for cases, particularly once an NAO investigation has unearthed serious deficiencies in a national labor law scheme. The threat of an appeal to an ECE could provide the modest leverage of greater public exposure and prestigious remonstrance, but even that threat is lacking as to the three collective labor law rights, which have provided the basis for a majority of the alleged violations.

Diplomatic and political concerns have hamstrung NAOs and labor ministries in initiating their own matters without the impetus of a public submission, in creating real negotiating pressure to settle cases, and in appealing cases to the ECE or higher levels. Sovereignty concerns led the NAALC negotiators to create a process that would remain in the control of labor ministry officials from the three countries

200. *See id.* annex 39, para. 3, at 1516.

201. *See id.* art. 41, annex 41B, at 1512–13, 1517.

202. *See id.* annex 41A, at 1516–17.

203. The Ministerial Council has itself resolved to try to "conduct the process as rapidly as possible." Four Year Review Report, *supra* note 87, part 1 and part 2, at 2, 7–9. However, cases handled since that report was issued have in fact bogged down even more.

from start to finish. During the Clinton administration, this meant the authorities were willing to exploit the sunshine effects of the process up to a point, but no farther. During the George W. Bush administration, even this limited use of the NAALC procedures may cease.

An important byproduct is that such NAALC enforcement as has occurred has been dependent upon the resources and agendas of the labor movement, worker rights NGOs and other private actors, rather than being guided by a rational scheme of labor rights development and enforcement priorities. A review of the submissions cases helps make this point even more clear.

B. The NAALC Submissions: Filings and Outcomes

1. Composition of the Cases

No cases have yet produced the appointment of an ECE, and no cases have progressed beyond ministerial consultations. Twelve submissions have been settled by ministerial agreement.[204] Only one open case, still in the cooperative consultations process, raises issues which if not resolved, could lead to appointment of an ECE. There are no open submissions that could eventually go before an arbitral panel.

During the first four years of the NAALC, only one submissions case was filed before the Mexican NAO, and all others were filed before the United States NAO. Delays in ratification of the Agreement by Canadian provinces precluded the Canadian NAO from exercising jurisdiction over such cases until 1998.[205] Between 1998 and January

204. *See* U.S. NAO 940003 (1995) (Sony); Mexico NAO 9501 (1996) (Sprint/LCF); U.S. NAO 9601 (1997) (Fisheries Ministries/SUTSP); U.S. NAO 9701 (1998) (Gender Discrimination in Maquiladoras); U.S. NAO 9702 (2000) (Han Young); U.S. NAO 9703 (2000) (ITAPSA); Mexico NAO 9801 (2000) (Solec); Mexico NAO 9802 (2000) (Washington Apple Growers); Mexico NAO 9803 (2000) (DeCoster Egg); U.S. NAO 9901 (2000) (TAESA); Mexico NAO 9804 (1999) (Yale/INS); and U.S. NAO 2000-01 (2001) (Auto Trim/Custom Trim); *see also*, U.S. NAO, Ministerial Implementation Agreements, *available at* http://www.dol.gov/ilab/programs/nao/minagreemt_toc.htm (last visited Mar. 28, 2003); Ministerial Consultations Joint Declaration, *available at* http://www.dol.gov/ilab/media/reports/nao/jointdeclar061102.htm (last visited Mar. 28, 2003) [hereinafter Joint Declaration].

205. The NAALC restricts Canadian NAO jurisdiction in submissions cases based upon the extent of Canadian provincial ratification, because the Canadian government construes itself as unable to impose directly upon the provinces treaty provisions negotiated at the federal level. The NAALC therefore requires provincial ratification to render the treaty binding as to that province within the area of its labor law jurisdiction. *See* NAALC, *supra* note 2, Annex 46; 32 I.L.M. 1499, 1517–18 (1993); *see also* Canadian Intergovernmental Agreement Regarding the North American Agreement on Labour Cooperation, *available at* http://www.labour-travail.hrdc-drhc.gc.ca/doc/ialc-cidt/eng/e/final-e.html (last visited

2003, several submissions were filed before the Canadian and Mexican NAOs, as well as additional submissions filed before the United States NAO.[206]

As of January 2003, a total of twenty five submissions had been filed in all three countries. Sixteen were filed with the United States NAO.[207] Of these, fourteen were against Mexico,[208] and two were

Mar. 28, 2003). On the impact of Canadian federalism on its role in the NAALC, and more broadly, its handling of international agreements, *see generally NAALC Seminar Proceedings*, *supra* note 47.

206. Summaries of the submissions/public communications cases, along with their current status, may be found in Status of Submissions, *supra* note 191. These are also available on the Commission website, *at* http://www.naalc.org/english/publications/summary-usa.htm, http://www.naalc.org/english/publications/summaryca.htm (last visited Mar. 28, 2003), and http://www.naalc.org/english/publications/summarymx.htm (last visited Mar. 28, 2003); and on the Canadian NAO website at http://www.labour-travail.hrdc-drhc.gc.ca/doc/ialc-cidt/eng/e/submiss-e.html (last visited Mar. 28, 2003). The text of the submissions themselves in more recent U.S. NAO cases may be accessed at http://www.dol/gov/dol/ilab/programs/nao/submissions.htm (last visited Mar. 28, 2003). Reports of review issued by all three NAOs may be found in each submissions case *at* http://www.dol.gov/ilab/media/reports/nao/public-reports-of-review.htm (last visited Mar. 28, 2003).

207. *See* U.S. NAO 940001 (1994) (Honeywell); U.S. NAO 940002 (1994) (General Electric/Compania Armadora); U.S. NAO 940003 (1994) (Sony); U.S. NAO 940004 (1994) (General Electric/Compania Armadora) (follow-up to U.S. NAO 94002); U.S. NAO 9601 (1996)(Mexican Fisheries Ministry/SUTSP); U.S. NAO 9602 (1996) (Maxi-Switch); U.S. NAO 9701 (1997)(Maquiladora sector); U.S. NAO 9702 (1997) (Han Young); U.S. NAO 9703 (1997) (ITAPSA) (related submission: Canadian NAO 98-1); U.S. NAO 9801 (1998) (AeroMexico/Flight Attendants); U.S. NAO 9802 (1998) (Mexican vegetable farms/Tomato/Child Labor); U.S. NAO 9803 (1998) (McDonald's); U.S. NAO 9804 (1999) (Canada Post Corp./Rural Mail Couriers); U.S. NAO 9901 (1999) (TAESA); U.S. NAO 2000-01 (2000) (AutoTrim/Custom Trim/Breed Mexicana); U.S. NAO 2001-01 (2001) (Duro Bag). A summary of each case is available at http://www.dol.gov/ilab/programs/nao/status.htm (last visited Mar. 28, 2003). The official report of the U.S. NAO in each case may be accessed from http://www.dol.gov/ilab/media/reports/nao/public-reports-of-review.htm (last visited Mar. 28, 2003). The text of the submissions in each U.S. NAO case may be found at http://www.dol.gov/ILAB/programs/nao/public_submissions.htm (last visited Mar. 28, 2003). Transcripts of the hearings are also available in two submissions: Transcript of Public Hearing on U.S. NAO Submission 2000-01 (Auto Trim/Custom Trim/Breed Mexicana), *available at* http://www.dol.gov/ILAB/media/reports/nao/submissions/autotrimhearing.htm (last visited Mar. 28, 2003); Transcript of Public Hearing on U.S. NAO Submission 9901 (TAESA), *available at* http://www.dol.gov/ILAB/media/reports/nao/submissions/9901Transcript.htm (last visited Mar. 28, 2003). Because the official citation to each case consists merely of the identity of the country whose NAO received the submission, followed by a nondescript number, it is customary to refer to these cases by the identity of the employer or group of employers whose labor law violations were allegedly not effectively responded to, triggering the claim that the government in question was failing to effectively enforce its laws. The employer, however, is not formally a party to the case; rather, it is the government in whose territory the employer was allegedly breaking the law who is accused of breaching its NAALC obligations.

