



Dialogue **on** Globalization

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Thomas Greven

Social Standards in Bilateral and Regional Trade and Investment Agreements

Instruments, Enforcement, and
Policy Options for Trade Unions

A grayscale map of the Geneva region in Switzerland, showing various towns and geographical features. The word 'GENEVE' is prominently displayed in the center. Other visible locations include Crêt de la Neige (1718 m), Ferney-Voltaire, Meyrin, Versoix, and Carouge.

Dialogue on Globalization

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Preface

The issue of labour standards has always been highly controversial due to the conflicting political, economic and ideological interests involved. Since 1919 the International Labour Organization (ILO) has been mandated to establish a system of international labour standards to further humane conditions of labour and to prevent unfair competition: “...*the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries*” (Preamble of the ILO Constitution).

However, the incorporation of core labour standards into the multilateral trading system of the World Trade Organization (WTO) established in 1995, as demanded by international trade union organizations with some support from industrialized countries, including the European Union, did not meet with success: A majority of WTO member states, in particular developing and countries in transition, rejected the concept of core labour standards as a form of covert protectionism by developed countries. The First WTO Ministerial Conference (Singapore 9-13 December 1996) concluded: “*We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes and agree that the comparative advantages of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.*”

Observers in Geneva would note that there is no – or very little – such a collaboration to be seen in practice! Whereas the Doha Declaration of 14 November 2001 reaffirmed the declaration of the Singapore Ministerial Conference, adding “*We take note of the work under way in the International Labour Organization (ILO) on the social dimension of globalization,*” the promotion of core labour standards is not playing any direct role in the ongoing negotiations in the WTO under the “Doha Development Agenda” (DDA). Lack of progress in the multilateral negotiations – culminating in the failure of the Cancun Ministerial Conference in September 2003 – has led to an increased concentration on bilateral and regional trade agreements. The European Union is particularly active in this field, and explicitly states that the Commission “...*tries to promote the link between trade and social development (outside the DDA) in a number of ways.*” The US has also stepped up its negotiation efforts at bilateral, regional and sub-regional levels, increasingly including specific labour rights provisions, as required by US trade legislation and demanded by AFL-CIO unions. Does this imply that the stalemate over the incorporation of core labour standards at the multilateral WTO level will be compensated for by progressive promotion of labour rights in bilateral and regional agreements?

With a view to contributing to a clearer picture and understanding of these developments and analyzing the consequences for political and trade union strategies, the Friedrich-Ebert-Stiftung commissioned Dr. Thomas Greven of the John F. Kennedy Institute for North American Studies at the Free University Berlin to prepare this study on “Social Standards in Bilateral and Regional Trade and Investment Agreements.” In addition to research and teaching on U.S. politics, he has written extensively on international labour rights and global rules for trade. Given the lack of progress at the multilateral level, he concludes “*The second-best option seems to be to pursue labour rights provisions in regional and bilateral trade agreements. These may have the potential of changing the quality of regional governance*”.

Dr. Erfried Adam
Director, Geneva Office

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Executive Summary

Despite efforts of the ILO, no viable multilateral labor rights regime has been established. At the same time, an increasingly global economy requires such regimes in order to prevent ruinous competition between countries competing in similar product markets on the basis of a similar set of production factors. Particularly if cheap labor is one of these factors, systematic violations of labor rights may be used as source of competitive advantages, even if such advantages are marginal. So-called 'core labor rights' can enable domestic actors to fight for improved standards.

Unilateral labor rights provisions do exist in the Generalized System of Preferences of the United States and the European Union, and have been applied with some success. However, attempts of the international labor movement to establish more enforceable multilateral labor rights provisions at the WTO have failed so far. Civil society actors have therefore stepped up their efforts to push individual transnational enterprises to adopt so-called voluntary codes of conduct, with mixed (and limited) success.

A more recent strategy is the inclusion of labor rights provisions in bilateral or regional trade and investment agreements. With the multilateral trade process stalling, the governments of developed countries are moving toward bilateral and regional negotiations, where they have more bargaining power. Also, the value of unilateral trade preference schemes has decreased due to multilateral liberalization. Labor rights provisions in bilateral or regional agreements may thus be seen as a promising strategy for improving compliance regarding core labor rights.

Specific labor rights provisions have been included in several agreements negotiated by the U.S., and more general provisions are to be found in agreements of the EU. Most U.S. provisions are effectively limited to the commitment of parties to enforce domestic labor law. However, there are notable exceptions in the agreements with Cambodia and Jordan, which could serve as examples for future labor rights provisions. In EU bilateral agreements, the focus is clearly on general human rights, development issues, technical cooperation and political dialogue, rather than on specific and enforceable labor rights provisions.

In addition to the problematic subordination of labor rights decisions to foreign policy objectives, there are two main problems for even the strongest labor rights provisions: First, their effective enforcement relies on strong local actors; yet it is the absence or weakness of such actors that makes external pressure necessary in the first place. Second, labor relations are among the most political domestic institutions, and resistance to external pressure can be expected not just in cases of systematic violations of core labor rights.

Thus the strengthening and democratization of local actors will have to be at the center of all efforts to use external pressure to improve compliance with core labor rights. Outside pressure can support, but not substitute for, domestic efforts to strengthen labor rights.

Labor rights provisions cannot solve the larger problems of the global economic order, especially if they remain largely unwelcome additions to a liberalizing agenda. The international labor movement must continue to push for coherent reforms at all levels, and do so from a global justice perspective.

2. The Failure to Establish an International Labor Rights Regime

The debate on international labor standards goes back to the early 19th century.

The debate on international labor standards goes back to the early 19th century. As early as 1833, the insight that the newly established regulations of the domestic labor market could be affected by world market competition led a member of the British Parliament, Charles Frederick Hindley, to suggest an international treaty on working hours. In 1919, guided by the insight that social injustice is a major cause of war and revolution, the peace negotiators in Versailles agreed on the founding of the International Labour Organization (ILO). Until today, the tripartite ILO (with representatives from member governments, employer organizations and unions) has drafted and passed 182 conventions on labor standards, with more than 6,300 ratifications of the 175 member states (*current data at <http://www.ilo.org>*).

In the current discussion on international social standards the focus is generally on the core labor rights embodied in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

The preamble of the ILO's constitution explicitly refers to the relationship between social standards and international competition: "Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries." The ILO has consistently relied on consensus, voluntary action and technical assistance as mechanisms for adopting and enforcing conventions on social standards. The annual International Labor Conference adopts conventions that are only binding for those member states that ratify them. In 1998, the ILO adopted a *Declaration on Fundamental Principles and Rights at Work* concerning an obligation of all ILO Members to respect and promote certain fundamental rights even if they have not ratified the conventions. A follow-up mechanism was also agreed to; it was modeled on the special mechanism developed for the Freedom of Association Convention, and falls short of sanctions. In the current discussion on international social standards the focus is generally on the following core labor rights embodied in the 1998 Declaration:

- The Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87; 142 ratifications as of January 1, 2005; cf. <http://www.ilo.org/ilolex/english/docs/declworld.htm> for current data), establishes the right of all workers and employers to form and join organizations of their own choosing without prior authorization and lays down a series of guarantees for the free functioning of organizations without interference by public authorities;
- the Right to Organize and Collective Bargaining Convention, 1949 (No. 98; 154 ratifications), provides for protection against anti-union discrimination, protection of workers' and employers' organizations against acts of mutual interference, and measures that promote collective bargaining;
- the Forced Labor Convention, 1930 (No. 29; 164 ratifications), requires the suppression of forced or compulsory labor in all its forms. Certain exceptions are permitted, such as military service, convict labor properly supervised, and emergencies such as wars, fires, earthquakes, and so forth;
- the Abolition of Forced Labor Convention, 1957 (No. 105; 162 ratifications), prohibits the use of any form of forced or compulsory labor as a means of

political coercion or education, punishment for the expression of political or ideological views, workforce mobilization, labor discipline, punishment for participation in strikes, or discrimination;

- the Discrimination (Employment and Occupation) Convention, 1958 (No. 111; 160 ratifications), calls for national policies to eliminate discrimination in access to employment, training and working conditions, on grounds of race, color, sex, religion, political opinion, national extraction, or social origin, and to promote equality of opportunity and treatment;
- the Equal Remuneration Convention, 1951 (No. 100; 161 ratifications), calls for equal pay for men and women for work of equal value;
- the Minimum Age Convention, 1973 (No. 138; 135 ratifications), aims at the abolition of child labor, stipulating that the minimum age for admission to employment shall not be lower than the age of completion of compulsory schooling;
- the Worst Forms of Child Labour Convention, 2000 (No. 182; 150 ratifications), while in no way supplanting Convention no. 138, prioritizes dealing with child labor in its most extreme forms, such as all forms of slavery; the use, procuring, or offering of a child for prostitution; and work which is likely to harm the health, safety, or morals of children.

The majority of these ILO conventions have achieved the status of universally accepted human rights. They have been reaffirmed in many international treaties and declarations; for instance, at the World Social Summit in Copenhagen in 1995. However, at no time has the ILO been capable of securing effective enforcement of its conventions with the mechanisms at its disposal. There have therefore been several attempts to establish more enforceable multilateral labor rights provisions.

As early as 1948, the draft constitution of the stillborn International Trade Organization (ITO) included an explicit, albeit vague, linkage between trade and social standards in Chapter II, Art. 7. No such labor rights provision was included in the General Agreement on Tariffs and Trade (GATT), which merely extended to member states, in Article XX(e), the right to discriminate against products made with prison labor. Starting in 1953, the United States has repeatedly proposed a labor rights provision for the GATT, and then for the WTO, but the proposals have failed to attract support from developing countries. Instead, the U.S. started, in the 1980s, to introduce labor rights provisions in its trade legislation and bilateral trade agreements. The European Union, which has supported a working group on labor rights at the WTO and increased cooperation between the ILO and the WTO, followed suit in the 1990s, introducing labor rights provisions in its trade agenda. In part, these efforts were a result of the international labor movement's renewed support of a labor rights provision in the GATT/WTO and other trade agreements.

In an attempt to restart the debate after labor rights proposals failed at WTO ministerial conferences, civil society actors increased their efforts to push individual transnational enterprises to adopt so-called codes of conduct that would voluntarily commit companies to respect different sets of labor rights. In the 1970s, there had been multilateral efforts to establish such codes of conduct by the ILO and the OECD, but they never received serious support by companies or governments. Recently, the OECD Guidelines for Multinational Enterprises have been reformed and re-activated and are now marginally contributing to improving labor standards.

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Neither the U.S. nor the EU has developed a clear strategy on linking labor rights and foreign direct investment. This is especially problematic because of the growing relevance of so-called 'offshoring'.

So far, then, no viable multilateral labor rights regime has been established. In fact, the dominant trends seem to have contrary effects. For example, the reform of the OECD Guidelines came about only in the context of efforts to establish a Multilateral Agreement on Investment (MAI), which arguably would have worked at cross-purposes with the guidelines. While the MAI failed, OECD countries have moved to establish broad investor protections against government interference in bilateral negotiations. Neither the U.S. nor the EU has developed a clear strategy on linking labor rights and foreign direct investment.¹ This is especially problematic because of the growing relevance of so-called "offshoring."

Recently, there also seems to be a lack of public pressure to enforce the myriad "voluntary" codes of conduct. Perhaps the famed anti-sweatshop movement is already past its peak.² In addition, some observers have detected a certain "monitoring fatigue" on the part of factory managers in developing countries bound up with the multiple labor rights schemes of Western TNEs.³ On the other hand, several unions and Global Union Federations (GUFs) have been able to negotiate so-called International Framework Agreements (IFAs) with Transnational Enterprises. An IFA is a contractual version of a code of conduct; however, most IFAs have been concluded with European companies, while U.S., Japanese and Korean TNEs have not been supportive. Also, IFAs do not have the same status as bargaining agreements and GUFs lack the resources to enforce IFAs down the production chain to cover suppliers and subcontractors. Some in the European Parliament have proposed minimum standards for codes of conduct and social labeling schemes – with a role for either the EU or the ILO – but in its 2001 Green Paper on corporate social responsibility, the EU rejected a regulatory approach, emphasizing the importance of voluntary efforts instead.

Still, there has been some progress. A growing number of trade agreements include references to human rights, some "soft" in nature ("affirming," "recognizing," or "declaring"), some with "harder" conditionalities. However, it remains to be seen whether references to general human rights will mean progress for specific labor rights or standards, which are mentioned in far fewer agreements. Also, some developing country governments now see labor rights as a bargaining chip in bilateral negotiations, trading commitments to progress in this area for concessions in other areas. This may be a viable strategy, as the EU (and to a certain extent the U.S.) stress that social and labor standards have to be raised "without protectionism."⁴

Recently, there has also been progress on international labor rights at the World Bank. There is a growing consensus, in part due to a study by Werner Sengenberger (which reinforced the findings of a 1996 OECD study and several ILO and World

1 Susan Ariel Aaronson, 2003: Corporate Social Responsibility in the Global Village: The British Role Model and the American Laggard, in: *Business and Society Review*, 108:3, 309-338. In the EU, specific investment agreements are still in the competence of the member states. In the U.S., there are labor provisions in the 34 bilateral investment treaties of the U.S., but they have not been used.

