ENFORCING INTERNATIONAL LABOUR STANDARDS IN THE AMERICAS IN AN ERA OF FREE TRADE

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I. INTRODUCTION

Labour and social issues are inextricably linked with the integration of global economies and markets and the negotiation of trade agreements. While states and businesses have attempted to argue in the past that there is no link between trade and social rights, the growth of foreign investment and multinational enterprises, internationalization of the financial markets and deregulation and privatization of the public sector have demonstrated that these trends cannot be separated from the working and social conditions of citizens. The structure and conditions of employment for working men and women are often in a constant state of flux, both positive and negative, creating economic uncertainty.[1]

Trade liberalization policies often tend to define social and economic regulation as "trade barriers" and this can lead to a harmonizing down rather than upwards in a country's labour and social laws. Often the liberalization of trade alters the bargaining position of workers by introducing "flexibilization of labour" policies such as subcontracting where corporations try to maintain competitiveness by avoiding direct financial responsibility for workers. Globalization also often exacerbates existing gender inequalities, partly because structural adjustment policies often throw the burden on women to make up for government cuts in social spending.[2] This leads to a disparate impact on women workers' employment, poverty levels and social burden.[3]

In light of the above, trade agreements negotiated at the transnational level have a profound impact on public policy and citizens' living conditions making it more difficult for citizens to democratically control their lives.[4] The negotiation and operation of trade agreements has been widely criticized for their lack of substantive social and labour protections as well as the lack of transparency and the secrecy surrounding the dispute resolution mechanisms.

At the same time that governments and businesses have joined together in multilateral organizations to further free trade, there has been a growing level of cooperation between unions and social organizations to forward a "social dimension" to free trade agreements to increase their benefits and lower their costs. These civil society organizations have marched and lobbied for trade reforms so that globalization "takes place through a "high road" of development which raises standards in all jurisdictions rather than a "race to the bottom" as workers compete for investment

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1 "Social Policy, Good Governance, Core Labour Standards and Development, March 1, 1999, International Confederation of Free Trade Unions, online, see www. icftu.org.

2 See "Continental Integration and the Americas- Alternatives for the Americas - Towards an Agreement between the Peoples of the Continent - Second Peoples Summit, Quebec City, April, 2001

3 For a further discussion of this, see ICFTU Briefing Statement on Gender and Trade - Some Conceptual and Policy Links, prepared by the Informal Working Group on Gender and Trade (IWGGT) for the Second Ministerial Meeting of the World Trade Organization, Geneva, May 18-20, 1998, online, www.icftu.org.

4 "A Trade Union Guide To Globalization - December, 2001", International Confederation of Free Trade Unions, online, "www.icftu.org/pubs/globalisation" p.9

through lower wages, standards and social programs."[5] At the World Social Forum held each year in Porto Allegre, Chile, unions and social organizations meet to discuss ways of altering the course of globalization by seeking to build institutions which respect common international principles and thereby reduce poverty and eliminate discrimination or social exclusion.[6] Citizens are increasingly seeking information and participation rights in the substance and operation of trade agreements.

It is increasingly recognized that trade agreements must include appropriate protections or "social clauses" to ensure protections for the interests of not only businesses and governments but also citizens in their workplaces and communities.[7] Stated more specifically, the "new architecture" for the global economy must ensure respect for core labour standards and human rights principles along with a comprehensive scheme for social protection.[8]

NAFTA's 1994 labour side agreement, the North American Agreement on Labour Cooperation ("NAALC") and the environmental side agreement, NACEC, were hailed by some at the time as promising a new breed of trade agreements. This was because there was at least some recognition of and protection of labour and social rights, even if those limited protections were contained in a

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5 *Review of the North American Agreement on Labour Cooperation, Annex 1, Report of the Independent Advisory Committee of the Operation and Effectiveness of the North American Agreement on Labour Cooperation,* Section I, p. 1. This is an independent review by a three member Review Committee of Experts, Pierre Verge, (Canada) and Clyde Summers (United States), with dissenting opinion by Luis Medina (Mexico--This report was commissioned pursuant to the four year review process set up pursuant to Article 10:1 (a) of NAALC., Annex 1). See also "2001-WTO Consultations - Doha (Qatar) WTO Ministerial Meeting - Trade and Labour Information Paper, Department of Foreign Affairs and International Trade, Government of Canada - online - www. dfait-maeci.gc.ca/t;na-mac"

6 See Bensusán, Graciela "Labour: Impacts & Outlooks", April, 2001, p. 14. Unpublished.

7 For a discussion of this, see *Review of the North American Agreement on Labour Cooperation, Annex 1,* Section I, p. 1,Online North American Labour Commission on Cooperation website - www.naalc.org. The International Confederation of Free Trade Unions has recommended the inclusion of a social clause in trade agreements. See www.icftu.org

8 For a discussion of these issues see the following articles: Langille B. (1994), "Labour Standards in the Globalized Economy and the Free Trade/Fair Trade Debate" in Sengenberger W. and Campbell D., eds., International Labour Standards and Economic Interdependence, International Labor Office, Geneva, 1994; OECD (1996). Trade, Employment and Labour Standards: a Study of Core Worker's Rights and International Trade, Paris; ODI (Overseas Development Institute) (1989), "Labour Standards or Double Standards? Worker Rights and Trade Policy Briefing Paper and "Learning from a Decade of Policy Failures" Statement by Global Unions to the Spring 2002 Meetings of the IMF and the World Bank,paras. 13-16, Leo McGrady, Q.C., International Treaties and Canadian Unions: NAALC and Workers Rights; and Chew, Diana & Posthuma, Richard, International Employment Dispute Resolution under NAFTA's Side Agreement on Labour. See ICFTU website www.icftu.org. "Canada, Mexico, United States, Trading Away Rights, the Unfulfilled Promise of NAFTA's Labour Side Agreement, Human Rights Watch, April, 2001, Vol. 13, No. 2(B), www.hrw.org.

"side" agreement rather than in the main agreement.[9] Covering Canada, the United States and Mexico, NAFTA was unlike the pre-existing MERCOSUR, the South American free trade agreement which had no labour side agreement. NAALC was enacted as part of NAFTA's explicit commitment to "protect, enhance and enforce basic workers' rights" among the signatory countries.[10]

While a full discussion of the European Economic Community based on a "federation" model is outside the scope of this paper, the relative success of economic and social integration in Europe is attributed at least in part to the incorporation of "social clauses" in the EEC's founding 1957 Treaty of Rome document. This led to the Council of Europe's Social Charter of 1961 and the "Revised" Social Charter of 1996. These instruments establish a set of social and economic human rights which includes the core labour standards. Countries submit national reports every two years regarding their application of Charter provisions. These reports are then assessed by the European Committee of Social Rights. The establishment of an Economic and Social Committee of the EEC and the incorporation of provisions for social legislation, social funds and democratic consultation, particularly in the Maastrict Treaty have been fundamental to the success of the European Union. While the ongoing improvements in the EEC have happened as a result of sustained civil society pressure and are far from complete, they are an important model to consider. [11]

In the past five years, after many decades of work, the world trade community has made significant progress in defining core workers' rights and obtaining agreement that countries should respect and promote those rights.[12] The international consensus on the fundamental rights and fair practices for the world's workplaces is contained in the Conventions and Recommendations of the International Labour Organization ("ILO").[13] The *ILO Declaration on Fundamental Principles of Work and its Follow Up* set out these core labour standards which are detailed in Appendix "A". This Declaration adopted at the 1998 International Labour Conference is the social minimum which must be respected in labour matters regardless of the level of economic development. Follow up mechanisms provide for review and monitoring of global and country progress, as well as technical assistance in meeting the Declaration obligations.[14]

Since 1994, further NAFTA-type arrangements have been entered into. The 1997 Canada-Chile Free Trade Agreement and its labour side agreement, CCAAL, basically followed the NAALC model whereas the 2001 Canada - Costa Rican Free Trade Agreement (not yet ratified by the Costa Rican

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9 Christine Elwell, Queen's University, Kingston, Ontario, Commission for Labor Cooperation, *Review of the North American Agreement on Labor Cooperation*, online: Commission for Labor Cooperation, www.naalc.org/english/publications/review_annex1_3.htm p. 26 (last modified August 3, 1999)

10 See Preamble to NAFTA

11 A Trade Union Guide to Globalization, above, p. 13-14

12 Protecting Worker's Rights: Building International Consensus, AFL-CIO, online, www.aflcio.org/globaleconomy.

13 See also ICFTU - Briefing Note, ILO Fundamental Workers' Rights Conventions. Online - www.icftu.org

14 See 2001- WTO Consultations, above, p. 2.

Parliament) with its CCRALC took a step forward incorporating the 1998 ILO Declaration on core labour standards and including enhanced dispute procedures.