against Canada.[209] Thirteen of the sixteen submissions filed with the United States NAO raised issues of freedom of association and the right to organize, the right to bargain collectively and the right to strike (in the aggregate, hereinafter referred to as collective labor law). Nine of these confined themselves to one or more of these issues.[210] Four raised other issues as well collective labor law matters.[211] Each of these four raised issues regarding occupational health and safety as an issue other than collective labor law rights; all but one raised additional issues as well.[212] Three raised no collective labor law

208. *See* U.S. NAO 940001 (1994) (Honeywell); U.S. NAO 940002 (1994) (General Electric/Compania Armadora); U.S. NAO 940003 (1994) (Sony); U.S. NAO 940004 (1994) (General Electric/Compania Armadora); U.S. NAO 9601 (1996) (Mexican Fisheries Ministry/SUTSP); U.S. NAO 9602 (1996) (Maxi-Switch); U.S. NAO 9701 (1997) (Maquiladora sector); U.S. NAO 9702 (1997) (Han Young) U.S. NAO 9703 (1997) (ITAPSA) (related submission: Canadian NAO 98-1); U.S. NAO 9801 (1998) (AeroMexico); U.S. NAO 9802 (1998) (Mexican vegetable farms); U.S. NAO 9901 (1999) (TAESA); U.S. NAO 2000-01 (2000) (AutoTrim, Custom Trim/Breed Mexicana); U.S. NAO 2001-01 (2001) (Duro Bag).

209. *See* U.S. NAO 9803 (1998) (McDonalds); U.S. NAO 9804 (1998) (Canada Post Corp.).

210. *See* U.S. NAO 940001 (1994) (Honeywell) (freedom of association and the right to organize); U.S. NAO 940002 (1994) (General Electric/Compania Armadora) (freedom of association and the right to organize); U.S. NAO 940003 (1994) (Sony) (freedom of association and the right to organize, particularly through manipulation of the union registration process); U.S. NAO 940004 (1994) (General Electric/Compania Armadora) (freedom of association and the right to organize); U.S. NAO 9601 (1996) (Mexican Fisheries Ministry/SUTSP) (freedom of association and the right to organize when merger of government agencies under federal government labor legislation entails recognition of only one of the pre-existing union representatives; impartiality of the conciliation and arbitration boards); U.S. NAO 9602 (1996) (Maxi-Switch) (freedom of association and the right to organize); U.S. NAO 9801 (1998) (AeroMexico) (right to strike); U.S. NAO 9803 (1998) (McDonalds) (freedom of association and the right to organize, the right to bargain collectively, alleged closure of facility to avoid unionization); U.S. NAO 2001-01 (2001) (Duro Bag) (freedom of association and the right to bargain collectively; particularly non-secret ballot union representation/ownership of the collective agreement voting process).

211. *See* U.S. NAO 9702 (1997) (Han Young) (freedom of association and the right to organize, prevention of occupational injuries and illnesses); U.S. NAO 9703 (1997) (ITAPSA) (freedom of association and the right to organize, right to bargain collectively, prevention of occupational injuries and illnesses, minimum employment standards) (related submission: Can NAO 98-1); U.S. NAO 9804 (1998) (Canada Post Corp.) (freedom of association and the right to organize, right to bargain collectively, prevention of occupational injuries and illnesses, compensation for occupational injuries and illnesses, and elimination of employment discrimination); U.S. NAO 9901 (1999) (TAESA) (freedom of association and the right to organize, minimum employment standards including hours of work, overtime premium pay, payroll deductions for social programs, prevention of occupational injuries and illnesses, impartiality of the tribunal, and undue delays in the enforcement processes).

212. *See* U.S. NAO 9702 (1997) (Han Young). This submission raised only collective labor and occupational health and safety issues.

issues, alleging only violations of technical labor standards: one case regarding pregnancy discrimination,[213] one case regarding child labor,[214] and one case regarding prevention and compensation of occupational illnesses and injuries.[215] The United States NAO held hearings on nine of the submissions.[216]

Six submissions have been filed with the Mexican NAO.[217] All Mexican NAO submissions were against the United States. Canada was

213. *See* U.S. NAO 9701 (1997) (Maquiladora sector).

214. *See* U.S. NAO 9802 (1998) (Mexican vegetable farms/Tomato Growers).

215. *See* U.S. NAO 2000-01(2000) (AutoTrim/Custom Trim/Breed Mexicana).

216. *See* U.S. NAO 940001 (1994) (Honeywell) (freedom of association and the right to organize); U.S. NAO 940002 (1994) (General Electric/Compania Armadora) (freedom of association and the right to organize); U.S. NAO 940003 (1994) (Sony) (freedom of association and the right to organize, particularly through manipulation of the union registration process); U.S. NAO 940004 (1994) (General Electric/Compania Armadora) (freedom of association and the right to organize) (follow-up to U.S. NAO 94002); U.S. NAO 9601 (1996) (Mexican Fisheries Ministry/SUTSP) (freedom of association and the right to organize when merger of government agencies under federal government labor legislation entails recognition of only one of the pre-existing union representatives; impartiality of the conciliation and arbitration boards); U.S. NAO 9701 (1997) (Maquiladora sector) (pregnancy discrimination in the export processing sector in Mexico); U.S. NAO 9702 (1997) (Han Young) (freedom of association and the right to organize, prevention of occupational injuries and illnesses); U.S. NAO 9703 (1997) (ITAPSA) (freedom of association and the right to organize, right to bargain collectively, prevention of occupational injuries and illnesses, minimum employment standards); U.S. NAO 9901 (1999) (TAESA) (freedom of association and the right to organize, minimum employment standards including hours of work, overtime premium pay, and payroll deductions for social programs, prevention of occupational injuries and illnesses, impartiality of the tribunal and undue delays in the enforcement processes; U.S. NAO 2000-01 (2000) (AutoTrim, Custom Trim/Breed Mexicana) (prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses). The administration under president George W. Bush has recently resolved this first case by dismissing the matter without a hearing, in U.S. NAO 2001-01 (2001) (Duro Bag) (freedom of association and the right to organize and bargain collectively).