2 Christoph Scherrer, Thomas Greven (2001): *Global Rules for Trade: Codes of Conduct, Social Labeling and Workers' Rights Clauses*, Münster: Westfälisches Dampfboot.

3 Kimberly Ann Elliott, 2004: *Labor Standards, Development, and CAFTA*, Institute of International Economics, International Economics Policy Briefs, No. PB04-2, Washington, D.C., March, 9.

4 European Commission, 2003: *Making Globalization Work for Everyone. The European Union and World Trade*, Brussels: European Commission, 17-20.

Bank studies) indicating that core labor rights may be beneficial to development because respect for them results in a more equal distribution of income.⁵ Freedom of association remains controversial, however. And while the World Bank now officially supports the promotion of all core labor rights, its operational policy for the most part remains tantamount to a “de facto recommendation to violate” these same standards. There is almost no conditionality, except that two World Bank agencies, IFC and MIGA, do require prohibition of child and forced labor as a standard loan condition. Often, however, loan conditions appear to work in the opposite direction because they amount to recommendations to reduce wage levels or increase labor market flexibility. Unions have pushed the World Bank and other international agencies to increase consistency in terms of promotion of labor rights.⁶

In February 2002, the ILO World Commission on the Social Dimension of Globalization published its final report (“A Fair Globalization – Creating Opportunities for All”).⁷ The focus of the report was on the importance of decent work, fairer rules for the global economy, and effective global governance. However, the ILO once again refrained from proposing trade-related enforcement mechanisms.

A 1996 OECD study and several ILO and World Bank studies indicate that core labor rights may be beneficial to development because respect for them results in a more equal distribution of income.

5 Werner Sengenberger, 2002: Globalization and Social Progress: The Role and Impact of International Labour Standards. A Discussion Paper. Bonn: Friedrich Ebert Stiftung.

6 Peter Bakvis, 2002: Labour Standards and Development. ICFTU Presentation to World Bank Conference on Development Economics, Oslo, June 25.

7 Cf. <http://www.ilo.org>

3. The Limits of Unilateral Labor Rights Instruments

The U.S. and the European Union (as well as Canada) are moving away from unilateral trade preference schemes toward bilateral and regional trade agreements, i.e. toward more reciprocal relations. This in some ways has entailed a decrease in leverage regarding labor rights, as there is no annual evaluation of the benefit status of the participating countries. On the other hand, the leverage in unilateral schemes has also been decreasing because of low GATT tariffs and the growth in bilateral trade agreements.

3.1 U.S. Unilateral Labor Rights Provisions: Basic Concepts

The Generalized System of Preferences

The U.S. is the only country to prioritize workers' rights over general human rights as far as specific legislative language is concerned.

The U.S. is the only country to prioritize workers' rights over general human rights as far as specific legislative language is concerned. The most important labor rights provision in U.S. trade law is the provision in the Generalized System of Preferences (GSP). The GSP provides preferential (in most cases duty-free) access to the U.S. market for a wide range of products from eligible developing countries. Since 1984, observance of labor rights has been one of several eligibility criteria (so-called country practices). Preferential access can be denied "if such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country (including any designated zone in that country)." Benefits can be withdrawn in part or in full. The provision can be waived by the president, however, for reasons of national economic interest.

"Internationally recognized worker rights" are defined as follows: the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. This definition, which goes beyond the ILO Declaration regarding working conditions, but falls short of it in terms of discrimination, was the standard definition of labor rights in U.S. proposals until recently.

The administrative GSP review process is quasi-judicial.

The labor rights provision in the U.S. Generalized System of Preferences is the key provision among those unilaterally enacted by the United States: first, because the GSP is the largest preference program; second, because it provides for public participation (beyond parties with an economic self-interest) through a petition process and at least one annual public hearing; and third, because several other unilateral labor rights provisions have over time been linked to the determinations made under the GSP review process.

The administrative process is quasi-judicial. The Office of the U.S. Trade Representative heads an interagency committee, the GSP Subcommittee of the Trade

Policy Staff Committee, which invites interested parties to submit petitions on labor rights violations. After a hearing process, the Committee determines whether to accept a petition and initiate a review process. After this investigation, the Committee decides whether to suspend eligibility, withdraw benefits in part, or to end or continue the review. Because of several vague provisions in the law, the U.S. administration retains almost full discretion, though it generally has to justify its decisions. The interagency structure of the process results in bargaining between different agencies, with the Department of Labor more likely to support petitioners and USTR more likely to be opposed. The Department of State, which prepares annual reports on the labor rights situation in all countries, often brings in general foreign policy considerations.

The GSP has lapsed several times over the course of its existence, largely because there is no large constituency for its renewal in the U.S. It was reauthorized until Dec. 31, 2006, on August 6, 2002. Some argue that the GSP is losing relevance because of low GATT tariffs, the increasing number of bilateral and regional free-trade agreements, and other preferential trade legislation.⁸ In terms of its labor rights provision, others argue that the GSP benefits remain very important for some exporters, and that there is thus still considerable leverage. Even the threat of a loss of benefits for a significant part of the export sector can compel governments to act on labor rights.

Similar labor rights provisions in other U.S. preferential trade legislation are, or were, tied to the enforcement of the GSP provision, including, among others, the Andean Trade Preference Act, the Overseas Private Investment Corporation Amendments Act, and the African Growth and Opportunity Act (see below). Recently, the Caribbean Basin Trade Preference Act renewed the 1983 Caribbean Basin Economic Recovery Act/Caribbean Basin Initiative, which was also tied to the GSP labor rights provision. According to Congressman Sander Levin, this linkage will be weakened through the negotiation of the Central American Free Trade Agreement (CAFTA; see below).⁹

The Africa Growth and Opportunity Act

The *African Growth and Opportunity Act* (AGOA) of 2000, amended and renewed on August 6, 2002 (AGOA II), provides trade preferences beyond the GSP, including e.g. garments, for 36 eligible sub-Saharan countries. Candidates are obliged to observe human rights, and workers' rights specifically. According to Section 104 of the AGOA, eligible countries must protect "internationally recognized worker rights, including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."

⁸ Congressional Research Service, 2004: Generalized System of Preferences, CRS Report for Congress, 97-389 E, 6.

⁹ Sander Levin, quoted in Michael Allen, 2003: A European-American Dialogue on Trade Agreements and Core Labor Standards. Roundtable Discussion of the Friedrich Ebert Foundation and the Carnegie Endowment for International Peace, Washington, D.C., Dec. 1-2.

There are in fact two opportunities to promote labor rights in the AGOA. First, the president has the authority to designate countries as eligible if they are “determined to have established, or are making continual progress toward establishing ... the protection of human rights and worker rights; and elimination of certain child labor practices.”¹⁰ Second, once accepted into the program, countries have to continue to respect workers’ rights (Sec. 104). In cases of labor rights violations, decisions made under the GSP labor rights provision are relevant, i.e. if a country is denied GSP benefits, it will also lose AGOA benefits. Critics have argued that, like the 1983 CBERA/CBI membership conditionality, little progress is to be expected after membership has been granted because of foreign policy considerations and/or domestic politics. After all, the extended benefits for sub-Saharan countries are a result of domestic pressure by African-American members of Congress – even though many did push for stronger labor rights provisions – and reflect foreign policy priorities.

Other Labor Rights Provisions in U.S. Trade Law

There are a number of other labor rights provisions in U.S. law which have not been as consequential. The *Bonded Child Labor Elimination Act* of 1997 prohibits imports of goods made by indentured child laborers, but it is unclear even to its legislative sponsors how it is actually to be enforced by U.S. Customs.¹¹ As part of the fight against child labor, President Clinton ordered the government in 1999 not to procure goods made with the worst forms of child labor. He had to exclude Mexico and Canada from this executive order, which binds only the federal government, because NAFTA rules do not allow such protections.¹²

Sec. 301(d) of the U.S. Trade Act of 1974, as amended in 1988, stipulates that persistent denial of internationally recognized workers’ rights constitutes an unreasonable trade practice. Such unfair trade practices are actionable if they constitute a burden on or restriction of U.S. commerce (Sec. 301(b)(1)). Interested parties can petition the U.S. government to take action, which may take the form of trade sanctions. The office of the USTR then has 45 days to decide whether to investigate the matter. Corporations have frequently filed petitions under Sec. 301 regarding violations of intellectual property rights. While often contemplating a 301 petition, the U.S. labor movement has so far filed only one petition concerning labor rights.

China’s system of internal passport controls (‘hukou’) has put an estimated 150 million Chinese migrant workers seeking factory work outside the area in which they are registered in a very weak bargaining position.

In March 2004, the AFL-CIO filed a petition requesting that action be taken against China because of its systematic repression of workers’ rights. Specifically, the petition argues, China’s system of internal passport controls (“hukou,” i.e. “household registration”) has put an estimated 150 million Chinese migrant workers seeking factory work outside the area in which they are registered in a very weak bargaining position. They are denied basic rights, suffer from horrible working conditions in terms of hours of work and health and safety, their wages are frequently withheld, etc. “The only real limits on wages and hours in China’s factories are the physiological and psychological limits of the young women and men who work in that

10 Quoted in: Clean Clothes Campaign, 2002: Africa Report (<http://www.cleanclothes.org>) [September 2004].

11 Robert M. Stern, 2003: Labor Standards and Trade Agreements, Research Seminar in International Economics, University of Michigan, Discussion Paper No. 496, 19.

12 AFL-CIO, 2003a: Time to Choose: Good Jobs and Strong Communities or NAFTA Times Ten? Workers and the Free Trade Area of the Americas, Washington, D.C., 8.

sector.” The petition further argues that this “persistent pattern of denying labor rights and standards” constitutes a significant burden on the U.S. economy, specifically the manufacturing sector, costing between 268,345 and 727,130 actual and potential jobs due to a “supply shock” from artificially cheap labor (estimates based on various economic models).¹³

3.2 U.S. Unilateral Labor Rights Provisions: Enforcement and Effectiveness

The Sec. 301 China Case

The administration of George W. Bush turned down the AFL-CIO’s Section 301 petition regarding China’s systematic labor rights violations in April 2004, just before the deadline. Instead of initiating a Section 301 investigation that could potentially result in trade sanctions, the USTR will start his own investigation, which the AFL-CIO considers “non-binding” and not to be taken seriously.¹⁴ Several business groups had lobbied the White House to reject the petition.¹⁵ The fact that a Republican administration generally associated with big business interests was unable to avoid the “symbolic use of politics” involved in starting a non-301 investigation shows that labor rights considerations can no longer be simply brushed off in the face of evidence of serious violations, but it also shows that foreign policy and commercial considerations clearly still dominate the political process regardless of such evidence. There is a significant political constituency in the U.S. that supports labor rights – joined in this case by various anti-China forces – but it is nowhere near as strong as the business lobby.

There is a significant political constituency in the U.S. that supports labor rights, but it is nowhere near as strong as the business lobby.

The Generalized System of Preferences

As in case of the Sec. 301 labor rights provision, enforcement of the GSP provision remains at the administration’s discretion. From the beginning, various administrations have refused to review several petitions, claiming that no “new information” had been provided; have found that several countries were “taking steps” to afford internationally recognized worker rights; and have suspended or excluded only those countries that were to be pressured for unrelated foreign policy reasons (e.g. Nicaragua, Romania, and Paraguay in 1987, and Chile in 1988).¹⁶

The review process became more effective during the first Bush presidency. A legal challenge to the previous review practices, a change of personnel in the subcommittee responsible for the review process, and political maneuvering in favor of NAFTA may have contributed to this change. Under President Clinton few petitions were filed. For several years, no new petitions were accepted, or their acceptance was delayed because the GSP program had lapsed for budgetary reasons. Although benefits were always reauthorized retroactively, the opportunity

13 AFL-CIO, 2004a: Section 301 Petition of the American Federation of Labor and Congress of Industrial Organization Before the Office of the United States Trade Representative, Washington, D.C., March 16. A feature on China in an October 2004 issue of the German newsweekly *Der Spiegel* also documented the plight of migrant workers.

14 AFL-CIO 2004b: Statement by AFL-CIO President John J. Sweeney on Bush Administration’s Decision to Turn Down the AFL-CIO Petition on China’s Workers’ Rights Violations, Washington, D.C., April 28.