In December 2001, the United States-Jordan Free Trade Agreement went the next step of insisting that each country strive to ensure that core labour standards are incorporated in a signatory country's laws and including the protection of labour principles in the main text of the agreement.[15] While there are enhanced enforcement protections in such an approach, the labour standards are still not as effectively enforced in the trade agreement as other "corporate" interests such as investment and copyright protection.

The purpose of this paper is to serve as a reference document to describe the various trade agreements and their mechanisms for the enforcement of labour standards in the Americas' trade agreements as well as the International Labour Organization's standards and enforcement procedures. A brief comparison is also made to the Inter-American Commission on Human Rights and the Inter-American Court.

The paper also provides an initial commentary on these issues. To be effective in protecting workers in a free trade era, trade agreements must include both the substantive requirement for countries to legislate and abide by the ILO core labour standards and for the effective enforcement of those rights. Such enforcement must be at a comparable level with the enforcement of the other economic rights in the trade agreement although tailored to address labour and social compliance requirements. While there has been some movement to include these protections, although with very weak or non-existent enforcement mechanisms, there is still strong resistance to effective enforcement. As Bush said at the 2001 Quebec Free Trade of the Americas Summit where 34 countries met to discuss trade liberalization, "I don't want those labour protections to be used to destroy the free trade agreement."[16]

II. INTERNATIONAL LABOUR ORGANIZATION CORE LABOUR STANDARDS

Introduction

The ILO is a tripartite UN specialized agency with representatives of employers, workers and governments from 175 countries responsible for the development and enforcement of fair working conditions in the world's workplaces.

ILO standards are developed through negotiations between governments, trade unions and employer representatives in ILO member states.[17] One hundred and eighty Conventions have been adopted in a process which requires a vote of two thirds of the country delegates at the annual International Labour Conference. Once a Convention is ratified by a country's legislature, then the

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15 See Human Rights Watch World Report, 2001, www.hrw.org

16 Sanger, David E. "Bush Links Trade with Democracy at Quebec Talks, New York Times, April 22, 2001, natl.ed.

17 See ILO website for further references - www.ilo.org.

Convention is binding. The country is required to pass laws which implement the ratified standards. Unlike Conventions which are binding when ratified, Recommendations are not ratified and provide guidance only for the interpretation of the Convention.

The ILO's core labour standards are a set of four internationally recognized basic workplace rights and principles;

a. Elimination of all forms of forced or compulsory labour;
b. Effective abolition of child labour with priority to the worst forms;
c. Equal opportunity and non-discrimination in employment; and
d. Freedom of association and the right to collective bargaining.

These basic rights have been repeatedly agreed to in a number of international instruments including the 1948 *Universal Declaration of Human Rights* and the Declaration of the 1995 Copenhagen Summit on Social Development. As noted above, the core labour standards were specifically substantiated by the ILO in the *1998 Declaration on the Fundamental Principles and Rights at Work and its Follow Up.* The Declaration calls on each of the ILO members to comply with the four core standards regardless of whether the country has ratified the relevant Conventions. The core labour standards are also supported by the World Bank which is committed to understanding and incorporating Core Labour Standards in the development of their Country Assistance Strategies.[18]

The four core labour standards relate to one or more of the following ILO Conventions which are described in more detail in Appendix "A" to this paper:

a. *Convention 87 Concerning Freedom Of Association And Protection Of The Right To Organize (1948);*
b. *Convention 98 Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (1949);*
c. *Convention 29 Concerning Forced Or Compulsory Labour (1930);*
d. *Convention 105 Concerning The Abolition of Forced Labour (1957);*
e. *Convention 100 Concerning Equal Remuneration For Men And Women Workers For Work of Equal Value (1951);*
f. *Convention 111 Concerning Discrimination In Respect Of Employment And Occupation (1957);*
g. *Convention 138 Concerning Minimum Age For Admission To Employment (1973).*

ILO Enforcement System

ILO Conventions are enforced through a requirement for regular reporting along with various complaint procedures. Although there are enforcement difficulties with the ILO system, it remains an important model to consider and enhance.

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[18] See www.wbln0018.worldbank.org

The reporting system is the primary way in which the Conventions are enforced. Countries who have ratified Conventions must report to the ILO regularly which means every five years for general Conventions and every two years for priority Conventions such as those noted above.[19] The ILO Committee of Experts, composed of independent experts, examines these Government reports annually. These Experts then submit their report on a Government's application of the Conventions and Recommendations to the International Labour Conference where it is discussed by a tripartite committee on standards. Only a limited number of serious cases are discussed by the Conference committee. The Experts' report and the Committee observations are then used to help governments bring their laws and practice into compliance. Countries are also offered ILO technical advisory assistance to bring their laws into compliance. While this reporting and review mechanism only applies to ratified Conventions, the ILO Governing Body can ask a Government for a report on a non-ratified Convention.

A trade union or employer organization has access to directly file a complaint with the ILO alleging that a Government is not observing a ratified Convention.[20] This complaint is then dealt with by a tripartite committee set up by the ILO governing body. This committee reports back to the Governing Body which can adopt conclusions and recommendations.

A government can also file a complaint against another government about the failure to ensure the effective application of a Convention so long as both governments have ratified the Convention at issue. The ILO Governing Body or an ILO Conference delegate can also file a complaint. Government complaints are infrequent. The Governing Body decides whether to refer the complaint for inquiry and report to a Commission of Inquiry composed of eminent experts. The complaining Government must indicate whether its accepts the Commission's recommendations or wishes to refer the complaint to the International Court of Justice.

Governing Body Committee on Freedom of Association

Widely recognized as the most effective ILO complaint procedure is the tripartite Governing Body Committee on Freedom of Association which has examined more than 1800 cases since its creation in 1951. This Committee is responsible for the enforcement of Conventions 87 and 98 and other Trade Union Rights Conventions. The Committee meets and reports to the Governing Body three times a year. It has the power to examine and to adopt conclusions and recommendations on complaints submitted to it. Part of the reason for its effectiveness is that unlike other procedures, the Committee will deal with complaints against non-ratifying Governments. It takes the position that ILO member countries agreed to respect the ILO constitution when they joined the ILO, and therefore, must respect the principles of freedom of association contained in that Constitution.

The ILO Workers' Group is lobbying for the rest of the Fundamental Rights Conventions to be similarly enforced.

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[19] See Article 22 of the ILO Constitution.

[20] See Article 24 of the ILO Constitution.

III. NORTH AMERICAN AGREEMENT ON LABOUR COOPERATION ("NAALC")

Introduction

The North American Free Trade Agreement ("NAFTA") came into effect on January 1, 1994 and opened the borders between Canada, Mexico and the United States for the free trade of goods and services.

NAFTA's Preamble provides that the signatories explicitly acknowledge that protecting labour rights "will encourage firms to adopt high productivity competitive strategies" and will "complement the economic opportunities created by NAFTA with the human resource development, labour-management co-operation and continuous learning that characterize high productivity economies." The Preamble refers to the parties' desire to "build on their respective international commitments and to strengthen their co-operation on labour matters."

NAFTA does not incorporate the issue of labour standards in the main body of the agreement, but rather, in a NAALC "side" agreement. Under NAALC, unlike the ILO, governments are placed in a tri-national relationship with each other rather than a vertical supernational relationship accountable to an international body.[21] The NAALC side agreement was signed with the following stated objectives:

a. improve working conditions and living standards in each Party's territory;
b. promote, to the maximum extent possible, the labour principles set out in Annex 1 (see below);
c. encourage co-operation to promote innovation and rising levels of productivity and quality;
d. encourage publication and exchange of information, data development and coordination, and joint studies to enhance mutually beneficial understanding of the laws and institutions governing labour in each Party's territory;
e. pursue cooperative labour-related activities on the basis of mutual benefit;
f. promote compliance with, and effective enforcement by each Party of, its labour law; and
g. foster transparency in the administration of labour law. (Article 1)

While NAALC requires signatories to promote the Annex 1 labour principles (see below), there is no explicit requirement for a signatory to legislate the principles. Instead, NAALC specifically recognizes the parties' right to legislate their own domestic standards. Mexico, the United States and Canada did allow the other signing parties the right to scrutinize each other's enforcement of their labour regimes.[22] NAALC's Article 2 states:

> *Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic standards, Each party shall ensure that its labour laws and*

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21 *Review of the North American Agreement on Labour Cooperation,* Annex 1, Section 1, p. 1,*supra*

22 *Review of the North American Agreement on Labour Cooperation,* Annex 1, Section I, p. 1, *supra*

regulations provide for high labour standards , consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.