217. *See* Mexico NAO 9501 (1995) (Sprint/La Connexion Familiar) (freedom of association and the right to organize; alleged plant closure to avoid unionization); Mexico NAO 9801 (1998) (Solec) (freedom of association and the right to organize, right to bargain collectively, prevention of occupational injuries and illnesses, minimum employment standards); Mexico NAO 9802 (1998) (Washington State Apple Growers) (freedom of association and the right to organize, right to bargain collectively, prevention of occupational injuries and illnesses, compensation for occupational injuries and illnesses, minimum employment standards, employment discrimination, protection of migrant workers); Mexico NAO 9803 (1998) (DeCoster Egg) (prevention of occupational injuries and illnesses, compensation for occupational injuries and illnesses, minimum employment standards, elimination of discrimination, protection of migrant workers); Mexico NAO 9804 (1998) (Yale/INS) (lack of enforcement of minimum wage and overtime minimum employment standards legislation as to foreign workers because of MOU requiring U.S. Department of Labor ("DOL") inspectors to examine immigrant status of workers and report potential violations to the U.S. Immigration and Naturalization Service ("INS") (parallel submission: Canadian NAO 98-2); Mexico NAO 2001-1 (2001) (New York) (New York State worker's

not named as a Party in any of the six. All submissions against Canada have so far been filed with the United States NAO. The involvement of migrant workers, foreign workers, or Hispanic-American workers has been a prominent feature in each of the submissions filed with the Mexican NAO.

Three submissions were filed with the Canadian NAO.[218] One submission was against Mexico, while two submissions were against the United States.

2. Outcomes of the Submissions

a. Cases an NAO Declined to Accept for Review or Cases That Were Withdrawn by the Submitters

Only a handful of submissions have been disposed of summarily, without an NAO investigation and issuance of a report. Under United States procedural guidelines, the NAO should accept a submission for review unless either it raises no issues relevant to labor law matters in the territory of another Party, or if review would not further the objectives of the Agreement.[219] Canada's procedural guidelines adopt a similar test.[220]

In the case of only four submissions,[221] the NAO declined to accepted the matter for review because the alleged infringement of one

compensation system violates NAALC substantive obligations regarding compensation for occupational injuries and illnesses, as well as prevention of occupational injuries and illnesses, and in addition, violates various due process and procedural commitments).

218. *See* Canadian NAO 98-1 (1998) (ITAPSA) (Party-Mexico) (filed by United Steelworkers of America and in concert with other unions and organizations concerning freedom of association and the right to organize, right to bargain collectively, and prevention of occupational injuries and illnesses in Mexico) (parallels U.S. NAO 9703); Canadian NAO 98-2 (1998) (Yale/INS) (filed by a group of United States immigrant rights and union organizations arguing a lack of enforcement of minimum wage and overtime minimum employment standards legislation as to foreign workers because of memorandum of understanding requiring U.S. DOL inspectors to examine immigrant status of workers and report potential violations to INS) (parallels Mexico NAO 9804); Canadian NAO 99-1 (1999) (LPA) (filed by U.S. Labor Policy Association, an employer organization, and EFCO, a United States employer, concerning NLRA Section 8(a)(2) prohibition against employer domination of or assistance to labor organizations, alleged to contravene NAALC Art. 3 commitment to promote worker-management committees to address labor regulation of the workplace).

219. *See* U.S. NAO Procedural Guidelines, 59 Fed. Reg. 16,660, 16,661–62.

220. *See* Canadian NAO Procedural Guidelines, *supra* note 184.

221. *See* U.S. NAO 9801 (1998) (Aeromexico/Flight Attendants); U.S. NAO 9804 (1998) (Rural Mail Couriers); U.S. NAO 2001-01 (2001) (Duro Bag); and Canadian 99-1 (1999) (LPA); *see also* Status of Submissions, *supra* note 191. U.S. NAO 9802 might be regarded technically as a fifth case not accepted for review, but it was dismissed because of lack of prosecution by the submitters, the Florida Tomato Exchange, an employer organi-

of the eleven labor listed labor rights was in clear conformity with domestic labor law, hence was not deemed to state a claim of violation of a Party's NAALC obligations. Three were submissions to the United States NAO, and one to the Canadian NAO. The Mexican NAO has accepted all six submissions filed with it.[222]

In U.S. NAO 9801, the Mexican Association of Flight Attendants protested denial of freedom of association and the right to strike in connection with a strike against Aeromexico. The Mexican government, pursuant to emergency labor dispute authority under Mexican law, had taken over the operations of the airline, forcing the employees to return to work. While it dismissed the submission, however, the United States NAO commissioned a research project evaluating reconciliation of the right to strike with national interests of safety, security, and general welfare in each of the three countries.[223]

In U.S. NAO 9804, the Canadian rural letter carriers protested their exclusion from Canadian labor legislation, including the laws providing for the right to organize and bargain collectively, as well as their treatment as independent contractors, which denies them protection against occupational illnesses and injuries and protection against employment discrimination. The exclusion is pursuant to statute, so the United States NAO declined to accept the submission for review. However, despite formally rejecting the case, in response to this submission, the United States and Canadian NAOs jointly conducted a cooperative activities seminar on exclusions from coverage under their respective labor laws, focusing on independent contractor

zation. Canadian NAO 98-2, the parallel case to Mexico NAO 9804, regarding the United States Department of Labor MOU with the Immigration and Naturalization Service, might be regarded as a sixth case not accepted for review. However, this case was effectively settled on the basis of the new MOU negotiated between the United States DOL and the INS to eliminate the problem of deterrence of workers from filing wage and hour complaints with the Labor Department for fear of triggering INS investigation, in resolution of Mexico NAO 9804. *Id.*

222. *See* submissions cases cited *supra* Part III.B.1 and the accompanying footnotes.