15 Aerospace Industries Association et al., 2004: Letter to the President, April 7.

16 Henry J. Frundt, 1998: Trade Conditions and Labor Rights. U.S. Initiatives, Dominican and Central American Responses, Gainesville et al.: University Press of Florida.

to file labor rights petitions was lost for that year. Throughout the Clinton administration petitioners received better treatment, i.e. a larger percentage of the few petitions filed were accepted for review, and the GSP Subcommittee made a greater effort to explain its decisions. In fact, however, strategic foreign policy considerations still dominated the decision-making process. The administration resorted to a number of policy innovations that neither put too much pressure on beneficiary developing countries nor completely alienated petitioners. For example, decisions about accepting petitions for review were delayed; indeed, in the case of Malaysia they were delayed until the country was “graduated” from the program in 1996 because of its increased competitiveness. The review of Indonesia was “suspended” in February 1994 upon intervention by the National Security Council, and a policy of dialogue was implemented instead. In 1996, the GSP Subcommittee recommended withdrawal of Pakistan’s benefits only for products made with child labor. Many petitioners criticized the administration’s reluctance to withdraw benefits. They argued that the threat of withdrawal would become less credible if it was never implemented. Experience showed that governments would often make promises when under review, but did not follow through with these promises once the review had ended. During the George W. Bush administration, the USTR rejected most GSP petitions. One could argue that this was in part because the USTR was often pursuing negotiations regarding bilateral free-trade agreements with the same countries at the time, so it would have been politically embarrassing to accept workers’ rights petitions. In fact, however, the USTR continued free-trade negotiations even with countries that did face reviews for labor rights violations, e.g. Guatemala (the 2003 petition was rejected after the initial review) and Swaziland, which has been under review since 2003.¹⁷ A workers’ rights review is also ongoing for Bangladesh.

Since 1996, benefits have only been suspended for Belarus, and this 2000 suspension clearly followed foreign policy considerations.

Critics have maintained that the U.S. government, regardless of political persuasion, has not vigorously enforced the GSP labor rights provision, and has thus also disregarded the provisions linked to it. Since 1996, benefits have only been suspended for Belarus, and this 2000 suspension clearly followed foreign policy considerations.¹⁸ Other critics point to discriminatory and/or protectionist uses of the provision. An analysis of the enforcement of labor rights provisions in U.S. trade law, specifically in the Generalized System of Preferences, in fact confirms the often-stated criticism that labor rights provisions can be employed in a discriminatory fashion. The U.S. government has enforced the unilateral labor rights provisions less on the basis of a fair and consistent assessment of labor rights violations than with a view to U.S. foreign policy interests and domestic politics.

This subordination of labor rights decisions to foreign policy objectives, however, has contributed to the fact that the GSP provision has not been used in a protectionist fashion, a fact that has been demonstrated by several empirical studies.¹⁹ Thanks to the general free-trade outlook of the U.S. government few countries have had their trade benefits withdrawn.

¹⁷ AFL-CIO, 2004c: The Bush Record on Shipping Jobs Overseas, Issue Brief, August, Washington, D.C.

¹⁸ ICFTU/WCL/ETUC, n.d.: Trade Union Assessment of European Union Regulation on the Generalised Scheme of Preferences 2002-04, Brussels.

¹⁹ Kimberly Ann Elliott, 1998: Preferences for Workers? Worker Rights and the U.S. Generalized System of Preferences, Washington, D.C.: Institute for International Economics. (Elliott 1998b: 9-11)

If benefits are withdrawn so rarely, can workers' rights clauses achieve their objective; that is, do they lead to improved labor conditions? Several empirical studies have found small but positive changes. The OECD stated in its 1996 report on trade and labor standards that conditioning benefits on respect of core standards "induced a positive change in the behaviour of some countries," and argued that the U.S. experience prompted the EU to add a labor rights provision to its GSP (see below).²⁰ Two 1998 studies on Latin American countries showed that pressure based on GSP labor rights investigations and/or withdrawal of benefits has brought about significant change.²¹ In another 1998 study, based on a quantitative analysis without research on the ground, Kimberly Elliott of the Institute for International Economics argued that "...30 cases ended up being evenly divided between success and failure."²² Based on case studies of Chile, Guatemala, Malaysia, Indonesia, Pakistan and Belarus, Compa and Vogt arrive at very positive conclusions about the effects of the GSP labor rights clause on the promotion of workers' rights in beneficiary countries and beyond.²³

Of course there are critical voices as well. In her case study of Bangladesh, Clay pointed to the conflicting interests of U.S. investors, workers' associations in Export Processing Zones, and the AFL-CIO – which had petitioned the U.S. government – and concluded that GSP pressure had not been successful.²⁴ There are skeptics even within the largely supportive Democratic Party. Jenny Bates of the centrist Progressive Policy Institute argues that even when there is positive change, it remains unclear what the "real motivation" has really been.²⁵ But even critics of labor rights provisions concede some successes. Großmann et al. point to new legislation passed in Swaziland and Thailand because of the threat of withdrawal of benefits – which, in the end, proved insufficient in the case of Swaziland.²⁶ In sum, the evidence shows that both the labor rights review process and the threat of withdrawal of benefits have small but generally positive effects on the adherence of foreign governments to labor rights.

There is one important caveat, however. Success critically depends on the existence of domestic actors such as unions that can make effective use of the additional external pressure.²⁷ But, of course, such strong actors are often absent (and their absence is likely both a result of and a reason for labor rights violations). This indicates a dilemma of labor rights provisions: Weaker unions or NGOs are less likely to benefit from them, and where labor rights are most frequently violated, a social clause is least likely to be effective.

20 OECD, 1996: Trade, Employment and Labour Standards. A Study of Core Workers' Rights and International Trade, Paris: OECD.

21 Frundt 1998 [op. cit]; Christoph Scherrer, Thomas Greven, Volker Frank (1998): Sozialklauseln. Arbeiterrechte im Welthandel, Münster: Westfälisches Dampfboot.

22 Elliott 1998 [op. cit].

23 Lance Compa, Jeffery S. Vogt, 2001: Labor Rights in the Generalized System of Preferences: A 20-Year Review, in: Comparative Labor Law & Policy Journal, Vol. 22, No. 2/3.

24 Lisa Clay, 2001: The Effectiveness of the Worker Rights Provisions of the Generalized System of Preferences: The Bangladesh Case Study, in: Transnational Law & Contemporary Problems, Vol. 11, No. 1, 175-201.

25 E.g. Jenny Bates, 2000: International Trade and Labor Standards, Progressive Policy Institute, Policy Report, April.

26 Harald Großmann, Matthias Busse, Deike Fuchs, Georg Koopmann, 2002: Sozialstandards in der Welthandelsordnung, Baden-Baden: Nomos, 63.

27 Maria Lorena Cook, 2004: International Labor Standards and Domestic Labor Advocates: Unions, Labor Reform, and Workers' Rights in Latin America, Paper presented at the Conference on Transnational Labor Contention, Cornell University, April 9-11; Volker Frank, 1999: Die Durchsetzung internationaler Sozialstandards – Erfolgsbedingungen von Sozialklauseln, in: Peripherie, No. 75.

The Africa Growth and Opportunity Act

Eligibility criteria have been used to promote effective protection of worker rights in several countries. The 2001 and 2002 AGOA reports stated that several sub-Saharan African countries have introduced reforms, including improvements of labor and human rights (steps to combat the worst forms of child labor) and ratification of ILO conventions. The U.S. Labor Department's Office of International Labor Affairs provided technical assistance. This new approach, possibly based on the positive experience of the EU, e.g. in Pakistan (see below), may be jeopardized, however, because the office has been under continuous attack by the Bush administration and is surviving only because of Democratic support in Congress.

Following petitions by U.S. labor unions, the USTR put pressure on Swaziland to change its labor legislation or face withdrawal of GSP benefits and not be granted AGOA eligibility.²⁸ After several years of denying Cote D'Ivoire access to the benefits of the African Growth and Opportunity Act (AGOA) and requesting improvements, the U.S. Trade Representative in 2003 recognized sufficient progress on the protection of workers' rights. Specifically, forced and hazardous child labor in the cocoa sector was more effectively addressed, and legislation conforming to ILO standards was drafted.²⁹ Thus the benefits were granted in 2003, despite protests of U.S. human rights and labor activists over the limited effects of the reforms, which only covered part of the export sector.

In December 2003, the U.S. administration decided that the Central African Republic and Eritrea would lose their AGOA benefits because they "ha[d] backpedaled on progress towards a market-based economy, rule of law and workers' rights."³⁰ As critics have maintained, labor rights violations often seem to matter only in addition to other factors which warrant action, and when no foreign policy considerations are affected. Both countries are small and relatively insignificant, e.g. in the "war on terrorism."

3.3 EU Unilateral Labor Rights Provisions: Basic Concepts

Both the EU's unilateral preference systems and its bilateral agreements contain human rights provisions, some with explicit reference to core labor rights.

Most countries trading with the European Union (EU) receive some form of unilateral tariff preference or are party to a free-trade agreement with the EU. Only the U.S., Canada, Japan, New Zealand, Australia and Taiwan have Most Favored Nation status (MFN) according to the GATT, and only North Korea has less than MFN status.³¹ Both the unilateral preference systems (the Generalized System of Preferences, GSP, and the Cotonou Agreement with the so-called ACP states) and the bilateral agreements contain human rights provisions, some with explicit reference to core labor rights.

²⁸ Clean Clothes Campaign 2002 [op cit], 10.

²⁹ U.S. Trade Representative, 2003: Comprehensive Report of the President of the United States, U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act.

³⁰ American Apparel and Footwear Association, 2004: International Trade Update, January.

³¹ Bob Deacon, 1999: Socially Responsible Globalization: A Challenge for the European Union, Report prepared for the Ministry of Social Affairs and Health of Finland, 44.

Generalised System of Preferences (GSP)

The Generalized System of Preferences (GSP) provides either duty-free market access to the European Union, or reduced tariffs, for a range of exports from developing countries. These non-reciprocal preferences are made possible by the so-called “enabling clause” of the GATT-WTO. The EU GSP applies mostly to countries in Latin America, Asia, Central and Eastern Europe and the Commonwealth of Independent States (CIS). It also applies to the countries of Africa, the Caribbean and the Pacific (ACP), which, however, also receive preferential access in accordance with the Cotonou Convention (see below). Under the GSP, these latter countries can receive preferential access for products not covered by the Cotonou agreement (mainly agricultural).

Today, the EU’s GSP consists of five different arrangements: general arrangements, special incentive arrangements for labor rights, special incentive arrangements for the environment, special incentive arrangements for least-developed countries (LDCs), and special arrangements for anti-drug efforts. Among the other special arrangements, those for the protection of labor rights apply only to sensitive products, since non-sensitive products are already granted duty-free status.

The first labor rights provision, established in 1995, was a punitive one, similar to the U.S. GSP. The European Commission included the prohibition of forced labor (ILO Conventions 29 and 105) as a condition for receiving GSP benefits. This provision allowed for formal submissions by civil society actors. The European Commission’s GSP committee, consisting of representatives from several Directorates, were then to decide whether an investigation was warranted.

The first EU labor rights provision (1995) was a punitive one.

Effective as of January 1, 1998, the EU then added a labor rights incentive clause to the GSP. Countries that implement and respect the “substance of” core ILO conventions on freedom of association, the right to bargain collectively, and the prohibition of child labor have since been able to apply for additional tariff preferences. Non-discrimination was not included, following the U.S. example, despite lobbying efforts of ETUC, nor were general working conditions, an approach that, this time, differed from that of the U.S..

Labor union observers criticized that the 1998 GSP reform also included additional tariff incentives for eleven Latin American countries “actively engaged in combating the production and export of drugs,” despite the fact that those countries included several with serious labor rights problems.³² The same was true for Pakistan, which was added to this list of countries as of January 1, 2002. However, as part of the 2001 GSP regulation for the period from 2002 to 2004, countries that want to receive special incentives for combating drug production and trafficking will also be monitored on core labor standards and the environment.

The 2001 regulation has increased preferences for all countries and simplified the product categories, breaking them down into “sensitive” and “non-sensitive” products. It also introduced an “Everything But Arms” policy (EBA) for the least-developed countries, which will receive duty-free access for all products except weapons (and bananas, rice, and sugar, which will be phased in). Thus, for these

³² ICFTU/WCL/ETUC, n.d. [op cit].

countries, the labor rights incentives are not applicable. For all other countries, the incentives were increased to 5% and the clause now includes non-discrimination. Art. 14(2) states: “The special incentive arrangements for the protection of labour rights may be granted to a country the national legislation of which incorporates the substance of the standards laid down in ILO Conventions No 29 and No 105 on forced labour, No 87 and No 98 on the freedom of association and the right to collective bargaining, No 100 and No 111 on non-discrimination in respect of employment and occupation, and No 138 and No 182 on child labour and which effectively applies that legislation.” On the other hand, the punitive element of the labor rights provision was strengthened as well: Violations of all core rights can now lead to withdrawal of GSP benefits.