Eleven Labour Principles

NAALC's Annex 1 labour principles flow from internationally recognized labour conventions (eg. ILO and OECD).[23] Two of the eleven labour principles relate to gender-based pay (8) and employment discrimination(7). Three of the principles relate to trade union rights. (1, 2, and 3). The principles are as follows:

1. *Freedom of association and protection of the right to organize. The right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests.*

2. *The right to bargain collectively. The protection of the right of organized workers to freely engage in collective bargaining on matters concerning the terms and conditions of employment.*

3. *The right to strike. The protection of the right of workers to strike to defend their collective interests.*

4. *Prohibition of forced labour . The prohibition and suppression of all forms of forced or compulsory labour, except for types of compulsory work generally considered acceptable by the Parties, such as compulsory military service, certain civic obligations, prison labour not for private purposes and work exacted in cases of emergency.*

5. *Labour protection for children and young persons. The establishment of restrictions on the employment of children and young persons that may vary taking into consideration relevant factors likely to jeopardize the full physical, mental and moral development of young persons, including schooling and safety requirements.*

6. *Minimum employment standards. The establishment of minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements.*

7. *Elimination of employment discrimination. Elimination of employment discrimination on such grounds as race, religion, age, sex or other grounds, subject to certain reasonable exceptions, such as, where applicable,* bona fide *occupational requirements or qualifications and established practices or rules governing retirement ages, and special measures of protection or assistance for particular groups designed to take into account the effects of discrimination.*

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[23] See Ozay Mehmet submission, p. 36 and Canadian Association of Labour lawyers Submission and Michael Dion Submission www.naalc.org/english/publications

8. *Equal pay for women and men. Equal wages for women and men by applying the principles of equal pay for equal work in the same establishment.*

9. *Prevention of occupational injuries and illnesses. Prescribing and implementing standards to minimize the causes of occupational injuries and illnesses.*

10. *Compensation in cases of occupational injuries and illnesses. The establishment of a system providing benefits and compensation to workers or their dependents in cases of occupational injuries, accidents or fatalities arising out of, linked with or occurring in the course of employment.*

11. *Protection of migrant workers. Providing migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions.*

Requirement of Signatories to Enforce Domestic Labour Law

Specific action which signatory governments are required to take to ensure the enforcement of their domestic labour law is stated in Article 3 as follows:

> *Each Party shall promote compliance with and effectively enforce its labour law through appropriate government action, subject to Article 42, such as:*
> *a. appointing and training inspectors;*
> *b. monitoring compliance and investigating suspected violations, including through on-site inspections;*
> *c. seeking assurances of voluntary compliance;*
> *d. requiring record keeping and reporting;*
> *e. encouraging the establishment of worker-management committees to address labour regulation of the workplace;*
> *f. providing or encouraging mediation, conciliation and arbitration services; or*
> *g. initiating, in a timely manner proceedings to seek appropriate sanctions or remedies for violations of its labour law.*[24]

Governments are also required to ensure that private parties have access to enforcement procedures. Article 4 states:

> 1. *Each party shall ensure that persons with a legally recognized interest under a law in a particular matter have appropriate access to administrative , quasi-judicial, judicial labour tribunals for the enforcement of the party's labour law.*
>
> 2. *Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:*
>
> a. *its labour law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and*

[24] Article 3 , NAALC, *supra*

b. collective agreements

NAALC provides for procedural guarantees in the labour law enforcement process in each country as a direct obligation over and above the requirement to comply with domestic labour law. These guarantees include the following:

> *Each party shall ensure that its administrative, quasi-judicial, judicial and labour tribunals proceedings for the enforcement of its labour laws are fair, equitable and transparent and to this end, each Party shall provide that:*
>
> *a. such proceedings comply with due process of law;*
>
> *b. any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires;*
>
> *c. the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and*
>
> *d. such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.* Article 5

NAALC Institutions

NAALC is implemented through the following bodies: [25]

Trinational Institutions

1. Commission on Labour Cooperation - This body consists of a Ministerial Council and a Secretariat. The Council, composed of the Parties' Labour Ministers, is the governing body. It sets the priorities for cooperative activities as well as the approval of the Secretariat's research and reports. The activities are carried out under three headings - occupational safety and health, employment and labour training and labour legislation and workers' rights. The Parties' labour Ministers carry out Ministerial Consultations.

2. Secretariat - This is the Commission's working body which assists in the carrying out of its functions. (Article 13) The Secretariat is also responsible for independent long term research activities. (Article 14)

National Institutions

3. National Administrative Offices - Mexico, Canada and the US each have an NAO or Section which is a department of their respective Labour Ministries. The NAO sets up rules for the handling of public communications and reviews.

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[25] Article 10, NAALC, www.naalc.org

4. National Advisory Committee - This Committee, consisting of members of the public including representatives of business and labour, is there to advise on the implementation and further elaboration of the Agreement. (Article 17)

5. Governmental Committee - This Committee consisting of representatives of federal and state or provincial governments is there to advise on the implementation and further elaboration of the Agreement (Article 17). Only Canada and Mexico have set up this Committee.

Ad Hoc Committees

6. Evaluation Committee of Experts (ECE - Article 23). This Committee is to provide an independent analysis of a country's patterns of practice in the enforcement of its occupational health and safety or other "technical labour standards". No ECE has been set up to date.

7. Arbitral Panels - (Article 29) - This is the only stage which has any enforcement mechanism. As it is only set up after an ECE process, no panel has been formed to date.

Enforcement Mechanisms

NAALC is primarily designed to encourage governments to enforce their own labour laws. Resolution of differences under NAALC is encouraged through cooperative and consultative procedures, namely the Ministerial Consultations and the consultations between the NAOs and the evaluation services provided by the ECEs.[26] Arbitration panels are only used as a matter of last resort once all consultative activities are exhausted and unsuccessful.

The Labour Principles are not all equal when it comes to enforcement. While Consultations may be carried out with respect to all the Annex 1 Labour Principles (the 1st Tier), an ECE can only be set up to deal with the last 8 Labour Principles (the 2nd Tier) which are defined as the "Technical Labour Standards". This prevents the first three Labour Principles, freedom of association, protection of the right to organize and the right to collective bargaining from getting to the ECE stage. Sanctions can only be applied in limited circumstances by the Arbitral Panel for 3rd Tier level Labour principles, namely violations that involve labour by minors, work safety and health issues or minimum salary questions. In addition, the Arbitral Panel is further circumscribed by the need to find a discernible long term pattern of omissions or violations which is "trade related" and the requirement that all three countries have corresponding laws concerning the violation. [27]

Submission of Public Communications

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26 *Review of the North American Agreement on Labour Cooperation,* Annex 1, Section II, p.1, *supra*

27 See Bensusán, Graciela, p. 16, *supra*

There is no individual or group right to enforce NAALC's terms. An individual or group does not have the right to compel a hearing into a complaint and to obtain redress. Individuals must convince their respective National Administrative Office to take their case forward. [28]

While in general it is the countries themselves who are in charge of implementing the agreement, there is an opportunity for public individuals or groups , whether union, employer or otherwise to submit to the various NAOs for their consideration "communications" or submissions on issues with respect to the enforcement of labour legislation in one of the countries. Article 16(3) states:

> *Each NAO shall provide for submission and receipt, and periodically publish a list of public communications on labour law matters arising in the territory of another party. Each NAO shall review such matters, as appropriate, in accordance with domestic procedures.*

All three countries have a procedure for individuals or groups to file submissions to the NAO claiming violations of labour laws in another country and the governmental agencies' failure to enforce the laws. The inquiry only uses evidence to determine if there is a problem in the enforcement process not to adjudicate and provide a remedy for the individual wrong. Of the submissions to date, all have been submitted to the US NAO except for one which was submitted to the Mexican NAO.