223. *See* The National Law Center for Inter-American Free Trade, Emergency Procedures for Resolving Labor-Management Disputes in the United States, Canada and Mexico, http://www.dol.gov/ilab/public/media/reports/nao/EmergencyProcedures.htm (last visited Mar. 28, 2003). On the American emergency dispute body of labor law, see also Marley S. Weiss, *The Right to Strike in Essential Services Under United States Labor Law, in* RELACIONES LABORALES IN EL SIGLO XXI at 95 (Patricia Kurczyn, ed. 2000), *available at* http://info.juridicas.unam.mx/publica/librev/kurcz.htm (last visited Mar. 28, 2003). That article was written for a comparative labor law conference co-sponsored by the Mexican Department of Labor (Secretaría del Trabajo y Previsión Social, or "STPS") and the Institute of Juridical Research of the National Autonomous University of Mexico ("UNAM"), at which one session focused on labor emergency dispute legislation and the right to strike.

status, temporary, and other forms of contingent labor, supervisory, managerial and crown attorney exclusions.[224]

One dismissed case was a submission to the Canadian NAO: CAN 99-1. This case was one of only two cases filed before any NAO by an employer organization. Section 8(a)(2) of the National Labor Relations Act[225] prohibits employer domination of or assistance to labor organizations, thereby precluding many forms of worker participation or labor-management committees in non-union establishments. The employer organization in CAN 99-1 contended that Section 8(a)(2) violated a United States obligation under the NAALC. The NAALC provision requires "[e]ach Party [to] promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42, such as: . . . (e) encouraging the establishment of worker-management committees to address labor regulation of the workplace."[226] Because the domestic United States statute itself was the source of the claim, and conformed to all other domestic law, no NAALC violation was deemed to be alleged.[227]

The United States NAO recently dismissed the submission of U.S. NAO No. 2001-01 (Duro Bag), on the vague ground that pursuing the matter would not serve the purposes of the agreement. The Duro Bag case alleged, among other things, that Mexican government commitments contained in prior Ministerial Implementation Agreements, to assure free choice of union representation, particularly through secret ballot voting, had not been fulfilled, posing a whole new set of issues under the NAALC.[228] In resolving the case, the United States NAO took the position that Mexican law did not provide for secret ballot elections in union representation voting. Hence, notwithstanding the commitment to provide and effectively enforce the right of freedom of association, as well as commitments reached in the course of ministerial agreements in resolution of prior submissions cases, the NAO concluded that no violation of the NAALC was alleged. Mexico was

224. *See* agenda and linked summaries of presentations at this program, available on the website of the U.S. NAO *at* http://www.dol.gov/dol/ilab/public/programs/nao/trontoagenda.htm (last visited Mar. 28, 2003). Many of the papers have been electronically published, *available at* http://laboris.uqam.ca/toronto.htm (last visited Mar. 28, 2003).

225. *See* 29 U.S.C. § 158(a)(2) (2001).

226. NAALC, *supra* note 2, art. 3(1)(e), at 1503.

227. *See* Status of Submissions, *supra* note 190. The summary reports that the submitters filed an appeal, which Canadian NAO procedures permit from a dismissal of a submission. No result is reported, however, on the appeal, which was filed in 1999.

228. *See* U.S. NAO Public Submission 2001-01 (2001) (Duro Bag), *available at* http://www.dol.gov/ILAB/media/reports/nao/submissions/durosubmission.html (last visited Mar. 28, 2003).

failing to enforce a right, the right to a secret ballot, which did not exist under Mexican law. The United States NAO therefore declined to accept the case for review, asserting that review would not further the objectives of the NAALC.[229]

This case is uniquely disturbing among the NAALC submissions, because it raises deeper questions about the enforceability of an agreement so dependent on the prosecutorial discretion and diplomatic and political judgment of a country's executive branch labor ministry. Mexican law is contradictory regarding secret as opposed to open balloting,[230] and the Mexican government had previously entered into commitments in conjunction with prior Ministerial Implementation Agreements which it was allegedly violating in its election practices at Duro Bag. Regardless of the reach of the obligations of the NAALC itself, additional commitments entered into in settlement of submissions cases ought to be fully enforceable, and normally should be vigorously enforced by Party governments lest their failure undermine whatever vestiges of credibility the agreement may have.

Duro Bag also confirms the ambiguity problem in the meaning of "effectively enforce."[231] Mexican labor law substantively promises workers the right to form and join unions of their own choosing, leaving open the details of the method. The procedural approach in most Mexican jurisdictions of open voting on employer premises, in front of the employer and union representatives, effectively precludes free exercise of this right.

Three submissions have been withdrawn or abandoned by the submitters. U.S. NAO 940004 (General Electric/Compania Armadora) and U.S. NAO 9602 (Maxi-Switch), were unilaterally withdrawn by the submitters. In *Maxi-Switch*, the withdrawal followed a settlement between employer and union in the underlying labor dispute, reached under pressure of the pending NAALC submission. U.S. NAO 9803 (McDonald's) was also withdrawn by the submitters after

229. *See* Status of Submissions, U.S. NAO Submission 2000-1 (Duro Bag), http://www.dol.gov/ILAB/programs/nao/status.htm_(last visited Mar. 28, 2003).

230. *See* Public Report of Review in U.S. NAO 9702 (Han Young), *available at* http://www.dol.gov/ILAB/media/reports/nao/pubrep9702.htm _(last visited Mar. 28, 2003); Public Report of Review in U.S. NAO 9703 (ITAPSA), *available at* http://www.dol.gov/ILAB/media/reports/nao/pubrep9703.htm _(last visited Mar. 28, 2003); Agreement on Ministerial Consultations, U.S. NAO Submissions 9702 and 9703 (Mexican government commitment to "promote the use of eligible voter lists and secret ballot elections in disputes over the right to hold the collective bargaining contract," the Mexican equivalent to exclusive bargaining agent status in the United States), *available at* http://www.dol.gov/ILAB/media/reports/nao/minagreement9702-9703.htm_ (last visited Mar. 28, 2003).

231. *See supra* text accompanying notes 228–29.

they reached agreement with the Canadian provincial government to have the underlying issues regarding sudden facility closures and closures motivated by anti-union animus, be studied by a provincial council.[232] U.S. NAO 940004 was related to U.S. NAO 940002, another General Electrics case which was fully processed, and in which an NAO review report was issued, although the case was found to lack merit and no ministerial consultations were requested. Nevertheless, the GE case triggered joint cooperative programs intended to address freedom of association issues raised in the submission.[233]

U.S. NAO 9802, the other case filed by an employer organization, the Florida Tomato Exchange, alleged violations of labor protections for children by Mexican vegetable growers. However, after filing the initial submission, the organization asked that the matter be held in abeyance. Later, it failed to respond when submission of further information was requested by the NAO, in effect, abandoning the submission. On that basis, the U.S. NAO declined to accept it for review.