Additional preferences can be suspended if national law no longer meets the substance of ILO core conventions or is no longer effectively enforced.

The procedure for obtaining additional tariff preferences is as follows: Governments must provide information on their domestic labor legislation as well as on its implementation and monitoring. They have to commit themselves formally to monitor the application of the special incentives arrangement (Art. 15(1)). The applications are published by the European Commission in the Official Journal so that parties with relevant information, in practice meaning the international labor movement, human rights organizations, and unions in the respective country, can submit evidence (Art. 16(1)). The period for submitting evidence is not specified but has in practice (for applications under the old GSP since 1999) been 60 days. The Commission then undertakes to check the information provided by the applicant countries (Art. 16(3)). Additional preferences can be suspended if national law no longer meets the substance of ILO core conventions or is no longer effectively enforced (Art. 26, 3a).

The process for withdrawal of GSP benefits is as follows: Civil society actors can submit information on labor rights violations in beneficiary countries. The European Commission investigates, and normally submits a report within one year. ILO findings and decisions by ILO committees “shall serve” as the basis (Art. 26, 1b). Thus the EU has increased its reliance on the ILO. However, not in all cases have there been ILO investigations or findings (e.g. in cases where the respective country has not ratified the respective ILO convention).³³ The Council then decides within 30 days. With the exception of cases regarding forced labor, the Commission then has to watch the situation for six months, which gives the respective government the chance to remedy the situation or to declare its commitment to remedying it. If, after the six-month period, no such declaration or remedy has occurred, the Commission proposes a withdrawal of benefits. Council decisions on this will be effective six months after that, unless the situation is improved – so that the respective government has a last chance to remedy the situation.³⁴ There is also the possibility of a temporary withdrawal of benefits. In cases of “clearly unacceptable practices,” any GSP arrangement (general or special) can be temporarily withdrawn “at any time.” Possible reasons include practices of slavery or forced labor and violation of ILO core conventions on freedom of association and the right to collective bargaining, among others.³⁵

33 Martin Ölz, 2002: Die Kernarbeitsnormen der Internationalen Arbeitsorganisation im Licht der neuen handelspolitischen ‚Sozialklausel‘ der Europäischen Union, in: Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht (ZIAS), 319-359.

34 Ibid., 329-330.

35 European Commission, 2004a: The European Union’s Generalised System of Preferences. GSP, Brussels: European Commission. Directorate General for Trade.

Until the reforms of 2001, some observers called the EU's labor rights provision in the GSP a "mini social clause" because it was more limited than the U.S. GSP in its coercive elements.³⁶ Today, it is a full-fledged "sticks and carrots" approach, offering meaningful incentives and threatening meaningful sanctions for violations. There will be further reforms of GSP, starting in 2006, which will include the "full application of core labor standards in beneficiary countries."³⁷

Legal Challenges to GSP Conditionalities

GSP labor rights provisions have always been controversial because they appear to violate the non-discrimination standard of the GATT's "enabling clause" that made preferential arrangements possible. Some economists have even called the GSP systems "essentially reciprocal" because of their "side conditions."³⁸

Recently, India challenged the EU's GSP system of granting additional tariff reductions for countries that take steps to counter illicit drug production at the WTO, arguing that they are inconsistent with the GATT's Most Favored Nation principle and not justified by the "enabling clause" that requires non-discriminatory application of non-reciprocal preferential programs. A WTO panel decided that the EU provision was indeed discriminatory.³⁹ Had it been upheld by the WTO appellate body, this would have had negative consequences for the special incentives for labor rights as well (initially, India had addressed both schemes), and even for the U.S. GSP labor rights provision. However, the WTO Appellate Body ruled on April 7, 2004, that "WTO members may be selective in choosing which developing countries can benefit from special treatment under Generalized System of Preferences schemes, provided that they do not discriminate against countries with the same development, financial, or trade needs which the benefits are intended to address," and that performance requirements are objective, transparent and non-discriminatory.⁴⁰ The "enabling clause" allows for differential treatment "to respond positively to the development, financial and trade needs of developing countries."⁴¹ In terms of the ruling's significance for the labor rights conditionality, Robert Howse argued that "it is encouraging that the AB cited the conditions in the EU's environmental and labour preferences as examples of objective and transparent criteria."⁴² EU "special incentives" are more clearly "positive" than the possibility of withdrawal of sanctions in both the EU and U.S. labor rights provisions.⁴³

This legal debate within the WTO mirrors a scholarly and political debate on the U.S. GSP labor rights provision in the 1980s. Human rights scholar Philipp Alstom argued that it constituted "aggressive unilateralism," but Pharis Harvey of the International Labor Rights Fund, an organization that has frequently submitted petitions, defended the practice, arguing that the "unconditionally" criteria of the

GSP labor rights provisions have always been controversial because they appear to violate the non-discrimination standard of the GATT's "enabling clause" that made preferential arrangements possible.

36 Stephen Gibbons, 1999: Labour Rights, the International Trading Regime and the Multilateral Institutions – a Broad View, Presentation at the EJDM Conference, March 6/7.

37 European Commission, 2004b: Trade and Social Conditions (http://europa.eu.int/comm/trade/issues/global/social/index_en.htm), [July 2004].

38 Arvind Panagariya, 2002: EU Preferential Trade Policies and Developing Countries, Center for International Economics, University Of Maryland.

39 Cleary Gottlieb, EC Trade Report, Brussels October-December, 2003, 2-3.

40 International Trade Reporter, Current Reports, April 8, 2004.

41 GATT, quoted in: Andreas Blüthner, 2004: Welthandel und Menschenrechte in der Arbeit. The Compatibility of Human Rights at Work with the WTO-System, Frankfurt/M.: Peter Lang.

42 Robert Howse, 2004: Appellate Body Ruling Saves the GSP, at Least for Now, in: Bridges, No. 4 (www.ictsd.org), April [July 2004].

43 Ibid.

The Cotonou agreement will be superseded step-by-step by so-called Economic Partnership Agreements (EPAs), which will be negotiated between the EU and individual or groups of ACP states.

GATT's MFN referred to compensation, but that no country could be forced to provide tariff preferences if a beneficiary country violated fundamental human rights. More recently, Ian Robinson has discussed "progressive unilateralism" as a problematic but useful policy because it can help to overcome the resistance of "authoritarian or low-quality democratic states" to democratic change.⁴⁴ As we will see, however, there is considerable discriminatory treatment in the enforcement of labor rights provisions, mostly based on foreign policy priorities and the size of partner countries. Thus future challenges to the punitive elements of labor rights provisions are possible.

The EU's Cotonou Agreement with ACP States

The Cotonou agreement, signed on June 23, 2000, in Cotonou, Benin, is a descendent of a series of so-called Lomé Conventions that governed development assistance and trade relations between the EU and 78 countries of Africa, the Caribbean and the Pacific (ACP). The Lomé Conventions, among other things, provided unilateral tariff preferences beyond the GSP. This is why I believe that the Cotonou agreement has to be considered a "unilateral" program, at least for now. This agreement, which entered fully into force on June 8, 2003, will run for 20 years, is open to revision every five years, but will be superseded step-by-step by so-called Economic Partnership Agreements (EPAs), which will be negotiated between the EU and individual or groups of ACP states in order to move the EU-ACP relation from traditional non-reciprocal development assistance to more reciprocity within the 20 years. The first EPAs, dealing with trade and investment, but also with political and social issues, will enter into force after a transitional period that will end on December 31, 2007.

In the post-transitional period there will be three groups of beneficiary countries under the Cotonou agreement: The first group contains all LDCs, not just ACP LDCs. They will receive non-reciprocal free-market access for everything but arms (EBA initiative). The second contains non-LDC ACP states which negotiate EPAs, preferably in regional groupings, and the third group consists of non-LDC ACP states which cannot or do not want to negotiate EPAs. Alternatives for the last group will be evaluated by 2004; very likely they will eventually be reduced to GSP status.

Lomé IV introduced the issue of human rights as an "essential element" of cooperation, "meaning that any violations could lead to a partial or total suspension of aid by the EU."⁴⁵ The Cotonou agreement that replaced Lomé IV has five pillars: a political dimension, participatory approaches, poverty reduction, a framework for economic and trade cooperation, and a reform of financial cooperation (i.e. aid). It also includes strong references to human rights, and it commits "Parties [to] undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural" (Articles 9, 13, 26). There is a review mechanism and the possibility of sanctions (Art. 96).⁴⁶ Art. 9 reite-

44 Ian Robinson, 2000: Progressive Unilateralism? U.S. Unilateralism, Progressive Internationalism, and Alternatives to Neoliberalism, Foreign Policy in Focus Discussion Paper #3, November 15.

45 Panagariya 2002 [op cit].

46 Emilie M. Hafner-Burton, 2004: Trading Human Rights: How Preferential Trade Agreements Influence Government Repression, forthcoming in: International Organization, 20.

rates respect for human rights, democracy and good governance. “Breaches of any essential elements or fundamental element may ultimately lead to a country facing suspension as a measure of last resort provided in Article 96 and 97 of the Agreement respectively.”⁴⁷

However, it is unclear whether these human rights provisions can be utilized to advance respect for specific labor rights, even though there will be “cooperation in trade related areas such as ... trade and labor.”⁴⁸ In the preamble there is a reference to “relevant conventions of the ILO,” and Article 50 includes express references to core ILO conventions No. 87, 98, 105, 182, 111. Parties “reaffirm [their] commitment” and agree to “enhance cooperation” on the support of these conventions, and on the enforcement of domestic labor legislation. There is, however, no linkage to trade benefits. Rather than sanctions, the agreement envisions information exchange and technical assistance to improve domestic legislation and enforcement.⁴⁹ Perhaps because of the limited interest in special incentives within GSP (see below), the EU has not included accelerated benefits or special incentives for improving labor rights practices in the Cotonou agreement, a fact which will move many countries out of the reach of GSP through the negotiation of EPAs.

These negotiations started in September 2002. EPAs will likely take the form of agreements between the EU and groups of neighboring ACP countries, in order to strengthen regional integration, and will cover not just trade issues but political questions as well.⁵⁰ Critics argue that while the EPAs are part of an effort geared to regional integration, they are focused on market integration.⁵¹ Some in the labor movement argue that more specific labor rights provisions will need to be negotiated in EPAs.⁵² To achieve this, the unions are calling for the establishment of tripartite cooperation structures and consultation committees in beneficiary countries for the negotiations of EPAs.⁵³

Labor unions are calling for the establishment of tripartite cooperation structures and consultation committees in beneficiary countries for the negotiations of EPAs.

3.4 EU Unilateral Labor Rights Provisions: Enforcement

The 1995 provision, prohibition of forced labor, has so far been enforced only once. Following a submission of the ICFTU and the ETUC in June 1995, the European Commission launched an investigation regarding Burma (Myanmar) in early 1996. The investigation lasted one year and led to the suspension of all GSP benefits, taking effect in March 1997. Most observers considered this an obvious case as Myanmar had a record of systematic practice of forced labor. The initial impulse for ILO action on Myanmar that preceded EU action came from human rights activists, not from labor.⁵⁴ While democratic activist Daw Aung San Suu Kyi

47 Der-Chin Horng, 2003: The Human Rights Clause in the European Union’s External Trade and Development Agreements, in: *European Law Journal*, Vol. 9, No. 5, 681.

48 Panagariya 2002 [op cit].

49 Großmann et al. 2002 [op cit], 61.

50 European Commission, 2003 [op cit]: 16-17.

51 Carina van Rooyen, 2001: EU-Southern Africa Trade Relations and Poverty: Implications of the Cotonou Agreement. Paper presented at the Development Studies Association Conference, University of Manchester, 10-12 September.

52 ICFTU 2002: The Spread of Bilateral Agreements, Position Paper, Brussels: ICFTU, October 1.

53 ILO Programme for Workers’ Activities (ACTRAV), n.d.: Cotonou Agreement. Trade Union Report : ETUC, ICFTU and WCL.

54 Gay W. Seidman, 2002: Deflated Citizenship: Labor Rights in a Global Era. Paper presented at the American Sociological Association meeting, Chicago, August, 26.

expected “an impact on those who are involved in business with foreign companies,” and that GSP sanctions “would play a large part in hastening democratic reforms,” so far there has been little progress.⁵⁵ Contradictory foreign policy and commercial considerations became obvious when the EU challenged a decision by the state of Massachusetts not to do business (i.e. government procurement) with companies operating in Burma, even though it was taking action against Burma itself. In the end, the WTO did not have to act because the U.S. Supreme Court declared the Massachusetts law unconstitutional.