The general procedure is as follows:

1. The group or individual files the complaint alleging a violation of a country's labour laws and the failure to enforce that law. The NAO decides whether the submission meets the criteria for acceptance.

2. If the NAO decides to accept the submission, it obtains further information from those filing the submission, from the other country's NAO, the employers named in the submission and canvasses available research. The purpose of the review is to obtain information to assist the NAO to better understand and publicly report on the particular Government's promotion of compliance with and effective enforcement of its labour law.

3. The NAO issues a Public Report of Review which summarizes all the information concerning the event and conditions giving rise to the submission. It describes the applicable labour law, the enforcement mechanisms and the findings as to the practices and problems in the enforcement of the relevant labour law.

4. If there are serious violations, the NAO Report may recommend that Ministerial Consultations take place. This may result in a Ministerial Agreement to address the problem. In the Canadian context with a split government labour law jurisdiction, decisions are made after consulting the Canadian Inter-Governmental Committee. A public hearing or meeting

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[28] Christine Elwell, Queen's University, Kingston, Ontario, Commission for Labor Cooperation, *Review of the North American Agreement on Labor Cooperation*, online: Commission for Labor Cooperation, www.naalc.org/english/publications/review_annex1_3.htm p. 32 (last modified August 3, 1999)

is possible but not required. The United States holds a public hearing. The Mexican NAO states that public hearings are not appropriate as they are "adversarial" and not appropriate to a consultative procedure. The purpose of the hearing is to gather information for the NAO Report and not to adjudicate rights. [29]

Ministerial Consultations

In order to get to the ECE stage, the Ministerial Consultation stage must be completed. (Article 23). To date, Ministerial Consultations have been reactive rather than proactive despite the broad wording of Article 22 and have only taken place on a NAO recommendation following submission of a public communication.

Evaluation Committee of Experts

The Evaluation Committee of Experts can only be set up at the request of a Party Government and following a Ministerial Consultation which has not resolved a matter (Article 23). As noted above, no Evaluation Committee has yet been set up. The ECE cannot deal with disputes concerning the first three Labour Principles, freedom of association, protection of the right to organize and the right to collective bargaining. These principles were the subject of the vast majority of the consultations on public communications to date. The parties are to establish co-operative arrangements with the ILO to draw on its expertise and experience for purpose of implementing Article 24(1) which is the roster of experts required for the Evaluation Committee of Experts. The ECE stage is to be "consultative" and "non-adversarial" (see Part IV and Article 23).

Arbitration Panels

If the matter is not resolved at the ECE stage, the submission goes to a government-to-government dispute settlement where an arbitral panel is established to review the allegations as well as to recommend solutions. In order to get to the arbitral panel stage it is necessary to go through the ECE process. An arbitration panel has never been established.

Only three of the Labour Principles can be addressed by an arbitration panel - health and safety, child labour and minimum wage. This is the only stage which has any enforcement mechanism, i.e. an action plan and a monetary assessment. If the arbitration panel's recommendations are not implemented, monetary sanctions may result which are to be paid by the offending country into a fund to be used to improve its enforcement in its territory. If monetary sanctions are not paid, NAFTA benefits may be suspended. The assessment is enforceable by Canada in its domestic courts and by Mexico and the United States through trade sanctions. [30]

Commentary

There are many extra requirements and loopholes in the NAALC process which have contributed to the ineffectiveness of the document:

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[29] *Review of the North American Agreement on Labour Cooperation,* Annex 1, Section III, p. 1-2, *supra*

[30] Articles 38-41, NAFTA

1. A Government can defend itself by saying it decided to assign resources to a different labour matter. (Article 49);

2. Governments can rely on the "reasonable exercise" of their discretionary authority (Article 49);

3. Matters complained of to an ECE or Arbitral panel must be trade-related and related to the enforcement of a party's labour law. (Article 23, 29)

4. As well, a single violation is not sufficient- there must be a persistent pattern of failure to enforce labour laws (Article 27, 29 and 49);

5. A signatory or private party in one country is not able to enforce the agreement in another country or a right of action against a country for the breach of NAALC. (Article 42 and 43)

The protection of labour and human rights standards under NAFTA have been seriously hindered by NAALC's lack of any enforceable requirement for each signatory country to have harmonized labour standards meeting at least the ILO minimum. Where domestic laws are inadequate to protect workers' rights, there is no mechanism to improve those standards. The result is a harmonizing "down" not "up".[31] As a commentator has stated:

> *It is not as if empirical data is unavailable to reveal what the general North American public already knows: in the absence of high North American-wide norms, job loss and threats thereof in high standard jurisdictions to low cost locations tend to place a downward pressure on those high standards and their enforcement, resulting in a harmonized, but now lower, common dominator within the free trade area.*[32]

For "free trade" to be more fair, there needs to be a common standard of behaviour or social charter with an effective impartial enforcement mechanism.

> *Along with the reform of the national legislation, there should be greater convergence between the different levels of regulation, starting from the strengthening of NAALC's provisions and reach. Similarly, on the global level, common minimum labour standards should be adopted in order to ensure that islands of strong labour protection, such as the European Union, will not succumb before the competitive pressures emanating from other integration schemes such as NAFTA.*
>
> *Despite its imperfections, in fact, the European experience provides some useful lessons. For example, the North American labour agenda should incorporate a proposal for a supranational model of dealing with labour relations that would make the integration process more inclusive and help address one of the thorniest problems exposed by the NAALC: the absence of guarantees for the collective action of workers by unions.*

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[31] See Aimee Ableman " The Success of Labour Side Agreements in Preventing Sex Discrimination in Mexico and Latin America. unpublished. August, 2001

[32] Christine Elwell, p. 28, *supra*

Unlike at the time of the signing of NAALC, it can be argued now that there is a specific consensus by the NAFTA signatory parties on the core labour standards with the ILO 1998 Declaration of Fundamental Principles. This should allow for the elimination in the ranking of how these principles are treated in the NAALC review process.[33]

The submission process "leads to little corrective action" and its serious inadequacies have been detailed in an official study, *Review of the North American Agreement on Labour Cooperation*.

> *Although the investigation and hearing has produced substantial evidence that the law has been violated, that procedures lack impartiality and that the law is not being enforced, no remedy or correction follows.* [34]

As noted in another analysis of NAALC by Canadian commentator, Leo McGrady, after ten complaints were filed between 1994 and1997, with ten more in 1998, only two were filed in 1999, one in 2000 and two in 2001. "One reason why the NAALC is being tested less may be because out of all the complaints filed, not one has been referred past ministerial consultation and no violator has ever been sanctioned."[35]

To illustrate the limitations under the NAALC process, the following is an excerpt from a report on the NAALC:

> *In Submission 940003, the issues involved were dismissal for union activities, employer interference in union elections, police violence in a work stoppage, and denial of union registration. The NAO recommendation was limited to "further address the operation of the union registration process." The Ministerial Consultation Agreement was limited to a joint work program of public education, a study of independent experts on the Mexican law dealing with registration, and a meeting between officials of the Mexican Labor Department and officials of the union which had been denied registration.*
>
> *In Submission 9501, the issue was sudden plant removal immediately prior to a representation election. The Ministerial Consultation Agreement was that the U.S. Secretary of Labor keep the Mexican Secretary informed of developments, the Secretariat make a trinational study of sudden plant closings, and that a public forum be held in San Francisco.*
>
> *In Submission 9601, the issues were denial of union registration by application of the monopoly union provision, and the bias of FCAT. The NAO recommendation was to examine the relationship between treaties and the Mexican Constitution and labour laws. The Ministerial Consultation Agreement was that the NAOs of the United States and Mexico exchange information, provide each other with information on relevant labour legislation, and*

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[33] Christine Elwell, *supra*

[34] *Review of the North American Agreement on Labour Cooperation,* Annex 1, Section III, p. 15. and Section IV, p. 1, *supra*

[35] Leo McGrady, Q.C., International Treaties and Canadian Unions: NAALC and Workers Rights;, p. 2-3

organize a conference on the relationship between treaties and constitutional provisions in the two countries.

In Submission 9701, involving pregnancy discrimination, the NAO recommendation for Ministerial Consultation was to ascertain the extent of protection against pregnancy based on discrimination afforded by Mexican labour laws and their effective enforcement. The Ministerial Consultation was agreed to, but we have no information on the results.