In two mutually-related submissions, Mexico NAO 9804 and Canadian NAO 98-2, something approximating full relief was obtained by settlement. The two submissions had alleged that the Memorandum of Understanding ("MOU") then in effect between the DOL and the INS deterred workers from filing wage and hours complaints with the labor department. The MOU was intended to promote efficient use of government investigatory resources by having DOL wage and hour inspectors, in the course of their inspections, also inspect I-9 forms and otherwise address issues of immigration status of employees. DOL inspectors were to bring suspected violations to the attention of the INS for further action. The deterrent effect of the risk of initiating an INS investigation by workers complaining to the DOL about wage and hour violations was eliminated in the new MOU negotiated by the DOL and the INS.[234]

b. Reports of Review and Ministerial Consultations

Reports of review have been issued by the NAO to whom the matter was submitted in every case except those withdrawn or abandoned by the submitters, those denied acceptance for review by the NAO, and the settled case regarding the U.S. DOL – U.S. Immigration and Naturalization Service MOU. One exception is the most recent submission, Mexico NAO 2001-01, which claims that the New York State

232. *See* Status of Submissions, *supra* note 190.
233. *See id.*
234. *See id.*

workers' compensation system systematically provides untimely and inadequate compensation to workers for their occupational illnesses and injuries, violating the NAALC obligation on compensation for occupational illnesses and injuries. That submission was still open as this article was going to press.

Of those cases in which the U.S. NAO has issued a report, the matter has progressed from NAO-to-NAO consultations (the initial level), to ministerial consultations (the next level) in seven instances: U.S. NAO 940003 (Sony), 9601 (Fisheries Ministries/SUTSP), 9701 (Gender in the Maquiladoras), 9702 (Han Young), 9703 (ITAPSA), 9901 (TAESA), and 2000-01 (Auto Trim/Custom Trim/Breed Mexicana).

Of the six submissions to the Mexican NAO, a report of the review was issued in four, Mexico NAO 9501 (Spring/LCF), 9801 (Solec), 9802 (Washington Apple Growers), and 9803 (DeCoster Egg). In all four, Mexico initiated ministerial consultations over the submission. The fifth submission, Mexico NAO 9804 (Yale/INS), is the one involving the U.S. DOL – INS Memorandum of Understanding,[235] which was replaced with a newly negotiated MOU, effectively resolving the matter. However, that case, too, became the subject of a ministerial implementation agreement. The sixth case, Mexico NAO 2001-01 (New York), is still open, challenging the remedies, methods and procedures of the New York State workers' compensation authority.

c. Ministerial Implementation Agreements

Seven ministerial implementation agreements have been reached, covering twelve cases.[236] The earliest ministerial implementa-

235. *See id.*

236. *See* Ministerial Agreement on U.S. NAO 940003 (1994) (Sony) (freedom of association: union registration), *available at* http://www.dol.gov/ILAB/media/reports/nao/minagreemt940003.htm (last visited Mar. 28, 2003); Mexico NAO 9501 (1995) (Sprint) (freedom of association: sudden plant closures, plant closures to avoid unionization), *available at* http://www.dol.gov/ILAB/media/reports/nao/minagreemt9501.htm (last visited Mar. 28, 2003); Ministerial Agreement on U.S. NAO 9601 (1996) (Mexican Fisheries Ministry/SUTSP) (freedom of association: choice of collective bargaining representative, exclusivity of representation and its relationship to scope of the bargaining unit; neutrality of conciliation and arbitration boards), *available at* http://www.dol.gov/ILAB/media/reports/nao/minagreemt9601.htm (last visited Mar. 28, 2003); Ministerial Implementation Agreement in U.S. NAO 9701 (Maquiladoras) (pregnancy and sex discrimination), *available at* http://www.dol.gov/ILAB/media/reports/nao/mcia.htm (last visited Mar. 28, 2003); U.S. NAO 9702 and 9703 (1997) (Han Young and ITAPSA) (freedom of association and occupational safety and health), *available at* http://www.dol.gov/ILAB/media/reports/nao/minagreement9702-9703.htm (last visited Mar. 28, 2003); Mexico NAO 9801,

tion agreements focused on deepening mutual understanding of the operation of each other's labor laws, through the conduct of seminars, conferences, and programs directed at the specific type of problem underlying the submission, particularly when the NAO report itself was uncertain about the domestic legal situation. U.S. NAO 940003 (Sony), for example, alleged denial of freedom of association to workers. It challenged the manipulation of the union registration process to obstruct completion of legal formalities by an independent union. It also contested the Mexican labor law systems' acceptance of "protection contracts," through which a Mexican employer is free to enter into a collective agreement with a union commanding little or no membership among the employer's workforce, and without the knowledge of the workers either that the union has claimed to represent them, or of the terms of the agreement. In addition, by entering into an "exclusion clause," the equivalent of a closed shop arrangement, the employer can bind itself to hire only employees who are already members of the "protection contract" union. This submission was resolved through the conduct of a tri-national government-to-government seminar on the domestic operation of labor law bearing on conferring representation and collective bargaining rights on a labor union in each of the three countries.

Mexico NAO 9501 (Sprint) alleged that the United States did not effectively provide freedom of association and the right to bargain collectively in the context of plant relocations in order to avoid unionization. That case was resolved by the Ministerial Council charging the Secretariat to conduct a comparative tri-national research study of sudden plant closures to avoid unionization.

U.S. NAO 9601 (Mexican Fisheries Ministry), was resolved through the conduct of a tri-national comparative seminar on the relationship between domestically ratified international treaties and conventions and domestic law. Mexico had ratified International Labor Organization conventions regarding freedom of association and

9802, 9803 (1998) (Solec; Washington Apple Growers; Maine/DeCoster Egg) (migrant workers, freedom of association, occupational safety and health, workers' compensation, minimum employment standards, employment discrimination), *available at* http://www.dol.gov/ILAB/media/reports/nao/minagreemt9801-9802-9803.htm (last visited Mar. 28, 2003); U.S. NAO 9901, U.S. NAO 2000-01, Mexico NAO 9804 (TAESA; Auto Trim/Custom Trim/Breed Mexicana; Yale/INS) (freedom of association, the right to organize, the right to bargain collectively, minimum wages, prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses, and the protection of migrant workers), *available at* http://www.dol.gov/ILAB/media/reports/nao/jointdeclar061102.htm (last visited Mar. 28, 2003).

collective bargaining. Its legislation limiting federal government agency employees to representation by one union per agency had been previously found by ILO organs to violate its obligations under that convention. In the NAALC proceedings, the Mexican government contended that ILO conventions were not automatically incorporated into domestic law, and did not automatically override conflicting statutory enactments, although opposing views were presented on this problem of Mexican constitutional law.[237] Therefore, Mexico had reasoned, the ILO conventions did not become a part of the corpus of domestic labor law whose effective enforcement was an obligation of Mexico's under the NAALC.[238]