In the less obvious case of Pakistan, no investigation was launched following an ICFTU/ETUC submission on forced child labor in June 1995, even though it was requested by the European Parliament, “as the European Commission continued to insist that progress on forced labor in Pakistan could be achieved without it.”⁵⁶ Some do argue that in fact success in terms of better conditions regarding child labor was achieved by implicitly threatening withdrawal of GSP benefits, as the European Commission deliberated withdrawal of benefits through 1997. Typically, this implicit threat was combined with financial support of Pakistan’s participation in the ILO’s child labor program (IPEC). Pakistan introduced national legislation banning child labor and informed the European Commission regularly on its progress. The European Commission concluded that preferences should only be withdrawn as a last resort if a policy of encouragement backed up with financial support does not work.⁵⁷ However, the case of Pakistan also clearly shows that – just as in the U.S. enforcement of the labor rights provisions – foreign policy priorities dominate the decision-making process. In 1996, while the child labor dispute was ongoing, the European Council authorized the Commission to begin negotiations with Pakistan on a broader non-preferential 3rd Generation Cooperation Agreement. Negotiations were postponed for several years because of Pakistan’s nuclear testing, but the agreement was signed in 2001. After September 11, Pakistan was granted further trade preferences for textiles and apparel, and the agreement was signed on November 24, 2001.

The 1998 and 2001 incentive schemes have met with only very limited interest. As of January 2005, only five countries had applied for additional GSP benefits: Moldova, Russia, Georgia, Ukraine, and Sri Lanka. The ICFTU and ETUC have requested to be consulted on every application filed under the special incentive program, and this request has always been accepted by the European Commission.⁵⁸ The European Commission’s GSP committee also consulted with the domestic labor movements in each case. The ICFTU and ETUC supported Moldova’s 1999 application and it was approved. Russia’s 1999 application as well as Georgia’s and the Ukraine’s 2001 applications have been held pending because of critical reports by the ICFTU, ETUC and the WCL.⁵⁹ A fifth application was submitted by

55 Transcript of Daw Aung San Suu Kyi’s Video Address to the General System of Preferences’ Hearings, Brussels, Sept. 22, 1996 (<http://ibiblio.org/freeburma/assk/gsp.html>) [July 2004].

56 ICFTU/WCL/ETUC n.d. [op cit].

57 Barbara Brandtner, and Allan Rosas, 1999: Trade Preferences and Human Rights, in: P. Alston, M.R. Bustelo, J. Heenan (eds.), *The EU and Human Rights*, New York: Oxford University Press.

58 ICFTU/WCL/ETUC n.d. [op cit].

59 In 2003, Human Rights Watch addressed the human rights and labor rights problems in Ukraine, calling on the EU to, among other things, “strengthen labor rights conditionality in the EU-Ukraine bilateral market access trade agreements designed to promote Ukraine’s access to the WTO” (<http://www.hrw.org/press/2003/10/ukraine100703.htm>).

Sri Lanka in April 2002.⁶⁰ After the European Commission put this application on hold – a deferment at the last minute because of union concerns regarding free-dom of association – Sri Lankan trade unions scored some rare victories in the country’s free-trade zones. Even some apparel industry representatives – worried about the end of the world textile quota system – conceded that because “a lot of international trade concessions are now tied to labor conditions and workers’ rights,” companies should let employees vote on union representation “without a fuss.”⁶¹

In January 2004, Sri Lanka’s application for additional trade benefits was approved. At the same time, the European Commission decided to launch an investigation into alleged labor rights violations in Belarus, based on information submitted by the ICFTU, ETUC and the WCL. EU Trade Commissioner Pascal Lamy said on this occasion that “these decisions demonstrate the EU’s twin-track approach towards using tariff preferences to promote the respect of core labour standards: rewarding those beneficiary countries under the GSP that make particular efforts to implement core labour standards on the ground, and withdrawing GSP benefits in case of serious and persistent violations of labour rights.”⁶²

As in the U.S., the most serious problem with the EU’s GSP labor rights provision is that it is ultimately subject to discriminatory practices, mostly political rather than commercial, despite the concerns about protectionism. Some countries get away with egregious practices for foreign policy reasons.⁶³

In the context of agreements with ACP countries, no specific action on labor rights has been taken as of yet; however, procedures regarding respect for basic social rights have been enacted involving “flagrant breaches of democracy in Fiji and Zimbabwe.” The Article 50 references to ILO core conventions in the Cotonou agreement (“reaffirming commitment” and agreement to “enhance cooperation” in support of these conventions, and enforcement of domestic legislation) may have to be strengthened in each bilateral EPA negotiation.⁶⁴

The most serious problem with the EU’s GSP labor rights provision is that it is ultimately subject to discriminatory practices. Some countries get away with egregious practices for foreign policy reasons.

60 ICFTU/WCL/ETUC n.d. [op cit].

61 Feizal Samath, 2003: Trade Unions Chalk Up Two Key Victories, Inter Press Service, August 28.

62 European Union, Update on GSP (http://europa.eu.int/comm/trade/issues/global/gsp/pr070104_en.htm), accessed Sep. 2004.

63 ILO representatives and others have stressed the inconsistency of application, cf. Lee Swepston 2002: Globalization and International Labor Standards: Countering the Seattle Syndrom, Address in Lund, October 14.

64 ICFTU 2002 [op cit].

4. New Instruments: Labor Rights in Bilateral Trade Agreements

4.1 Labor Rights Provisions in U.S. Bilateral and Regional Trade Agreements: Concepts

So far, the United States has only a small number of free-trade agreements (Canada, Mexico, Israel, Jordan, Chile, and Singapore); however, many others have been negotiated and are waiting for Congressional passage, or are being negotiated (e.g., Morocco, South Africa).⁶⁵ Those of particular interest in the debate on labor rights will be covered chronologically and in some detail.

North American Agreement on Labor Cooperation (NAALC)

The North American Agreement on Labor Cooperation (NAALC), which was negotiated as a side agreement to the North American Free Trade Agreement (NAFTA) and entered into force on January 1, 1994, was heralded at the time as a historic agreement (“the most ambitious link between labor and trade ever implemented”).⁶⁶ For the first time, labor rights provisions were the subject of an international trade agreement. The agreement, however, clearly failed to meet its preeminent political goal, i.e. appeasement of the U.S. labor movement’s opposition to NAFTA. This opposition was based on the concern that major capital flight would occur as a result of cheaper Mexican labor. While it is unclear whether the U.S. labor movement would have supported any free-trade agreement that included Mexico, regardless of the likely effectiveness of a proposed labor rights regime, the provisions of the NAALC were immediately considered insufficient by all labor leaders in the U.S. Employer representatives were equally opposed to the NAALC, fearing it would set a precedent for future trade agreements – in the sense that labor rights would be considered at all. Both labor and employer concerns have subsequently come true: Labor rights have been considered in most U.S. trade agreements since, and the basic concept of the NAALC, a commitment to enforce domestic labor law, has often been used as a model.

The NAALC does not establish a set of international labor rights and standards but mainly commits the signatories to enforce their own national labor law.

The NAALC does not establish a set of international labor rights and standards but mainly commits the signatories to enforce their national labor law. “Each party shall promote compliance with and effectively enforce its labor law through appropriate government action.”⁶⁷ This focus on domestic labor law was based on the assumption by U.S. negotiators that the problem was not with the provisions of Mexican labor law but with its enforcement, and it also reflected the adamant opposition of the Mexican and Canadian negotiators to any commitment to

⁶⁵ For an overview, cf. USTR – United States Trade Representative, 2004: 2004 Trade Policy Agenda and 2003 Annual Report of the President on the Trade Agreements Program, Washington, D.C.

⁶⁶ Human Rights Watch, cited favorably in Norman Paech, 2003: Die sozialen, ökonomischen und kulturellen Menschenrechte im Rechtssystem der internationalen Wirtschafts- und Handelsordnung, Bonn: Friedrich-Ebert-Stiftung, 64.

⁶⁷ NAALC, 1993: North American Agreement on Labor Cooperation between the United States of America, Mexico, and Canada, Article 3.

international standards. In Canada most labor law is provincial, and in Mexico the dominant unions were determined to protect their position against challenges from independent unions, which could be strengthened by such standards.

The NAALC includes references to 11 basic labor principles (freedom of association and protection of the right to organize; the right to bargain collectively; the right to strike; prohibition of forced labor; labor protections for children and young persons; minimum employment standards; elimination of employment discrimination; equal pay for women and men; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses; protection of migrant workers). These principles go far beyond the core labor rights embodied in the 1998 ILO Declaration, and the NAALC calls on all three governments to improve performance regarding all these rights and standards. There is, however, no enforceable obligation to do so. In fact, the parties to the NAALC are not even explicitly prohibited from weakening their labor law: Article 3 of the NAALC recognizes “the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations.”⁶⁸

Actual enforcement provisions entail a three-tiered structure that precludes sanctions or fines outside child labor, minimum employment standards and occupational health and safety. In cases involving freedom of association and the right to bargain collectively, arguably the most important of the core rights, the most that can be achieved under the NAALC are so-called ministerial consultations between the labor ministers.

The NAALC created a Commission of Labor Cooperation, consisting of a ministerial council (the three labor ministers) and a secretariat, which deal mostly with cooperative endeavors and studies, and also set up an institutional structure to deal with complaints regarding non-enforcement of domestic labor law (“submissions”). So-called National Administrative Offices (NAO) in each signatory’s labor department receive and process submissions from civil society concerning non-enforcement of labor law in either of the two other countries. These submissions are not limited to matters affecting trade. The NAOs are obligated to provide information, if requested, from any of the other NAOs. Based on its review, the NAO can then request ministerial consultations. If these do not resolve the issue, no further action can be taken for problems involving freedom of association, the right to bargain collectively, or the right to strike. For all others, a three-person evaluation committee of experts (ECE) can be appointed to work out a report for review by the ministerial council, including recommendations to improve compliance. Finally, a five-member arbitration tribunal can be appointed. In cases of child labor, minimum employment standards and occupational safety and health, a “persistent pattern of non-enforcement” can ultimately result in monetary assessments (fines) – which will be paid into a fund to improve enforcement of labor law in the offending country) – or, if those are not paid, trade sanctions. Both fines and trade sanctions are capped at 0.007% of the volume of trade between the two countries (or US\$ 20 million, whichever is lower). Critics of these cumbersome, quasi-diplomatic enforcement procedures have pointed out that it will take more than 30 months to reach this final stage.⁶⁹

National Administrative Offices in each signatory’s labor department receive and process submissions from civil society concerning non-enforcement of labor law.

⁶⁸ Ibid.

⁶⁹ Scherrer/Greven 2001 [op cit].

Even though Mexico's labor rights situation was its initial focus, the agreement's most remarkable feature is its reciprocity, which has led to complaints about U.S. labor practices. In essence, the process is similar to that of the International Labor Organization (ILO), i.e. it principally employs diplomatic pressure and moral suasion.

Some observers have criticized the focus on national law as insufficient because of the lack of compliance of domestic standards with international core standards. Others point to the fact that in some developing countries labor law language is sometimes overly rigid and that these countries would do better with improved protection of core rights rather than pressure to enforce their rigid legislation on working conditions etc. A focus on domestic law enforcement could have negative effects, Kimberly Elliott argues, because if limited resources must be spent on cumbersome detailed laws, there may be a lack of resources for improvements in core rights.⁷⁰

*U.S.-Cambodia Bilateral Textile Agreement*⁷¹

The Clinton administration negotiated a uniquely innovative textile agreement with Cambodia in 1999. It followed a 1998 petition against Cambodia under the Generalized System of Preferences labor rights provision by the U.S. textile workers union UNITE! and the AFL-CIO, which alleged persistent labor law violations. Under the agreement's Art. 10(d), Cambodia can win bonus quotas for textile and apparel exports to the U.S., at first up to 14% annually, if garment factories are brought into "substantial compliance" with Cambodian and international labor standards (as defined by U.S. trade law, see above). The ILO monitors the agreement, and the cost of monitoring is borne by the two governments and GMAC, the Cambodia Garment Manufacturers Association.⁷² Observers argued that shifting the bulk of the costs of monitoring away from companies – as opposed to practices regarding "voluntary" codes of conduct and monitoring schemes – may be an "inducement for firms to locate production in Cambodia."⁷³

The agreement was renewed in 2001, with the maximum quota bonus increased to 18% annually. Unfortunately, the agreement expired at the end of 2004 because of the expiration of the quota system of the Multifibre Arrangement (MFA) in 2005, which had provided some stability for textile exporting countries.⁷⁴ The Cambodian garment industry is one of many under threat of competition, in particular from China.⁷⁵

*U.S.-Jordan Free Trade Agreement*⁷⁶

The Clinton administration negotiated a free-trade agreement with Jordan, which was signed on October 24, 2000. Uniquely, the agreement was supported by the labor movements in both countries. AFL-CIO President John Sweeney called it a "small step toward our ultimate goal" (ibid.). The agreement consequentially passed the U.S. Congress on a unanimous voice vote, and entered into force on December 17, 2001.

⁷⁰ Elliott, 2004: 6 [op cit].

⁷¹ U.S.-Cambodia Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products.