There has been no recommendation or consultation agreement that a Secretary or Minister would undertake any formal or informal action to remedy any violations of law, correct any actions by agencies of government, alter any procedures, or make any effort to modify any laws. There has been no recommendation or consultation agreement to promote the Labour Principles set out in Annex 1 in accordance with Article 1 and 2 of the NAALC.

The submissions process has involved lengthy delays. Ministerial recommendations and consultations have not addressed the many allegations of delays, lack of impartiality and fair and transparent procedures even though NAALC provides a guarantee of procedural fairness.[36]

While there is substantial evidence of systemic violations of labour laws particularly in the United States and Mexico, the submission process has been used infrequently. The procedure is not well known generally and for the labour groups and organizations who have used it, the procedures have been widely criticized as futile because it provides no remedy and has not resulted in any significant changes to labour laws or their enforcement.[37] While the recommendations of the NAO and the Ministers should be directed to a systemic solution, there is no reason why the recommendations could not start with the situation of the individuals involved. This would diminish the disillusionment with the process. [38]

So despite a finding of a persistent pattern of failure by a NAFTA government to enforce its own labour laws, often entailing fundamental human rights, the NAALC by design institutionalizes a type of immunity for governments from providing effective individual remedies for the breach of fundamental rights recognized by domestic law and the NAALC.[39]

As well, the NAO Reports have generally failed to address other Treaty violations and particularly violations of ILO Conventions.[40] At stated by commentator Christine Elwell:

In the first cases, the U.S. NAO reports failed to deal with the relevance of treaties in Mexican law. In Submissions 940002 and 940003, violation of Convention 87 of the ILO

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36 Article 4.26

37 *Review of the North American Agreement on Labour Cooperation,* Annex 1, Section III, p. 16, *supra*

38 *Review of the North American Agreement on Labour Cooperation,* Annex 1, Section III, p. 14, *supra*

39 Christine Elwell, p. 32, *supra*

40 *Review of the North American Agreement on Labour Cooperation,* Annex 1, Section III, p. 16, *supra*

> *protecting the right of freedom of association was expressly alleged in the submissions. There were then more than 10 years of ILO precedents concerning union monopoly provisions for federal employees in Mexican federal law from which one might conclude that the refusal of the CAB to register the independent union was a violation of Convention 87. Also, the coerced resignations in 940001, 940002, and 940003 might have been found in violation of Convention 87. There was no discussion in any of these Reports as to whether any of this conduct violated the ILO Convention.*
>
> *...*
>
> *In the Public Report on Submission 9701, the Report acknowledged Convention 111's broad protection against gender discrimination and the Committee of Experts' concern about pre-employment pregnancy tests. However, because no decision of the Committee of Experts had explicitly held that pre-employment testing violated Convention 111, the Report refused to find Mexican law permitting pre-employment testing to be a violation of the ILO Convention or any other treaty.*

There have been some positive moments with a “sunshine effect” resulting in a focus on domestic labour laws, particularly in Mexico. As the Elwell study states:

> *Since the initiation of the submission processes, there have been relevant changes in Mexican law, although it is difficult to determine what role the process has played in the change. Subsequent to the Report on Submissions 940002 and 940003, which involved refusal to register more than one union in a workplace, the Supreme Court of Mexico, in two unanimous decisions, found two state statutes prohibiting more than one union in a workplace to be unconstitutional.*
>
> *This decision probably led the CAB in the Maxi-Switch case (Submission 9602) to register the union and agree to normalize the procedure in dismissal cases shortly before the scheduled hearing. This led the union to withdraw the complaint and cancel the hearing.*

It has turned out that the concerns expressed by community, social and labour organizations at the time of the signing of NAFTA and NAALC are well founded - ie. that NAALC’s lack of any minimum mandatory and enforceable labour standards leads to a "race to the bottom". That is, the signatory countries, Canada, the United States and Mexico would lower their labour standards in a bid to increase their competitiveness with one another and globally. A particular concern was an anticipated move to reduce the protections for workers to organize, collectively bargain and strike. For example, since the introduction of NAALC the Ontario government has repeatedly reduced access to collective bargaining, the right to organize, and the right to strike for workers in Ontario. The Ontario Government enacted these changes as part of its stated quest to be more competitive with its trade partners and the international community and, to use the language of the Ontario government’s *Common Sense Revolution*, to make Ontario “open for business”. Ontario is one of a number of Canadian provinces, including British Columbia which did not ratify NAALC, a problem which stems from Canada’s split jurisdiction over labour matters.

IV. COMPARISON TO THE NAFTA ENFORCEMENT MECHANISMS

The lack of direct enforcement in NAALC stands in sharp contrast to the direct and powerful enforcement mechanisms in NAFTA. In comparison to the lengthy and arduous NAALC process,

NAFTA investors and defenders of economic rights are granted access to both a civil and criminal process to defend and enforce their rights.

The principle NAFTA dispute settlement mechanisms are found in Chapters 11, 14, 19 and 20. Chapter 11 investment disputes are determined under the Agreement's dispute provisions. Chapter 19 provides for binational panel review of anti-dumping (AD), countervailing duty (CVD) and final injury determinations as well as the power to review amendments made by either Canada, the United States or Mexico to their anti-dumping or countervailing duty law. Chapter 20 dispute provisions relate to interpretation or application disputes including those relating to the Chapter 14 financial services provisions.

The following is an examination of the dispute resolution processes for Chapter 11 and Chapter 19.

A NAFTA investor who alleges that a host government has breached its investment obligations under Chapter 11 may, at its option, have recourse to one of the following impartial arbitral mechanisms:

1. the World Bank's International Center for the Settlement of Investment Disputes (ICSID);

2. ICSID's Additional Facility Rules; or

3. the rules of the United Nations Commission for International Trade law (UNCITRAL rules).

Alternatively, the investor may choose the remedies available in the host country's domestic courts. Final awards by Chapter 11 arbitration tribunals are enforceable in domestic courts.

Under Chapter 19, a signatory government may request that an amendment to another party's anti-dumping or countervailing duty statute be referred to a panel for a declaratory opinion on whether the amendment is consistent with the GATT (General Agreement on Tarriffs and Trade) and the NAFTA. Article 1904, provides for the establishment of panels to review anti-dumping and countervailing duty statutes and make final determinations.

To implement the provisions of Chapter 19, the Parties have adopted common Rules of Procedures. Unlike the delays experienced under NAALC, the NAFTA Article 1904 Panel Rules are designed to result in final panel decisions within 315 days of the date on which a request for a panel is made. Within the 315 day period, strict deadlines have been established relating to the selection of panel members, the filing of briefs and reply briefs and the setting of the date for Oral Argument. Based on these Rules, a detailed timeline is established for each Chapter 19 panel review.

Article 1904 also provides for an "extraordinary challenge procedure" where in defined circumstances, a participating Party can appeal a panel's decision to a three-member committee of judges or former judges. The committee is to make a prompt decision to affirm, vacate, or remand the panel's decision. Under Article 1905, a three-member special committee may be established to review allegations of one Party that the application of another Party's domestic law has interfered with the proper functioning of the panel review system.

V. CANADA-CHILE AGREEMENT

Canada and Chile signed the Canada Chile Free Trade Agreement as a follow up to NAALC and to ease Chile's eventual inclusion in NAFTA. Effective June 7, 1997, this Agreement also included a labour side agreement, Canada-Chile Agreement on Labour Co-operation ("CCALC"). The agreements are very similar, using the same 11 labour principles and providing for similar consultation, co-operation and review procedures with Ministerial Consultations and Evaluation Committee of Experts.

VI. CANADA-COSTA RICA AGREEMENT

The Canada-Costa Rica Free Trade Agreement which was ratified by Canada in December, 2001 failed to be ratified by the Costa Rican Parliament before it dissolved on April 30, 2002. The Costa Rican FTA also had a labour side agreement, the Canada-Costa Rica Agreement on Labour Co-operation ("CCRALC").

The CCRLALC was negotiated using the CCALC as a starting model but with a new approach of incorporating the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*. While the administrative and dispute structure had been more streamlined than NAALC or CCALC, the CCRALC took a step forward and permitted the ILO Fundamental labour principles to go forward to the dispute resolution stage. The remedy power has also been broadened from a fine to allow an order for "reasonable and appropriate measures." Although there are still many problems with the CCRALC, it will not in any event be put in place unless the CCRFTA is ratified at some point by Costa Rica. The Costa Rica Parliament just recently failed to ratify the agreement which makes its future uncertain.