Resolution of later cases has several times involved obligating the complained against NAO to conduct public education and outreach sessions to clarify the rights of affected workers and to improve worker awareness, hence enforcement of the allegedly under enforced labor rights. In U.S. NAO 9701, the case involved claims of sex discrimination, particularly pregnancy discrimination among maquiladora industry employers. The strongest allegations included claims that employers routinely compelled applicants for hire and employees already on the payroll to undergo pregnancy tests, refused to hire applicants already pregnant, demanded assurances of applicants that they were using contraception or otherwise ensuring they would not become pregnant, and firing incumbent employees who were suspected of having become pregnant. During the U.S. NAO investigation of the submission, the Mexican NAO asserted that its labor law statute prohibited sex discrimination only against incumbent employees, not applicants for hire. It also asserted that its Conciliation and Arbitration Board tribunals had jurisdiction only over matters involving incumbent employees, not job applicants, so that even were the statute interpreted to cover applicants for hire, they would have access to no forum providing redress for the violation.

The implementation agreement for the maquiladora pregnancy discrimination submission contained four elements: (1) a government-to-government conference regarding pregnancy discrimination issues in the workplace, and enforcement mechanisms permitting workers to assert pregnancy-related anti-discrimination rights; (2) United States and Mexican outreach sessions in the border area to

237. *See NAALC Seminar Proceedings, supra* note 47.

238. The edited transcript of the presentations at the seminar have been published in *NAALC Seminar Proceedings, supra* note 47. For an analysis of the issues raised in the submission and the seminar, *see* Weiss, *supra* note 47.

assure dissemination of public information regarding these rights and enforcement mechanisms; (3) the NAOs were to conduct a conference on enforcement mechanisms for effectuating protections against pregnancy discrimination and the rights of working women; and (4) the Secretariat was to publish a public report reflecting the issues in the outreach sessions and the conference.[239] There was also a commitment by the Mexican government to reverse its previous position and issue a clarification that the statute covered applicants for hire as well as incumbent employees.

The agreement for U.S. NAO 9702 and 9703 (Han Young and ITAPSA) covered allegations of denial of freedom of association as well as failure to effectively enforce occupational safety and health provisions. Mexico agreed to host a tri-national seminar on the role and structure of labor boards in each of the three countries, and later, to host a tri-national government-to-government meeting on occupational safety and health issues. Mexico had previously hosted a public education seminar on freedom of association in connection with these two cases, although members of an independent union attended and engaged in a physical confrontation with members of rival, traditional unions, disrupting the program and engendering considerable controversy.

The agreement covering Mexico NAO 9801, 9802, and 9803 (Solec, Washington Apple Growers, and DeCoster Egg) led both to inter-governmental meetings and public outreach programs targeted to reach migrant workers. In 2001, a government-to-government meeting was held to explore avenues of cooperation concerning protection of the rights of migrant workers. This is a field which poses some complicated problems in the United States because many of these workers' rights are set at the state rather than federal level, the workers are exempted from coverage under some, but not all regularly applicable federal and state labor legislation, and numerous different agencies, federal and state, have jurisdiction over union organizing and collective bargaining, elimination of employment discrimination, establishment of minimum conditions of employment, occupational safety and health, and protection of other migrants' rights, the issues raised by the submission. During 2000, a series of five migrant agricultural workers public outreach sessions were conducted by the U.S. DOL, one each in California, Florida, Washington State, Ohio, and New

239. *See* Ministerial Consultations Implementation Agreement, U.S. NAO Submission 9701 (1997) (Gender), *available at* http://www.dol.gov/ILAB/media/reports/nao/mcia.htm (last visited Mar. 28, 2003).

York State, intended to educate migrant agricultural workers, especially women workers, about their labor and employment rights. In the spring and summer 2001, public forums were held in Washington State and Maine on migrant worker labor and employment rights issues, particularly agricultural labor issues, which would include participation by officials of relevant state as well as federal agencies. In addition, a tri-national Conference on Agricultural Migrant Labor in North America was held in Los Angeles, California, from February 7 to February 9, 2000.[240] The ministerial agreement also required the Secretariat to publish a tri-lingual guide covering substantive law and enforcement procedures for labor and employment rights provided for migrant workers in the three NAFTA/NAALC countries, which has yet to appear.

In U.S. NAO 9901 (TAESA), and U.S. NAO 2000-01 (AutoTrim), along with Mexico NAO 9804 (Yale/INS), a single ministerial agreement was reached, aimed at resolving all cases pending ministerial resolution. It covers a wide range of claims, including freedom of association, the right to bargain collectively, minimum wages, prevention of occupational injuries and illness compensation for occupational injuries and illnesses, and protection of migrant workers. To resolve issues about occupational safety and health, the United States and Mexican Labor Secretaries established a Bi-national Occupational Safety and Health Working Group, which will be headed on each side by a high level official in the field, and bolstered by technical experts. The group will meet on an ongoing basis and collaborate to solve technical problems. The Mexican Labor Secretariat ("STPS") also undertook to engage in a public education and outreach campaign to improve worker awareness of governmental legal advice and assistance for workers regarding prevention and compensation of occupational injuries and illnesses, and practicalities about claims filing and appeals. Issues regarding formation of unions and collective bargaining rights will be addressed together with freedom of association issues from an earlier ministerial implementation agreement in U.S. NAO 9702 and 9703 by holding a trilateral seminar on the structure of labor boards, their roles in union recognition and collective bargaining,

240. *See* Protection of Migrant Agricultural Workers in Canada, Mexico and the United States: Legal Background Paper Prepared by the Secretariat for the Tri-National Cooperative Activity on Migrant Agricultural Work, Los Angeles, California, Feb. 7–9, 2000, *at* http://www.naalc.org/english/publications/ sum_infoworkers.htm (background paper prepared for the conference) (last visited Mar. 28, 2003).

as well as "structures that guarantee the impartiality of labor boards," and best practices and procedures regarding labor boards.[241]

d. ECE and Arbitral Dispute Resolution-Eligible Cases

No matter has yet been taken before an ECE, although there have been a significant number raising one or more issues which could have qualified. The one open case, raising the matter of compensation for occupational injuries and illnesses, would be eligible if no resolution is reached at the ministerial consultations stage. In light of the non-remedial nature of most of the ministerial implementation agreements, plus the recurrence of similar types of violations suggesting that systemic enforcement problems in some areas remain unremedied, one must question the propriety of avoiding sending any cases on to the ECE level for independent fact-finding. Because no cases have passed through the ECE stage, none have been eligible for appeal to an arbitral panel and potential trade sanctions.