⁷² According to ILO reports, the U.S. government provided \$1.4 million for three years, the Cambodian Labor Ministry \$200,000, and GMAC \$200,000 as well.

⁷³ Aaronson, 2003 [op cit].

⁷⁴ Jonathan P. Hiatt, Deborah Greenfield, 2004: The Importance of Labor Rights in World Development, Washington, D.C.: AFL-CIO, 20-25.

⁷⁵ Interfaith Center on Corporate Responsibility, 2004: Trade Union and NGO Responses to the Phase-Out of the Multifibre Arrangement (www.iccr.org) [August 2004].

⁷⁶ Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, October 24, 2000.

While modest in scope (trade between the two countries was only US\$ 300 million in 1999), it is significant because this is the first time that a bilateral trade agreement included in its body a labor rights provision. This provision refers to the enforcement of domestic labor law and provides for dispute resolution procedures and remedies that are the same for commercial issues and labor rights violations. There is no multi-tier system of enforcement, as under the NAALC; disputes concerning all labor provisions can be brought to dispute resolution. Human Rights Watch has referred to this as “parity of enforcement.”⁷⁷ In addition, the agreement includes a provision that binds parties to “strive to ensure” the core rights embodied in the 1998 ILO Declaration as well as a commitment to “strive to ensure” that standards are not lowered (non-derogation).

This labor rights provision refers to the enforcement of domestic labor law and provides for dispute resolution procedures and remedies that are the same for commercial issues and labor rights violations.

While these provisions constitute progress vis-à-vis the NAALC, some still argued that the latter two provisions (core labor rights and non-derogation) are ultimately non-enforceable because of the vagueness of the language.⁷⁸ There is a controversial – and as of yet untested – provision that may allow the weakening or non-enforcement of labor law on bona fide budgetary grounds and/or for reasons of political discretion. Some critics have also mentioned a side-letter that “essentially requires that all trade disputes between the two countries be resolved by avoiding trade retaliation actions and employing monetary fines instead.”⁷⁹

In contrast to the NAALC, the Jordan agreement provides for a high threshold to initiate a review of labor rights issues. Violations must take place “in a manner affecting trade between the Parties.” Civil society actors cannot petition the governments to review violations of the agreement, but they can provide further information (“amicus curiae” briefs) during such a review. The AFL-CIO did not push for the right to petition, because it realized that ultimately any U.S. action under a labor rights provision is subject to the administration’s political will. At the time, the Clinton administration was favorable, and arguably a Gore administration would have been even more so.⁸⁰

The review process, which remains untested, is structured as follows: Extensive consultations between the governments include four opportunities for the parties to reach an amicable resolution of the dispute. The time periods for the stages of this process are shorter than the NAALC’s, but there is no timeframe for the appointment of members of a dispute settlement panel; ultimately, this will depend on the political will of the governments concerned. If the matter cannot be resolved, “the affected Party shall be entitled to take any appropriate and commensurate measure.”⁸¹ These can include fines or the withdrawal of trade benefits.⁸²

Bipartisan Trade Promotion Authority Act (TPA)

After an 8-year lapse, a U.S. president was finally able to secure the so-called fast-track authority again, this time referred to as trade promotion authority. The fast-

77 Human Rights Watch, 2002: Labor Rights and Trade: Guidance for the United States in Trade Accord Negotiations, Global Policy Forum, <http://www.globalpolicy.org/globaliz/law/intlaw/1030labor.htm> [August 2004].

78 Human Rights Watch, 2001: Canada/Mexico/United States: Trading Away Rights, Report, http://www.hrw.org/reports/2001/nafta/nafta0401-03.htm#P339_43368 [August 2004].

79 Advisory Committee for Trade Policy and Negotiations (ACTPN) 2003: The U.S.-Chile Free Trade Agreement, Report, February 27, Washington, D.C., 6.

80 Interview with Thea Lee, AFL-CIO Public Policy Department.

81 U.S.-Jordan Free Trade Agreement, Art. 17, Sec. 2(b) [op cit].

82 Hiatt/Greenfield, 2004: 25-28 [op cit].

track procedure limits the time Congress can debate a trade agreement negotiated by the president and allows only for an up-or-down vote without amendments. One of the most important reasons why Congress had repeatedly denied President Clinton this authority after the passage of the GATT Uruguay Round in 1994 was disagreement regarding a labor rights provision.

The Bipartisan Trade Promotion Authority Act (TPA) was signed into law by President George W. Bush on August 6, 2002. It did include the usual features of fast-track authority, but it also obligated the United States Trade Representative (USTR), to “promote respect for worker rights ... consistent with core labor standards of the ILO” (Sec. 2102(a)(6)). In section 2102(b)(12)(G), the TPA instructs negotiators to seek provisions that “treat United States’ principal negotiating objectives equally with respect to (i) the ability to resort to dispute settlement under the applicable agreement; (ii) the availability of equivalent dispute settlement procedures; and (iii) the availability of equivalent remedies.” These, however, are negotiating objectives among many; in the end, their realization is dependent on the negotiators’ political will and negotiating skills.

The question of whether the labor rights provisions in agreements subsequently negotiated by the Bush administration, i.e. U.S. Trade Representative Robert Zoellick, meet the requirements of the TPA has been hotly debated, particularly in those Trade Advisory Panels that include representatives from organized labor. The reason for this is that several of the TPA’s provisions are rather vague. Human Rights Watch points out that the language referring to international core labor rights is vaguer than in the U.S.-Jordan agreement, since it states that the objective should be to “promote respect for worker rights” rather than to “strive to ensure” that domestic labor law meets international standards and to “strive to improve” its law.⁸³ There is, however, the clarifying language of the U.S. Senate’s Finance Committee’s report, which states that future trade agreements must at least meet the standards of the U.S.-Jordan free-trade agreement.⁸⁴

Similarly, the so-called “no retaliation” clause added to the TPA at the last minute states that “no retaliation may be authorized” when a party fails to enforce its law based on an exercise of discretion, e.g. regarding the allocation of resources. If interpreted literally, Human Rights Watch argues, this would prohibit the imposition of punitive measures in labor rights disputes – because a government can always argue that its decisions are based on such discretion.⁸⁵ Again, there is evidence in the bill’s legislative history, as well as concerning internal consistency, that this clause should not be interpreted in this way.⁸⁶ In her commentary on the TPA, however, Kimberly Elliott seems to think otherwise: “And even that provision [on enforcement of domestic labor law] excludes weak enforcement that is due to ‘a reasonable exercise of ... discretion [with respect to investigatory, prosecutorial, regulatory, and compliance matters], or results from a bona fide decision regarding the allocation of resources.’”⁸⁷

83 Human Rights Watch 2002 [op cit].

84 Ibid.

85 Ibid.

86 Ibid.

87 Elliott, 2004: 6 [op cit].

U.S.-Chile Free Trade Agreement and U.S.-Singapore Free Trade Agreement

Negotiated by the George W. Bush administration in late 2002 and early 2003, respectively, the U.S.-Chile and U.S.-Singapore free-trade agreements came into force January 1, 2004. Both agreements are more appropriately described as trade and investment agreements. In fact, Singapore's tariffs on U.S. manufactured goods were already zero before negotiations began.

Both agreements include labor rights provisions in the body of the agreement, with what the Bush administration has called "an innovative enforcement mechanism."⁸⁸ The parties guarantee in a verifiable manner that they will enforce their domestic labor laws. Non-enforcement can lead to "monetary assessments" (i.e., fines) or trade sanctions, provided trade is affected. The parties will also "strive to ensure" that they will not weaken labor laws in a manner affecting trade. In addition, the parties reaffirm their commitment to the labor rights entailed in the 1998 ILO Declaration. Both these latter provisions, however, are completely unenforceable, since disputes arising under them cannot even be brought to dispute resolution. Critics argue that this constitutes a step backwards from the U.S.-Jordan free-trade agreement, back to the NAALC provisions, since it creates an incentive to simply weaken or eliminate labor laws.⁸⁹ In another parallel to the NAALC, the agreements also include provisions regarding cooperative endeavors on labor issues, e.g. the establishment of a Labor Affairs Council provided for in the Chile agreement, and a similar provision in the Singapore agreement.

Citing annual reports by the U.S. Department of State and the ILO, critics have pointed out that the focus on the enforcement of domestic labor law is not appropriate for Chile because Chilean labor standards do not meet international standards. Teamsters president Jimmy Hoffa said: "The fact is that Chile can't reaffirm its commitment to ILO standards if it doesn't enforce those standards now."⁹⁰ The situation in Singapore is even more complicated, as the agreement's "Integrated Sourcing Initiative" for certain specified goods includes the two Indonesian islands Bintan and Batam (which could be the "most significant aspect of this FTA," according to the U.S. Ambassador to Singapore). Neither the Indonesian nor the Singapore government, however, assumes any of the obligations of the labor chapter for production on these islands. Thus investors, particularly in electronics manufacturers, can take advantage of low wages on these islands and duty-free access to the U.S. without having to respect workers' rights. Sandra Polaski of the Carnegie Endowment for International Peace points out that this creates "second-class areas where labor and environmental objectives can be ignored," contrary to the stated objectives of Congress in the TPA (see above).⁹¹

Other criticisms raised against both agreements include several significant differences between dispute resolution of commercial and labor issues, making labor issues de facto less enforceable:

⁸⁸ USTR 2004 [op cit], 106.

⁸⁹ LAC – Labor Advisory Committee for Trade Negotiations and Trade Policy, 2003: *The U.S.-Chile and U.S.-Singapore Free Trade Agreements*, Report, February 28, Washington, D.C.

⁹⁰ James P. Hoffa, 2003: *Dissenting Views of James P. Hoffa, General President, International Brotherhood of Teamsters, Advisory Committee for Trade Policy and Negotiations (ACTPN), The U.S.-Chile Free Trade Agreement*, Report, February 27, Washington, D.C.

⁹¹ Sandra Polaski, 2003: *Serious Flaw in US-Singapore Trade Agreement Must Be Addressed*, Global Policy Forum, <http://www.globalpolicy.org/socecon/ffd/2003/0403singapore.htm> [August 2004].

Both agreements include labor rights provisions in the body of the agreement, with what the Bush administration has called 'an innovative enforcement mechanism'.

Parties can always choose to pay a fine rather than endure trade sanctions.

Fines may be better than sanctions, because with fines no jobs are lost in the affected country's export sector, and the money can be used to address the problem.

- 1) In contrast to the commercial chapters, the consultative process before labor issues can move to dispute resolution is cumbersome (60 days), especially the provision of an optional second round of consultations before an arbitral panel is established;
- 2) In contrast to the commercial chapters, the terms of the calculation of fines or sanctions (which, according to Article 15(2) and (3), are to have “an effect equivalent to that of the disputed measure”) for labor rights violations make reference to mitigating factors such as the reason why a party has failed to enforce its labor law, the level of enforcement that could be reasonably expected, or “any other relevant factor”;
- 3) Parties can always choose to pay a fine rather than endure trade sanctions; but while in the commercial chapter the fine is capped at half the amount of trade sanctions, the monetary assessment for labor issues is capped at US\$ 15 million, regardless of the level of harm. Critics have pointed out that this amount is insufficient to be an effective deterrent;⁹²
- 4) In commercial disputes, trade sanctions can be imposed in the full original amount if the fine is not paid; in contrast, the labor chapter limits trade sanctions to the value of the assessment, or US\$15 million;
- 5) In commercial disputes, the fine will be paid to the party harmed; the fine in a labor rights case will be paid into a fund to improve labor law administration in the offending country. This potentially creates an incentive to shift government resources away from labor law enforcement and then to wait and see whether one is forced to reshift; there is no provision to safeguard against this.⁹³ Interestingly, this provision may respond to proposals by Human Rights Watch, as one way to deal with the problem of non-enforcement due to “technical capacity rather than lack of political will.”⁹⁴ Human Rights Watch, however, wanted to limit payment of fines into a fund to such cases where non-enforcement is clearly a problem of capacity. On this issue, there is considerable disagreement among labor rights advocates. For instance, Sandra Polaski of the Carnegie Endowment argues that fines are better than sanctions, because with fines no jobs are lost in the country's export sector, and the money can be used to address the problem. Fines, however, should be capped according to country's economic potential, in her view.⁹⁵ These differences between dispute resolution processes and remedies between commercial and labor issues potentially violate the provision of the TPA stating that dispute resolution procedures and remedies should be “equivalent” for all matters, commercial as well as labor and environmental.
- 6) Lastly, there is, once again, no mechanism for public petitions; enforcement of the labor chapter is left to the governments alone.⁹⁶

Consequently, critics – particularly in the U.S. labor movement – considered both agreements a step backwards from the U.S.-Jordan agreement as well as from

92 LAC 2003 [op cit]; Citizens Trade Campaign, 2003: U.S.-Chile Free Trade Agreement, (<http://citizenstrade.org/chile.php>) [August 2004].