VII. THE U.S. - JORDAN FREE TRADE MODEL

Introduction

The U.S. - Jordan Free Trade Agreement ("USJFTA") effective December 17, 2001 is the first U.S. trade agreement to include provisions aimed at protecting workers' rights and environmental protection. The USJFTA is the third American trade agreement, following NAFTA and the bilateral trade agreement with Israel.

Unlike prior trade agreements, such as NAALC, the USJFTA was the first free trade agreement to include labour and environmental standards in the main body of the agreement thereby making these provisions subject to the same dispute resolution mechanism as the agreement's other trade provisions. Furthermore, it provides that trade should not be at the expense of workers' rights and environmental standards[41].

The USJFTA's Preamble states that a purpose of of U.S. - Jordan trade relations is "with a view to raising living standards and promoting economic growth, investment opportunities, development, prosperity, employment and the optimal use of resources in their territory". The preamble also includes specific statements linking trade with labour standards and the environment:

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[41] Article 5 and 6

"Recognizing the objective of sustainable development, and seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development;
...
"Desiring to promote higher labour standards by building on their respective international commitments and strengthening their co-operation on labour matters; and

"Wishing to promote effective enforcement of their respective environmental and labour law;"

Given the potential for this agreement to be used as a framework for future agreements, its provisions are reviewed in some detail below. However, it is important to note that while some of its features are promising and were the result of being negotiated by the Clinton Administration, the USJFTA was ratified by the Bush Administration which has shown much less support for its more progressive features. In fact, although not given much public attention, the Bush administration in correspondence with the Jordanian administration has made it clear that it does not believe that there is a need to use the trade enforcement provisions of the agreement.

Enforcement Provisions of the Economic Provisions of the USJFTA

The economic enforcement provisions of the U.S. - Jordan FTA include the following:

a. the most up-to-date international standards for copyright protection.[42] In addition, the enforcement of intellectual property rights includes provisions that require both countries to provide their respective judicial authorities the power to order the infringer to pay the rights holder damages.[43] As well, each country is required to ensure that its statutory maximum fines are sufficiently high to deter future acts of infringement[44] and power is provided to authorities to initiate criminal actions and border measure actions without the need of a formal complaint by a private party or rights holder[45];

b. that the parties shall refrain from existing practices of not imposing customs duties on electronic transmissions and imposing unnecessary barriers on electronic transmissions, including digitized products[46];

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42 Article 4.1 and 4.29

43 Article 4.24

44 Article 4.25. See also, the Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights under the Agreement between the United States and Jordan on the Establishment of Free Trade Area, paragraph 3 whereby Jordan agrees to raise its domestic criminal penalties to JD 6,000 in order to meet its obligation under Article 4.25 of the FTA.

45 Article 4.26

46 Article 7

c. provides for dispute settlement panels to issue legal interpretations of the USJFTA and produce non-binding reports if the two countries fail to resolve the dispute through direct consultations. If the party is still unable to resolve the dispute after the panel issues its recommendations, the affected country is authorized to take appropriate measures.[47] The dispute resolution process in the USJFTA should not be construed to authorize a party to apply a measure that is inconsistent with the Party's obligations under the WTO Agreement.[48]

Enforcement of the Labour Provisions

The U.S-Jordan Agreement specifically states that the parties reaffirm their obligations as members of the ILO and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. Article 6 then requires that "the Parties shall strive to ensure that such labour principles and the internationally recognized labour rights... are recognized and protected by domestic law" (emphasis added). These rights include:

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 labour;

d. a minimum age for the employment of children; and

e. acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

While each Party has the right to establish its own labour laws, each party "shall strive to ensure" that the laws are consistent with the above internationally recognized labour rights. Article 6 also states that "it is inappropriate to encourage trade by relaxing domestic labour laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party" (emphasis added).

Finally, Article 6 recognizes that co-operation between the two countries provides enhanced opportunities to improve labour standards. Therefore, a Joint Committee established under the USJFTA to supervise the proper implementation of the trade agreement and to review the trade relationship between the parties, will consider any such issues raised by a party as it relates to the improvement of labour standards.

It should be noted that the language employed in the protection of the of labour rights - i.e. "shall strive to ensure" - may be contrasted to the intellectual rights provisions where the language is mandatory in requiring that domestic laws "shall ensure" that infringers face civil and prosecutorial

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[47] Article 17

[48] Article 1.4

consequences for violations.[49] While the USJFTA allows the U.S. or Jordan the exercise of discretion to set its own enforcement priorities when enforcing its labour laws, it does not afford the same discretion to domestic authorities in the enforcement of the intellectual property rights provisions. The intellectual property rights enforcement provisions are mandatory.

Furthermore, unlike the other enforcement provisions, to make a case under the dispute resolution process, a country must establish proof of a “sustained or recurring course of action or inaction” regarding a labour law that directly affects trade.[50]

Enforcement of the Environmental Provisions

Article 5 of the USJFTA provides for similar provisions with respect to environmental issues as are provided for in the labour area including the establishment of a U.S. - Jordanian Joint Forum on Environmental Technical Co-Operation for ongoing discussion of environmental priorities, and identifies environmental quality and enforcement as areas of initial focus.[51] The U.S. and Jordan has agreed to consult with and consider the views of interested members of the public in carrying out the work of the Joint Forum. The Joint Committee established under the USJFTA is responsible for the implementation of the provisions relating to the environment.

Dispute Resolution Mechanisms

Joint Committee

Article 15 establishes a Joint Committee to supervise the implementation of the trade agreement and to review the trade relationship of the parties. The functions of the Joint Committee includes reviewing the general functioning of the USJFTA; reviewing the results in light of experience gained during its functioning and its objectives, and considering ways of improving trade relations between the parties, facilitating avoidance and settlement of disputes; and discussing opportunities to improve labour standards.

The Joint Committee is composed of representatives from each state and led by the United States Trade Representative and Jordan's Minister primarily responsible for international trade, or their designees. The Joint Committee is also mandated to establish and delegate responsibilities to *ad hoc* and standing committees or working groups, and seek the advice of non-governmental persons or groups. The Joint Committee establishes its own rules of procedures and must meet at least once a year. All decisions are made by consensus.

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[49] For example, see the Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights under the Agreement between the United States and Jordan on the Establishment of Free Trade Area, paragraph 3 whereby Jordan agrees to raise its domestic criminal penalties to JD 6,000 in order to meet its obligation to ensure that statutory maximum fines are sufficiently high to deter future acts of infringement, as required in Article 4.25 of the FTA.

[50] Article 6.4

[51] See United States - Jordan Joint Statement on Environmental Technical Co-Operation

Consultation and Dispute Settlement

The USJFTA provides that every attempt shall be made to interpret and apply the USJFTA based on mutual agreement of the parties.[52] Where a matter cannot be settled, it is dealt with under Article 17 which sets out the dispute settlement mechanism whenever

a. a dispute arises concerning the interpretation of the agreement;

b. a party considers that the other party has failed to carry out its obligations under the agreement; or

c. a party considers that measures taken by the other party severely distort the balance of trade benefits accorded by the agreement or substantially undermine the USJFTA' s fundamental objectives.

Disputes about the interpretation or application of the labour standards fall under Article 17. The steps in the dispute settlement process are as follows:

a. Consultation: The parties shall attempt to arrive at mutually agreeable resolution through consultation by submitting a request for consultation. [53]

b. Joint Committee: If there is no resolution through consultation within 60 days of submitting the request for consultation, either party may refer the dispute to the Joint Committee which will convene to attempt to resolve the dispute.[54]

c. Dispute Settlement Panel: If the matter is not resolved at the Joint Committee within 90 days after the dispute was referred to it, or within such other period as the Joint Committee has agreed, either party may refer the matter to a dispute settlement panel composed of three members: each party will appoint one member and the two appointees will select the third member to act as chair.[55]

d. Dispute Settlement Panel's Report: Within 90 days after the chair is appointed, the Panel will present a report containing findings of fact and its determination as to whether either party has failed to carry out its obligations under the FTA or whether a measure taken by either party severely distorts the balance of trade benefits accorded by the FTA. If the panel makes such a finding, it may, at the request of the parties, make recommendations for resolution of the dispute. The report of the panel is non-binding.[56]

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[52] Article 16

[53] Article 17.1(a) and 17.1(b)

[54] Article 17.1(b)

[55] Article 17.1(c)

[56] Article 17.1(d)

e. Report Referred to Joint Committee: After the Panel has presented its report, the Joint Committee shall endeavour to resolve the dispute within 30 days, taking the report into account, as appropriate.[57]

f. No Resolution: If the Joint Committee is unable to resolve the matter, the affected party is entitled to "take any appropriate and commensurate measure".[58] The FTA does specify the form that this action should take; however, the party taking action may not act in a manner that is inconsistent with the WTO obligation. It is not clear whether trade sanctions are appropriate and commensurate measures.