IV. Designing FTA Labor Provisions for Implementability and Enforceability

The NAALC experience illustrates the limits of an enforcement system dependent upon private initiative, as well as one totally under the control of political and diplomatic government actors. Problems in the NAALC process have clearly manifested themselves. That the lack of strong remedies or enforcement measures would make it difficult to negotiate meaningful settlements even in strong cases was predictable. That a non-adjudicatory, diplomatic negotiations process would fail to yield consistent interpretation of NAALC obligations and would flounder in efforts to devise substantial solutions to real domestic labor law enforcement problems, was foreseeable. That the long, drawn out process, without firm internal deadlines, providing for no relief in the underlying domestic cases, would discourage members of the public from filing, and would hold down the volume of cases, could also have been forecast in advance.

Perhaps less obvious was the extent to which the needs, agendas, and resources of interested organizations would dictate the NAALC enforcement agenda. Freedom of association, collective bargaining,

241. Joint Declaration, *supra* note 206. The U.S. NAO has issued an agenda for the seminar, to be held March 20, 2003 in Nuevo Leon, Mexico. U.S. NAO, North American Agreement on Labor Cooperation Trilateral Seminar: Labor Boards in North America (copy on file with the author).

and the right to strike issues predominated throughout the first several years of NAALC submissions, even though it was obvious from the outset that these issues could never go past the first stage of the enforcement process, and hence had little prospect for achieving a significant resolution. During the first four years after adoption of the NAALC, with one exception, *all* submissions pertained to freedom of association, the rights to organize, to bargain collectively, and to strike. In the nine year history of the NAALC, there has been only one case involving compensation for occupational injuries and illnesses and one case on child labor, even though both are areas of immense importance and rampant violation.

Certainly collective labor rights constitute an area in which many violations of domestic labor law occur, but that is not the entire explanation. Sweat shops violating minimum wage and overtime laws, child labor laws, and occupational safety and health laws, are also notorious and rampant in certain areas of the United States and Mexico. Employment discrimination is clearly a huge problem in the United States, to judge from state and federal court filings; in Mexico, based on reports of maltreatment of women and indigenous population members; and in parts of Canada, as to linguistic minorities within a province as well as other groups of workers. Only one case, however, has made discrimination in employment its central focus, and only one (subsequently withdrawn) was aimed at child labor.

The explanation for the imbalance in the case filings is not the relative prevalence of systematic failures to enforce domestic labor laws. Rather, it is that the trade union movement across all three countries (in Mexico, primarily the independent rather than the establishment trade unions) has funded the lion's share of filings before all three NAOs. Child labor does not have the organized constituency that supports other workers' rights. NGOs focused on women's rights, indigenous rights, and the rights of racial minorities are less oriented than the labor movement toward pressure tactics and publicity, which are the main real sanctions available through the NAALC. Despite having authority to initiate investigations and negotiations on their own, none of the three NAOs ever took any such steps. Political and diplomatic forces make it extremely difficult for a unit housed within an executive branch agency like the Department of Labor to take such hostile action toward its counterpart in another country.

For lack of an independent, tri-national entity with prosecutorial authority, the enforcement of the NAALC will continue to depend on the level of funding, commitment, and interest of NGOs and the labor

movement to pursue submissions cases on particular labor law subjects. The main limitation of dependence on private actors to initiate enforcement is that the enforcement is likely to emphasize those areas where organized interests and stakeholders have the most to gain or lose, and those prospects may be only indirectly tied to the transnational labor rights measure they are directly enforcing. If the NAALC had stronger remedies, it might be easier for organizations to justify allocation of more resources to its utilization, but the proportionate emphasis would remain dependent on their levels of interest, rather than a coherent enforcement strategy. If meaningful enforcement is to be achieved, it would seem that either incentives for private enforcement efforts must be increased substantially, or a transnational FTA labor enforcement entity is required; preferably there would be both.

Despite all of the attention focused on the long, drawn out NAALC process, and the unfairness of its exclusion of certain labor rights from higher stages of the process, the truth is that none of the cases are progressing, no matter what their topic. The explanation seems to lie in the control of the process by diplomats and political appointees, who are extremely reluctant to take cases to an ECE, even when they are eligible to do so. For lack of willingness to pursue the harder sunshine effect of an ECE, the position of the governments in negotiating ministerial implementation agreements is not very different even as to matters which could proceed to higher levels or even to monetary penalties. There is no credible threat that this will occur, even in occupational safety and minimum wage matters. Settlements have now assumed an entrenched pattern of yet another tri-national seminar to study the problem and benchmark best practices, even when the problem has already been fully examined, and it is clear to all that only through domestic changes in labor law policy and practices will compliance with the NAALC actually occur.

The common theme through many of the submissions is not that of a government which systematically sits on its hands and declines to enforce its laws on the books, under funds enforcement agencies, or has corrupt labor inspectors. Although there is no doubt that these problems are significant, they are not what the submissions cases are aimed at. In nearly every submissions case, the problem is one of the ambiguity of the effective enforcement obligation. A national labor law system nominally promises workers a particular labor right, be it the right to organize and bargain collectively, protection against sex discrimination in employment, or a promise of reasonable, timely

compensation for occupational injuries and illnesses. The system then defeats the truth in advertising premise of the effective enforcement promise, either by exclusions and exceptions, or by procedural provisions which thwart meaningful realization of the formal right. Mexico promises freedom of association and the right to organize, but force workers to vote for union representation on the employer's premises, in front of their bosses and the union bosses of the protection union the employer has handpicked.[242] In the New York workers' compensation system, workers are shut out of the tort system in return for which they ostensibly receive swift and sure, reasonable, albeit low, compensation for their injuries, as well as medical and rehabilitation costs, but the poorly funded and organized New York state system transforms this promise into a charade.[243] In Mexico, workers are assured that it is illegal for their employer to fire them for organizing an independent union, but the remedies and procedures for wrongful discharge make it rare for a worker to hold out for actual adjudication of his or her claim;[244] the same could be said, perhaps, for the NLRB processes and remedies in the United States.[245] The Mexican tri-partite Conciliation and Arbitration Boards are systematically biased when the union representative seated on the Board is from a "traditional" union and the case involves an insurgent organizing campaign by an independent union.[246] This is a structural incompatibility with the due process/rule of law provisions, which cannot be rectified without changing the Mexican law on the composition of these boards.

No further seminars, studies, or reviews will solve these problems. They result from one provision of the law being either flatly inconsistent with another, or undermining its full effectuation. It is for this reason that effective enforcement of domestic law must be detached from its moorings in the surrounding domestic law context. Once the domestic law purports to promise the full effectuation of the supranational labor rights principle, deference to the contradictions of surrounding domestic law renders the FTA labor rights provision a dead

242. *See* U.S. NAO Submission 2001-01 (2001) (Duro Bag); Report of Review in U.S. NAO 9702 (1997) (Han Young) and in U.S. NAO 9703 (1997) (ITAPSA).