93 LAC 2003 [op cit].

94 Human Rights Watch 2002 [op cit].

95 Sandra Polaski, 2004: Protecting Labor Rights Through Trade Agreements: An Analytical Guide, in: Journal of International Law and Policy, University of California, Davis, Vol. 10, No. 13, 13-25.

96 Hoffa 2003 [op cit].

the GSP labor rights provision, which had covered Chile prior to the agreement.⁹⁷ It should also be pointed out that the U.S.-Chile and U.S.-Singapore free-trade agreements – just as other agreements under review here – have many provisions outside of their labor chapters that potentially exert pressure on labor rights and their enforcement, e.g. in the government procurement chapter. These issues can not be covered here.

U.S.-Australia Free Trade Agreement

The U.S.-Australia free-trade agreement was negotiated by the George W. Bush administration and signed on February 8, 2004, but it has not passed Congress yet. Its labor rights provision is essentially the same as in the U.S.-Chile and U.S.-Singapore agreements, and thus focuses on the enforcement of domestic labor law. As Australia is a highly developed OECD country, it could be expected that U.S. labor unions would welcome this agreement as providing export opportunities and endangering few if any U.S. jobs. But in fact the conservative Australian government has considerably weakened labor law over the last decade, and Australian unions have suffered a tremendous loss of membership and bargaining power.⁹⁸ With the reelection of the Howard government in October 2004 this trend will certainly continue.

The conservative Australian government has considerably weakened labor law over the last decade.

Thus it is very likely that Australian unions – which have explicitly and actively sought to learn from American labor strategies in dealing with their decline, particularly regarding their organizing methods – have encouraged their American counterparts to criticize the agreement’s labor rights provision. And U.S. unions have done so along the same lines as they have regarding the U.S.-Chile and Singapore agreements.⁹⁹

U.S.-Vietnam Bilateral Trade Agreement

The normalization of trade relations with Vietnam, bringing tariffs between the former adversaries to GATT-levels, passed Congress in July 2000 without any reference to labor rights. This was criticized by the AFL-CIO’s John Sweeney: The BTA “is missing what we’ve been championing – core labor standards, human rights and environmental protection.”¹⁰⁰

The George W. Bush administration subsequently negotiated a bilateral textile agreement, which could have been modeled after the U.S.-Cambodia textile agreement, but was not. The AFL-CIO argued that this has created an incentive for investors to move production from Cambodia to Vietnam, where independent unions are illegal and worker rights are violated with impunity.¹⁰¹

97 Thea Lee 2003: Testimony before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection, Washington, D.C., May 8; John Sweeney, 2003: Statement by AFL-CIO President John Sweeney on Chile and Singapore Trade Agreements, Washington, D.C., July 16.

98 David Peetz, 1998: Unions in a Contrary World. The Future of the Australian Trade Union Movement, Cambridge: Cambridge University Press.

99 LAC – Labor Advisory Committee for Trade Negotiations and Trade Policy, 2004a: The U.S.-Australia Free Trade Agreement, Report, Washington, D.C. March 12.

100 Stern 2003 [op cit]; Mark E. Manyin, 2001: Congressional Research Service Report on the Bilateral Trade Agreement With Vietnam, Dec. 11.

101 AFL-CIO, 2004c [op cit].

Central American Free Trade Agreement (CAFTA)

Negotiations between the U.S. and the member countries of the Central American Common Market (CACM), Costa Rica, El Salvador, Guatemala, and Nicaragua, were begun in January 2003. Business interests pressured the USTR to defer labor issues to side agreements, but in order to comply with the labor provisions of the Trade Promotion Authority, the USTR had to propose a labor chapter as part of the agreement. It is essentially the same as in the U.S.-Chile and U.S.-Singapore trade agreements, i.e. the parties commit themselves to enforce their domestic labor law. The labor chapter has therefore encountered some of the same criticisms (see above).

There is conflicting evidence on whether labor law and enforcement in CAFTA countries is sufficient to restrict the CAFTA labor provision to domestic labor law enforcement. Most agree that the problem is indeed mostly one of enforcement, not legal of language. A recent ILO report – commissioned by the governments of the five Central American governments – found that labor law in CAFTA countries is largely consistent with ILO core standards. The Labor Advisory Committee (LAC), however, claimed that “the ILO has found time and again that these laws fail to meet international standards on the right to organize.” The new labor rights provision would unnecessarily weaken the existing GSP leverage that has proved so successful. According to the LAC: “In fact, nearly every labor law reform that has taken place in Central America over the past fifteen years has been the direct result of a threat to withdraw trade benefits under our preference programs.” Human Rights Watch (HRW) shared much of this criticism.¹⁰² And so did the International Labor Rights Fund (ILRF): “Not one country even closely complies with internationally recognized worker rights.”¹⁰³ The Washington Office on Latin America (WOLA) concurred, quoting Department of State reports, and recommended the Cambodia agreement as a model, combined with the existing GSP worker rights mechanism.¹⁰⁴

Following these and other statements as well as a Human Rights Watch Briefing Paper which called the negotiated labor provisions “inadequate for the U.S., Chile, and Singapore ... [and] ... a disaster for Central America,” Congressional critics have stated that labor law in CAFTA countries does not meet basic international labor standards in many important respects (mostly regarding the right to form unions – the subject of numerous GSP labor rights petitions by the AFL-CIO). They therefore unsuccessfully proposed to make international rather than domestic labor rights enforceable through “a phased-in compliance period,” and to help countries both with technical assistance and with further market-access initiatives (an approach similar to the European GSP, see above). Human Rights Watch modeled its proposal of a “transitional mechanism” on the U.S.-Cambodia textile agreement: There would be incremental increases of benefits for incremental improvements, based on annual reviews.¹⁰⁵

102 LAC – Labor Advisory Committee for Trade Negotiations and Trade Policy, 2004b: The U.S.-Central America Free Trade Agreement, Report, Washington, D.C., March 19.

103 International Labor Rights Fund, 2004: Written Testimony Regarding the Central American Free Trade Agreement (CAFTA), August.

104 Washington Office on Latin America, 2004: Testimony on Labor Conditions in Central America to the USTR, June 4.

105 Vincent McElhinny, 2004: Update on the U.S.-Central America Free Trade Agreement (CAFTA): Implications of the Negotiations, Washington, DC: InterAction. IDB-Civil Society Initiative, 62-63; Human Rights Watch, 2003: Labor Rights Protections in CAFTA, A Human Rights Watch Briefing Paper, Washington, D.C., October; AFL-CIO, 2003b: Stronger Labor Provisions Needed in CAFTA, <http://aflcio.org/globaleconomy> [September 2004].

CAFTA does go beyond the Chile and Singapore bilateral agreements in two respects: There will be cooperation with the ILO to improve existing labor laws and U.S.-assisted building of local capacity to improve labor law compliance.¹⁰⁶ These kinds of technical cooperation projects, which are similar to the EU approach, remain precarious, however, because funding issues remain unresolved. The George W. Bush administration has constantly tried to reduce the budget of the Bureau of International Labor Affairs (ILAB), which would be in charge of such programs. ILAB is surviving only because of Congressional support from Democrats.¹⁰⁷

The finalized version of the agreement was made public on January 28, 2004. President Bush signed it in May 2004, but he did not submit it to Congress before the presidential election. The AFL-CIO, HRW and others remain opposed, and the ranking Democratic member of the trade subcommittee, Sander Levin, has said it will be defeated.¹⁰⁸ Indeed, because Congressional Democrats regard the labor chapter as insufficient they have vowed to defeat the agreement in Congress, and they may find Republican allies who are worried about competition from Central American exports.¹⁰⁹

Central American trade ministers have reacted to this situation by announcing the creation of a working group that will identify areas where labor law reform and improved compliance are needed, and seek technical assistance from the World Bank and others. There is even some willingness to work with unions, which are widely considered suspicious because of ties to local communist parties.¹¹⁰ This once again shows that there is leverage before an agreement is ratified. Marco Cuevas, economy minister of Guatemala, has said: "We recognize that the labor dimension is critical to passing CAFTA." There may be little leverage left, however, once it is in place.

U.S.-Andean Free Trade Agreement

Among the many proposed free-trade agreements the USTR has been negotiating, the U.S.-Andean agreement is perhaps the most controversial in terms of labor rights. This is because of Columbia and its sad record of killings and abductions of trade unionists.¹¹¹ Pointing to serious labor rights violations in both countries, the AFL-CIO and the Columbian trade union organizations have issued a joint statement calling for provisions in the body of the agreement that effectively secure compliance with all the core labor rights contained in the ILO Declaration of Fundamental Principles and Rights at Work.¹¹² This proposal is supported by other Andean unions. The approach the USTR has taken in other negotiations after passage of Trade Promotion Authority to require effective enforcement of domestic labor law seems especially insufficient in this case.

106 USTR 2004 [op cit] 109.

107 Vincent McElhinny, 2004 [op cit], 61ff; Elliott 2004 [op cit] 7.

108 Human Rights Watch, 2004: CAFTA's Weak Labor Rights Protections: Why the Present Accord Should be Opposed. A Human Rights Watch Briefing Paper, Washington, D.C., March.

109 Elliott 2004 [op cit] 6.

110 Nicolas Brulliard, 2004: Ministers Say CAFTA Helps Labor Rights, United Press International, July 13.

111 Jeffrey S. Vogt, n.d.: Comments Concerning Proposed United States-Andean Free Trade Agreement, Washington, D.C.: International Labor Rights Fund. Cf. also www.icftu.org for current reports.

112 Trade Union Declaration on the Free Trade Agreement between the United States of America and Columbia, Cartagena, Columbia, May 18, 2004.

These technical cooperation projects, similar to the EU approach, remain precarious because of unresolved funding issues.

Negotiations on the Free Trade Area of the Americas between the U.S. and 33 governments of the Western Hemisphere are effectively stalled because of commercial issues.

Free Trade Area of the Americas (FTAA or, in Spanish, ALCA)

Negotiations on the Free Trade Area of the Americas (FTAA) between the U.S. and 33 governments of the Western Hemisphere, which were at one time supposed to be concluded in 2005, are effectively stalled because of commercial issues. The labor rights controversy has played only a minor part so far. In contrast to NAFTA, there is little public debate on the FTAA in the U.S. The AFL-CIO and ORIT, the South American ICFTU suborganization, are campaigning to defeat the FTAA, which they regard as too closely built on the NAFTA model, especially concerning investor freedom and protection. Among other things, they stress the need to include enforceable protections of core workers' rights in the body of the agreement.¹¹³

Among the nine negotiating groups that are to formulate the chapters of the FTAA, there is no one explicitly devoted to labor rights. This issue is covered by the Technical Committee on Institutional Issues (TCI). In addition, civil society groups have taken the opportunity to voice their opinions on all FTAA issues, including labor rights, before the Committee of Government Representatives on the Participation of Civil Society (SOC).¹¹⁴

Critics have argued that NAFTA wrongly serves as a model for the FTAA, and that in terms of labor and the environment it is even a step backwards, as there are no labor rights provisions in the draft text, indeed, not even any side agreements.¹¹⁵ However, U.S. negotiators did propose that a labor rights provision be included in the TCI text, as called for by TPA (see above). The provision was modeled on the labor chapters in the U.S.-Chile and U.S.-Singapore free-trade agreements (see above). Essentially, "countries would be obligated not to fail to effectively enforce domestic labor laws through a sustained or recurring course of action or inaction, in a manner affecting trade."¹¹⁶ Some delegations, especially Brazil, have argued that the FTAA negotiations should focus on commercial issues, and have so far blocked serious discussion of the U.S. proposal. After negotiations were effectively stalled at the 2003 Miami ministerial, it was agreed to move forward at two speeds, which will basically result in a two-tier structure of rights and obligations, particularly in the realm of political issues. There was some support for the establishment of a consultative group on labor issues and the environment to discuss U.S. proposals, but nothing has come of it as negotiations quickly stalled on commercial issues.

Summary

In sum, it is questionable whether any true progress has been made in terms of enforceable labor rights provisions after the NAALC, with the exception of the Cambodia and Jordan agreements.¹¹⁷ Sandra Polaski of the Carnegie Endowment for International Peace argues that the inclusion of international labor standards

113 AFL-CIO, 2003a [op cit].

114 Cf. http://www.ftaa-alca.org/SPCOMM/COMMCS_E.ASP.

115 E.g., Sarah Anderson, 2003: The Equity Factor and Free Trade. What the Europeans Can Teach Us, in: World Policy Journal, Fall, 45-51.