The USJFTA dispute resolution procedure does not preclude a party from bringing a complaint under any other applicable dispute settlement mechanism under an agreement to which both parties are governed, but whichever mechanism is selected, that mechanism shall have exclusive jurisdiction over the matter.[59] If one of these mechanisms fails for procedural or jurisdictional reasons to make findings of law or fact, then the party is not prevented from invoking another mechanism with respect to the same claim.[60]

The USJFTA also provides at Article 18.1 that neither party may provide for a right of action under its domestic law against the other party on the ground that a measure of the party is inconsistent with the agreement.

Transparency

While trade agreements appear to espouse principles of "democracy", these principles often do not translate in the actual process of negotiation and implementation of trade agreements.
The USJFTA responds to this criticism by explicitly adopting the principle of transparency and openness. For example, under Article 15 which establishes the Joint Committee discussed above:

> *"Recognizing the importance of transparency and openness, the Parties reaffirm their respective practices considering the views of interested members of the public in order to draw upon a broad range of perspectives in the implementation of this Agreement."*

In addition, the U.S. and Jordan have entered a Memorandum of Understanding on Transparency in Dispute Settlement under the Agreement between the United States and Jordan on the Establishment of a Free Trade Area. This Memorandum of Understanding states that "recognizing that transparency in the administration of international trade agreements fosters public

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57 Article 17.2(a) and 17.1(b)

58 Article 17.2(b)

59 Article 17.1(e)(i)

60 Article 17.1(e)(ii)

understanding of international trade and strengthens the international trading system", the parties agree:

a. to solicit and consider the views of members of their respective public in order to draw upon a broad range of perspectives;

b. any submission to the Dispute Settlement Panel shall be made available to the public within ten (10) days of the date of submission;

c. oral presentations before the Dispute Settlement Panel shall be open to members of the public;

d. the Dispute Settlement Panel shall accept and consider *amicus curiae* submissions of individuals, legal persons, and non-governmental organizations with an interest in the outcome of the dispute; and

e. the Dispute Settlement Panel shall release its report to the public at the earliest possible time.

All of the above is contingent on the understanding that there is nothing in the USJFTA or the Memorandum of Understanding which requires the disclosure of confidential information to the public, a party, a non-governmental organization, or a panel.

Conclusion

The USJFTA has been heralded as a "template" for future trade agreements in light of the its inclusion of labour and environmental protections within the body of the agreement. Unlike NAFTA, which includes "side agreements" dealing with labour and environmental issues and a dispute resolution process separate and apart from the main trade agreement, the USJFTA subjects violations of the labour and environmental provisions to the same dispute resolution process as any other violation in the trade agreement.

The dispute resolution process under the USJFTA requires the will of the state to bring claims under the dispute resolution procedure; individuals or non-governmental organizations cannot initiate a claim. However, individuals or non-governmental organizations may make submissions as *amicus curiae* if the U.S. or Jordan initiates the dispute settlement process, but this is still dependent on a state bringing forward a complaint.

The USJFTA is also significant in its commitment to transparency in the dispute resolution process. In addition, it provides a space for non-state actors to voice concerns on labour and environmental issues.

It is too early to know how the enforcement procedures under the USJFTA will strengthen labour rights and environmental standards particularly since the new Bush administration would likely have never signed the agreement in the first place and does not appear to be supportive of its enforcement, particularly in the labour area. Closer examination of the language in the trade agreement also points to some weaknesses in the USJTA. There are no new labour commitments in the agreement and domestic labour laws remain the *status quo*. These provisions do not require

either country to adopt any new labour or environmental laws and each country retains the right to set its own labour and environmental standards to change those standards. The parties simply need "to strive" for adherence to the ILO standards. This is contrasted with provisions relating to intellectual property rights where each country is required to strengthen domestic laws in order to ensure protection and enforcement of these rights.

VIII. INTER AMERICAN COMMISSION AND COURT ON HUMAN RIGHTS

Organization of American States

Another venue for bringing forward labour standards issues with a human rights dimension in the Americas is the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights. These bodies are created under the Inter-American Convention on Human Rights. The Inter-American Convention requires signatory countries in North and South America to respect the human rights of all persons in their jurisdiction without discrimination[61].

The IACHR applies and interprets the substantive law in the following two documents, the American Declaration of the Rights of Man and the American Convention on Human Rights. The Declaration lacks the status of a Convention but is part of customary international human rights law. On the other hand, the Convention as a legal treaty, is enforceable against signatory parties. Both documents form part of the Charter of the Organization of American States as a result of the Protocol of Buenos Aires. The IACHR is composed of seven members elected in a non-governmental capacity by the OAS General Assembly and represents all the OAS members states.

The Inter-American Court on Human Rights consists of seven judges and may be nationals of any member OAS state.[62]

Any person, group of persons or any legally recognized NGO in a member OAS state can submit a "petition" to the IACHR through its Executive Secretariat alleging a violation of the Convention.[63] These instruments bear a number of similarities to the European Convention on Human Rights and the European Court of Human Rights.

The Convention has four parts: 1) the Preamble, 2) State Obligations and Rights Protected, 3) Means of Protection, and 4) General and Transitory Provisions. Chapter Two of Part One dealing with state obligations contains 23 articles setting out the inalienable rights which will be enforced and this includes freedom of association, right to judicial protection and a fair trial, freedom of thought and expression. Chapter Three of Part One dealing with Economic, Social and Cultural Rights

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[61] Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Sec.L?V?11.65,Doc.6, July 1st, 1985, Article 1, p. 26

[62] Steiner, Henry J. & Alston, Philip, *International Human Rights In Context: Law Politics Morals, Second Edition.* (Oxford University Press, 2000), p. 872-873.

[63] IACHR Regulations, Article 26 and 28, 1985 Handbook, p. 125

includes a provision requiring signatories to take certain economic and political measures as set out in Article 26 which states:

> *The state parties undertake to adopt measures, both internally and through international cooperation especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set for in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.* [64]

With the passage of the Convention, the IACHR took up a dual role as a political organ of the OAS with a power promote and protect human rights in the region as well as an organ of the Convention with the power and duty to supervise human rights in the signatory countries to the Convention. The Commission's functions include:

a. promoting human rights in all OAS member states;
b. advising in the drafting of human rights documents;
c. advising OAS member states;
d. preparing country reports which includes visits to the territories of the states to investigate the status of human rights;
e. mediating disputes over serious human rights problems;
f. handling individual complaints and initiating individual cases on its own motion both regard to state parties and states not parties of the Convention; and
g. participating in the handling of the cases and advisory opinions before the Court.

The Court has both a dispute resolution and advisory jurisdiction. The Court settles disputes about the interpretation and application of the Convention through a special procedure designed to handle individual or state complaints. In its advisory jurisdiction, the Court can interpret not only the Convention but any other treaty concerning the protection of human rights in the OAS states.

Individual or state complaints start before the Commission. The complainant need not be the victim of the human rights violation. The right of individual petition is a mandatory provision binding all OAS states not just Convention signatories. A state complaint can only be made between states which are Convention signatories. The Commission can also initiate its own complaint. The Commission has the power to request information and with the consent of the government to investigate the facts alleged in the complaint. The Court may consider a case referred by either the Commission or by a state party. For the Commission to refer a case, the case must have been admitted to investigation and the Commission's draft report sent to the state party. A state can refer directly to the Court.

Judgments of the Court are legally binding on the parties but very few cases go to the Court. If a state does not comply with the decision of the Court, the Court may inform and make recommendations to the OAS General Assembly. The conclusions and recommendations of the Commission are the result of the great majority of the cases and these are not legally binding. In its early years, the Commission used its power to investigate facts and prepare country reports to

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[64] 1985 Handbook, p. 38.

act as a kind of hemispheric "Grand Jury" to deal with gross violations of human rights caused by military regimes. [65] With the 1990s, the Commission continued to focus on country reports and there was increasing criticism that the Commission should be referring more cases to the Court who had the power to issue injunctions and could order reparations.[66] However, there is still a great need for country reports which focuses on the issue of discrimination and labour issues.