243. *See* Submission in Mexico NAO 2001-01 (2001) (New York State Workers' Compensation System).

244. *See* Public Report of Review of U.S. NAO Submission 9701 (1997) (Pregnancy Discrimination in the Maquiladoras).

245. *See, e.g.*, Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity under the NLRA and RLA*, 2 EMP. RTS. & EMP. POL'Y J. 327 (1998).

246. *See* Public Report of Review of U.S. NAO Submission 9601 (1996) (Fisheries Ministries/SUTSP).

letter, unless it is understood to require changes in domestic law to the extent that they are inconsistent with the corporate labor rights principle.

This type of analysis makes it clear that a permanent, impartial tribunal is essential to adjudicate these cases. Diplomacy and negotiation do not produce a rule of law. This is true of labor rights in the NAALC, and it will surely be true of the U.S.-Jordan FTA and other agreements which reserve control over investigation and prosecution of claims of violation to the national governments. Such a body can also develop an integrated understanding of domestic labor law in each of the Party countries, and of how that law relates to FTA obligations.

Ironically, in the BTPAA, Congress urged that future free trade agreements be interpreted and enforced in a more rule of law-like fashion.[247] To accomplish this, however, will require at least two pieces of real infrastructure, lacking from NAFTA, the NAALC, the U.S.-Jordan, U.S.-Chile, and U.S.-Singapore FTAs: a supranational enforcement body, beholden not to the staff member's home country but to the free trade area as a whole, and a supranational permanent tribunal. The enforcement body solves the problem of the diplomatic brake preventing vigorous enforcement of provisions of the agreement which are honored in the breach. The permanent tribunal allows for the systematic development of a coherent body of interpretation of the treaty itself, as well as the relationship between FTA obligations and domestic labor law provisions in each of the Party countries.

Judged by this standard, the U.S.-Jordan FTA enforcement and dispute provisions may move more backwards than forwards. The procedures are much like a truncated NAALC system, starting with consultations, omitting the ECE stage, and moving to an arbitral panel whose nonbinding recommendation may provide the basis for imposition of proportional trade sanctions.[248] The coverage of labor rights under the regular enforcement and remedies is offset by the weakness of the procedures and remedies, and the total lack of FTA institutions apart from joint activities of the two administrations. While theoretically, trade sanctions remedies may be available for violation of any covered labor right, and leaving aside the claims of some that only the effective enforcement commitment receives the benefit of this en-

247. *See* 19 U.S.C. § 3802 (2002).

248. *See* U.S.-Jordan FTA, *supra* note 3, arts. 15–17 at 75–78.

forceability, the reality is that no labor rights claims are going to reach the arbitral panel stage, let alone be the subject of trade sanctions. If a case is presented and consultations fail, the political officials in charge are no more likely to take the case to an arbitral panel than those same officials are to present a NAALC case to an ECE.

Moreover, the U.S.-Jordan agreement lacks any textual provision for public communications or submissions. Unless the two countries establish such procedures by mutual agreement, there will not even be a vehicle for initiating cases that allege systemic breach of FTA obligations. Given that no country has yet openly initiated a consultations proceeding under the NAALC without the impetus of a public submission, this lack of structured opportunity for public input and an established procedure for investigating cases is a serious flaw of the agreement, not only as to labor rights but as to other provisions as well. The Singapore and Chile FTAs appear to follow these aspects of the Jordan model. If so, they will be similarly flawed.

Experience under the NAALC has shown that an insider-outsider strategy is necessary to investigate these cases.[249] Most submissions are the product of collaboration between labor unions or NGOs on both sides of the border, along with the efforts of government officials devoted to bringing the agreement to life despite its deficiencies. Governments acting alone are poorly situated to initiate cases in part because they are not in the workplace or the courts or agencies of the other government on a regular basis, like the citizens and organizations of that country.

In this respect, the NAALC has been a real, if unintended, success. The nature of the submissions process against one country, by filing with another country's NAO, has fostered the cross-border collaboration necessary to produce the strongest submissions in many cases. While this feature could be partially replaced by a knowledgeable, professional supranational enforcement agency, some vehicle and incentive for public initiation and participation in enforcement processes is necessary for them to be effective.

The final way in which the U.S.-Jordan FTA is thought by some to represent a major labor rights advance is in the applicability of trade sanctions as a remedy. The rumored substitution of a form of monetary assessment for trade sanctions in the U.S.-Chile and U.S.-Singapore agreements has been decried as taking a step back.

249. *See* Weiss, *supra* note 177 (forthcoming NAS paper).

I am not as sure about this as the trade unionists and worker rights advocates, however. Trade sanctions are similar to the sanction of contract debarment for federal government contract violators under Executive Order 11246, and similar laws. These sanctions are rarely applied, because they are so draconian; moreover, they hurt the very people who are the intended beneficiaries of their deterrent effect. Debarring a government contractor employer will throw all the workers, victims of discrimination along with all the rest, into unemployment. Imposing trade sanctions may similarly throw exactly those workers whose labor rights are injured by non-enforcement into unemployment when the United States market for the goods or services they are producing is cut off.

Even worse, reluctance to impose such strong remedies undercuts the likelihood of their imposition, eviscerating the deterrent effect that is their primary justification to begin with. To the extent that workers in the breaching country become aware that the result of pursuing their FTA claims will be trade sanctions that will undermine their own sector of the economy, the workers are unlikely to collaborate in developing these cases. In addition, trade sanctions are likely to depress the job market and labor standards in the country that violates the agreement. Sanctions will only rectify the harm done to the complaining country's competing industry employers and their employees if the "appropriate and commensurate countermeasure" is delicately crafted by the complaining country's government to accomplish this goal. Sanctions so designed, however, may not yield a proportionate impact, or may not be feasible because of the essential nature of the product or services or because of domestic political considerations.

Conclusion

The NAALC expressed the goal that increased trade would lead to an upward, rather than a downward, spiral in labor rights and living standards, and indeed, was negotiated as a supplement to the basic NAFTA agreement precisely to calm fears that the opposite would be the case. This leveling upward, in the long term, is the necessary concomitant of expanded trade and investment. To make real progress, future FTAs must provide meaningful enforcement mechanisms, realistic remedies, and an interpretation of effective enforcement that obligates the actual delivery to workers of the rights purportedly provided in the domestic labor law system. Agreements which do anything undermine the very norms of transparency and truth in advertis-

ing that they purport to implement. Free trade unmoored from effective, enforceable labor rights provisions will eventually lose public support in all participant countries, for continued integration of regional economies. Morally, politically, and economically, it will become a form of unsustainable development.