IX. FUTURE DIRECTIONS: FREE TRADE AREA OF THE AMERICAS

Introduction

At the 1994 Summit of the Americas, the Organization of American States launched the effort to create the Free Trade Areas of the Americas ("FTAA") . To carry out that mandate, the OAS established a Trade Unit which works with the Inter-American Development Bank, the United Nations Commission on Latin America and the Caribbean ECLAC as part of the Tripartitie Committee in support of the negotiation of the FTAA.[67]

COSATE & ORIT

The OAS structure includes the Inter-American Labour System ("ILS"). That system is headed by the Conferences of the Labour Ministers of the Americas. It is in those conferences where the model of labour relations for the FTAA will be implemented. Trade Union participation in the ILS occurs through COSATE, the trade union consultative body of the ILS.

In its Report to the XII Conference of the Labour Ministers of the Americas on October 17-19, 2001, COSATE called for a commitment on the part of the OAS governments to the creation of decent work as the "flexibilization of labour policies" have threatened the core rights of workers. In October, 2001, COSATE and the OAS Labour Ministers had a joint session and issued a statement recognizing the ILO Declaration as an integral part of the decent work agenda. COSATE has stressed the importance of ensuring an ongoing commitment to genuine social dialogue and the providing of appropriate resources to the trade union movement to ensure it can effectively participate in the FTAA process.[68]

This Inter-American Regional Organization of Workers ("ORIT") is a regional organization of ICFTU. It represents the labour movement in the Americas. ORIT has called upon the America's governments to recognize it as the permanent participant in the FTAA talks.[69] In October, 1999, at

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[65] Steiner, Henry J. & Alston, Philip, p. 877, *supra*

[66] Steiner, Henry J. & Alston, Philip, p. 87-880, *supra*

[67] See www.sice.oas.org/Tunit.

[68] Report of COSATE to the XII Conference of the Labour Ministers of the Americas on October 17-19, 2001

[69] Bensusán, Graciela, p. 12, supra

the fifth FTAA Trade Ministerial talks, civil society participants succeeded in meeting with the Trade Ministers where they called for the opening up of the FTAA talks to the citizens of the Americas.

People's Hemispheric Agreement

At the 2001 Quebec Summit of the Americas, the "Peoples' Hemispheric Agreement" was proposed as an alternative to the Free Trade Area of the Americas (FTAA) by the Peoples' Summit, a continent wide grouping of civil society organizations forming the Hemispheric Social Alliance.[70] This Agreement proposes the Workers' Right Clause of ORIT which includes the creation of a working group on labour and social issues as part of the FTAA negotiating structures. It proposes an enforcement mechanism using the complaints-based procedure of the ILO's Committee on Freedom of Association referred to earlier in this paper. This body has the expertise in the field of monitoring the application of international labour standards. This could result in a business losing privileges under the trade agreement if fundamental workers' rights are not respected.[71] The Agreement provides that the first step is for countries to pass laws based on the ILO core standards and then to "harmonize the regulation upwards". [72]

X. CONCLUSION

The proliferation of trade agreements and globalization has resulted in growing public concerns about the protection and enforcement of labour standards and social rights. Civil society has been able to demonstrate from the experience of the current free trade agreements, like NAFTA, that free movement of goods and services across borders will result in a loss of labour and social standards if states ignore meaningful provisions to protect these standards.

As a result of public pressure and civil protest, states are now beginning to give some attention to the notion that free trade is linked with human rights and labour rights. This is demonstrated by the international consensus on the adoption of the ILO core labour standards and the development of "side agreements" to trade agreements which recognize the goal of improving citizens' working conditions and living conditions. More recently, with the US-Jordan Free Trade Agreement, there is even some movement to include labour standards within the main body of the trade agreement.

However, the true test to a country's commitment to ensure that labour and social standards are upheld is the passage of domestic laws which comply with international labour norms and which provide for effective enforcement procedures. States have demonstrated their willingness to adopt enforcement mechanisms which may compromise state sovereignty when there are disputes related to investor rights or economic rights. This can also be seen in the mandatory provisions under NAFTA and the USJFTA where failure to recognize investor provisions or intellectual property provisions can result in heavy financial penalties or sanctions. This same level of commitment or willingness has not been demonstrated when labour or social standards are at stake.

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[70] "Continental Integration and the Americas- Alternatives for the Americas - Towards an Agreement between the Peoples of the Continent - Second Peoples Summit, Quebec City, April, 2001

[71] Continental Integration, p. 15, *supra*

[72] Continental Integration, p. 16, *supra*

This paper attempts to outline the main provisions of the various free trade agreements and dispute resolutions processes in the Americas which purport to provide protections of labour and social standards in this age of globalization. Preliminary analysis suggests that these processes, when compared to the ILO provisions and the enforcement of investor or intellectual property rights, do not provide effective enforcement and do not go far enough. As we move forward to broader and more expansive trade regimes, states and corporations must adopt meaningful, transparent enforcement processes for the protection of labour and social rights of workers in order to prevent downward harmonization of these standards. It's time to make the goals and promises embodied in the ILO core standards and the labour side agreements a reality.

APPENDIX "A"

ILO FUNDAMENTAL WORKERS' RIGHTS CONVENTIONS

Convention 87 Concerning Freedom Of Association And Protection Of The Right To Organize (1948)

This Convention guarantees the right of all workers' to form and join organisations of their own choosing. These organisations have the right to draw up their constitutions and programmes, elect their representatives, and to organise their administration and activities in full freedom. The public authorities are to refrain from any interference in the exercise of these rights. Workers' organisations have the right to form federations and to affiliate internationally and must not be liable to administrative suspension or dissolution.

The Convention is ratified by 123 states.

Convention No. 98 Concerning The Application Of The Principles Of The Right to Organize And To Bargain Collectivelv (1949)

Convention 98 guarantees to workers' protection against acts of anti-union discrimination, such as dismissal, and against external interference in the operation of their organisations, such as attempts to place unions under employer domination. It also requires appropriate measures to be taken to promote voluntary collective bargaining to regulate the terms and conditions of employment.

It is ratified by 141 states.

Convention 29 Concerning Forced Or Compulsory Labour (1930)

This Convention requires ratifying states to suppress the use of forced labour in all its forms in the shortest possible time. Five categories of work are excluded from the definition of forced labour. (Compulsory military service, certain civic obligations, prison labour, work exacted in case of emergency, and minor communal services.) Illegal exaction of forced labour is made a penal offence.

It is ratified by 150 states.

Convention 105 Concerning The Abolition of Forced Labour (105)

This Convention requires the suppression of any form of forced or compulsory labour in five defined cases:

- as a form of political coercion or education or as a punishment for holding or expressing political views;
- as a means for mobilising labour for economic development;
- as a means of labour discipline;
- as a punishment for participation in strikes; as a means of racial, social, national or religious discrimination.

It is ratified by 135 states.

Convention 100 Concerning Equal Remuneration For Men And Women Workers For Work of Equal Value (1951)

This requires the promotion and application of the principle of equal remuneration for men and women workers for work of equal value. That principle is to apply to all forms of pay or other emolument arising from employment and may be enforced by law or by collective agreement and through appraisal of jobs on the basis of the work performed.

It is ratified by 137 states.

Convention 111 Concerning Discrimination In Respect Of Employment And Occupation (1957)

This requires ratifying states to declare and pursue a national policy aimed at eliminating all forms of discrimination in employment and occupation. It identifies criteria of prohibited discrimination as race, colour, sex, religion, political opinion, national extraction, social origin, and any other that has the effect of nullifying or impairing equality of opportunity or treatment. The scope of the Convention encompasses access to vocational training and to employment and terms and conditions of employment.

It is ratified by 132 states.

Convention 138 Concerning Minimum Age For Admission To Employment (1973)

This requires the setting of a national minimum age for access to employment which cannot be less than 15 years except in countries whose economy and educational facilities are insufficiently developed, in which case it cannot be less than 14 years. Minimum age for employment in, nationally defined, hazardous employment can be no less than 18 years, or 16 years where special protection measures are in place. The Convention allows for some types of employment to be excluded from its coverage, and for light work to be undertaken from 13 years (or 12 where economic and educational facilities are insufficiently developed) on condition that safeguards concerning health and school attendance are observed.

The Convention is ratified by 71 states.