116 USTR 2004 [op cit] 111.

117 Marley Weiss, 2003: 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, in: University of San Francisco Law Review, Vol. 37, No. 689.

is “aspirational” in most bilateral agreements, in contrast to the labor rights provisions in unilateral programs, which explicitly refer to “internationally recognized labor rights,” and where in practice ILO evaluations, among other things, are being used to judge compliance.¹¹⁸ The enforcement provisions are still weak, much weaker than the commercial dispute settlement procedures. Polaski stresses, however, that one area of progress must be seen in the fact that in several of the agreements labor rights challenges would be referred to “neutral, international dispute settlement panel[s],” which should serve as a safeguard against protectionist abuse.

The USTR, who has been attacked by labor for not incorporating ILO standards more fully in post-TPA bilateral agreements and not providing the same dispute settlement mechanisms for labor issues as for commercial issues, blames this on Congress. As William Clatanoff of the USTR noted: Congress is not willing to tolerate this “encroachment on national sovereignty and Congressional prerogative.” Kim Elliott argues that the U.S. is reluctant to use ILO standards because it has not itself ratified most of the core conventions, a fact which may be reflective of the Congressional distrust Clatanoff mentioned.¹¹⁹

4.2 Labor Rights in U.S. Bilateral and Regional Trade Agreements: Enforcement

The North American Agreement on Labor Cooperation (NAALC)

The NAALC is probably the most studied labor rights agreement. Without exception, all studies come to fairly negative conclusions as far as tangible results of the submissions are concerned. There were 25 submissions between 1994 and 2002, 15 filed against Mexico, 8 against the U.S., and 2 against Canada. Most submissions were filed before 2000; since then there has been a certain “submission fatigue.”¹²⁰ Those defending the original NAFTA, of course, point to the low number of submissions as evidence that there are fewer problems with Mexican labor law in particular than NAFTA critics have claimed. Given the large number of studies that show deficiencies not just with Mexican but with U.S. labor law and labor law enforcement (and increasingly with Canadian as well), these statements seem rather weak.

In early cases the lack of tangible results may have been a result of too high expectations on the part of submitters, relatively weak preparation, and the selection of cases involving weak independent unions challenging the dominance of the CTM unions in Mexico. However, U.S. unions and NGOs soon began selecting better

Most submissions were filed before 2000; since then there has been a certain ‘submission fatigue’.

118 Polaski 2004 [op cit].

119 Both references from Michael Allen 2003 [op cit].

120 Dombois et al. 2004: Dombois, Rainer, Erhard Hornberger, Jens Winter, 2004: Internationale Arbeitsregulierung in der Souveränitätsfrage. Das Lehrstück des North American Agreement on Labor Cooperation zwischen den USA, Mexiko und Kanada. Münster: Lit Verlag; cf. also Dombois, Rainer, Erhard Hornberger, Jens Winter, 2003: Transnational Labor Regulation in the NAFTA – a Problem of Institutional Design? The Case of the North American Agreement on Labor Cooperation between the USA, Mexico and Canada, in: International Journal of Comparative Labour Law and Industrial Relations. Vol. 19, No. 4, 421-440.

cases, working with stronger Mexican partners (albeit not with CTM unions), and preparing the quasi-judicial proceedings professionally. Still, there was no tangible improvement of the situation of the workers immediately affected. This is mostly due to the fact that, in the end, the NAALC enforcement process is not judicial but political.

No NAO has used its power to initiate a review process, a step which would undoubtedly cause diplomatic frictions.

A comparison with the environmental side agreement to the NAFTA – where the tri-national Secretariat has the power to investigate disputes – shows that it is more effective to have a national government agency, i.e. the respective NAO, which can bring up cases with its NAO counterparts. However, this relies on the political will of the respective government. To cite an example, no NAO has used its power to initiate a review process, a step which would undoubtedly cause diplomatic frictions.

One of the most critical and far-reaching assessments of NAALC was provided by a group of German researchers.¹²¹ They argue that while the NAALC is in some ways “designed to fail,” any international labor rights regime, regardless of whether it embodies international standards and includes the strong possibility of sanctions, is bound to face similar problems. Since not even the limited institutional possibilities of the NAALC have been used, it seems clear that the participating actors have not developed a common understanding of what the NAALC should be, and that they themselves are part of complex domestic arrangements that constrain their actions. There is “bargaining between states” and “bargaining within states.” The motives for participating governments to avoid conflict and to keep the issue within the confines of domestic regulation and for civil society actors to internationalize conflict as a means of creating pressure to solve domestic conflicts are at odds. Essentially, this analysis extends the logic of Robert Putnam’s two-level bargaining games from the negotiation of the agreement to the enforcement processes, which makes particular sense for the NAALC, as its rules favor quasi-diplomatic enforcement proceedings, and in practice enforcement has taken this form.

For the NAALC, Dombos et al. show that the three participating governments have implemented the agreement in very different ways, reflecting their industrial relations systems, e.g. concerning the staff of NAOs (career or political), the openness of hearings etc., and that they have very different expectations regarding the agreement’s procedures. The same is true for civil society actors. The authors do concede that these expectations and the strategies that follow from them are in part a question of political preferences, and they point to, e.g., the differences between the Clinton and Bush administrations. Clinton’s Labor Secretary Robert Reich (1993-1996) was particularly supportive, as were Congressional Democrats. In contrast, the George W. Bush administration refused to accept a submission for review (DuroBag); this was the first such refusal, and it in effect signaled to the AFL-CIO that the administration was not going to enforce the agreement. Bush has repeatedly tried, essentially, to shut down the Department of Labor’s Office for International Labor Affairs, which houses the U.S. NAO, and it has survived only because of Democratic support in Congress.

121 Ibid.

Most submissions have addressed issues regarding freedom of association and the right to organize (in Mexico, the rights of independent unions; in the U.S., the rights of migrants in particular and anti-union measures in general), which are the least enforceable rights. As Article 2 of NAALC commits member countries to improve national labor standards, there is a tendency to challenge not just the domestic enforcement of national norms but the norms themselves. However, the results have been meager. Not once has an enforcement process gone beyond ministerial consultations, which have mostly resulted in rather symbolic cooperative research and seminar efforts. An Evaluation Committee of Experts (ECE), the prescribed second step, has never been established, even though some submissions have included complaints about issues that may warrant an ECE, such as discrimination and health and safety issues.

Submissions have a greater chance of being accepted for review if they are filed by a transnational coalition. Also, the information needed will in most cases have to be assembled by domestic actors. Thus many submissions have been filed by such coalitions, or clearly on behalf of domestic actors. However, there are serious asymmetries in terms of resources and staff between Mexico and the two other countries, in terms of both unions and NGOs. In Mexico the relatively powerful corporatist unions are usually the alleged culprit. Dombois et al. speak of a “disappointment trap” for civil society actors, especially for those from the U.S., who expect quasi-judicial solutions to specific problems. But the authors are understating the learning processes of civil society actors. Only at the beginning may U.S. unions have expected quasi-judicial results in the solving of concrete cases. Today, submissions under the NAALC are used as elements of more comprehensive ‘corporate campaigns.’¹²² Considering the strained historic relationship between the U.S. and Mexico, as well as between U.S. and Mexican unions, it is remarkable that submissions by Mexican (or Canadian) unions and/or NGOs alleging flawed U.S. enforcement of labor law can be, and are, used in U.S. organizing campaigns. Representatives from U.S. unions have repeatedly welcomed such criticisms of the U.S. labor relations system, because such criticism helps them. This was unthinkable only a few years ago.

Without question, there is still great distrust between the three governments, which is reflected in the proceedings of NAOs and the Ministerial Council as well as by the limited role given to the Secretariat. The U.S. pushed for the agreement, and there is a limited domestic constituency for it – however skeptical – and thus the U.S. government is generally more active in terms of submissions and cooperative activities regarding the issues addressed by the submissions. The Mexican and Canadian governments, and in the case of Mexico the dominant unions, did not want the agreement (in Canada it became effective only in 1998, because labor law is a responsibility shared by the federal government and the provinces), and they therefore focus on cooperative activities and information gathering on “best practices” unrelated to the submissions process. Thus the NAALC’s effectiveness is highly dependent on the U.S. government’s priorities. Today, Dombois et al. argue, there is a “silent compromise” to avoid conflict and not to push NAALC cases.

122 Thomas Greven, 2003: Transnational ‘Corporate Campaigns’: A Tool for Labor in the Global Economy? In: International Journal of Comparative Labour Law and Industrial Relations. Vol. 19, No. 4, 495-513.

Most submissions have addressed issues regarding freedom of association and the right to organize, the least enforceable rights.

Submissions have a greater chance of being accepted for review if they are filed by a transnational coalition.

Civil society actors have difficulty devising truly international strategies because their interests (and cultures) often conflict.

All government actors want the issue to remain under domestic regulation, and thus any regulative effect the NAALC might have is neutralized or blocked. The Mexican and Canadian governments in particular want to limit external pressure from the traditionally hegemonic U.S., while civil society actors have difficulty devising truly international strategies because their interests (and cultures) often conflict. However, once again, there are ongoing learning processes, and even U.S. unions – which did in fact oppose NAFTA largely because of fear for jobs and memberships – have moved somewhat beyond this position and have now begun to understand the value of the larger process of democratization in Mexico, for which NAALC submissions may play a small supportive role.

According to Dombois et al., the “disappointment trap” may lead to a decreasing legitimacy of the NAALC.¹²³ If unions and NGOs stop using it because it is too expensive and ineffective, cooperative activities may also end altogether. So far, the U.S. government has been willing to pursue cooperative endeavors only in the context of submissions.

Based on their analysis of the NAALC, Dombois et al. come to far-reaching conclusions about the efficacy of labor rights provisions in trade agreements in general. They argue that more provisions for sanctions – the lack of which is probably the most often stated criticism of existing labor rights provisions, including the NAALC – will not automatically improve their effectiveness. This is because of the complexity of domestic industrial relations structures, in which state actors generally have limited authority and are forced to rely on voluntary compliance (“bargaining within states”), and the persisting asymmetric power relations between countries, which result in distrust and continued interest in maintaining sovereignty in labor relations (“bargaining between states”).

Dombois et al. go as far as to question the effectiveness of any labor rights provision attached to a trade or investment agreement, except in cases when the country in question is small and dependent (here they point to the U.S. GSP experience, see above). They do concede that the external pressure of an international labor rights regime can support endogenous processes of change. Which is precisely what most authors in favor of labor rights provisions have argued: They are unlikely to work if there are no domestic actors that can make use of the “extra pressure.”¹²⁴ In this sense, the NAALC is not without its successes. In Mexico, in particular, independent and reformist unions have been able to use NAO submissions brought forward by one of their American counterparts and/or NGOs to improve, albeit marginally, Mexico’s general labor rights performance. Sandra Polaski argues that “quasi-enforcement activities” (information exchange, technical assistance, cross-border workshops, public hearings, and the cooperation and capacity-building resulting from allegations linked to the possibility of sanctions) have produced some improvements.¹²⁵ Submissions can be a useful tool for, among other things, gaining additional political space. The participatory elements and regional focus of NAALC have led to the development, or strengthening, of transnational networks of unions and human rights organizations and have provided for greater publicity

123 Dombois et al. 2004 [op cit]; Dombois et al. 2003 [op cit].

124 Scherrer/Greven/Frank 1998 [op cit]; cf. Cook [op cit].

125 Polaski 2004 [op cit] 24.

than ILO complaints. Few had foreseen such cross-border union cooperation in the context of an agreement that was perceived as directed solely against Mexico. There are strong alliances, e.g. between the American communication workers union CWA and the Mexican union STRM, but cooperation seems to be strongest on the fringes of both labor movements, between the small and leftwing Mexican FAT and American UE (which is not affiliated with the AFL-CIO).¹²⁶

Bilateral Agreements

There is very little experience concerning the enforcement of labor rights provisions in U.S. bilateral trade agreements. In part, this is due to the fact that, in contrast to the unilateral clauses and the NAALC, the agreements do not include the right for the public to submit complaints about labor rights violations. Therefore, it is up to the U.S. administration to pursue enforcement, and the business-friendly George W. Bush administration has not shown any interest in doing so. In fact, critics have pointed out developments to the contrary. For instance, the AFL-CIO claims that Robert Zoellick, the USTR, wrote an open letter to the Jordanian government pledging not to use trade sanctions to enforce these provisions – because of lobbying from business.¹²⁷

In Jordan there has been a controversy surrounding the so-called “Qualified Industrial Zones” (QIZs) established on the basis of a provision in Jordan’s 1994 peace agreement with Israel. Products from these zones can be exported to the U.S. duty-free, provided eight percent of their industrial inputs come from Israel. Most factories in the QIZs are not owned by Jordanians, and only half of the workers are Jordanians. Working conditions are poor; there are almost no unions. Some activists argue that Jordanian unions, which have welcomed the foreign direct investment, have been controlled by the government for decades. It remains unclear how the U.S.-Jordan FTA has affected the situation of QIZs and, more generally, labor rights of more independent unions.¹²⁸

The U.S.-Cambodia agreement, on the other hand, is a success story in many different ways. There has been legal progress and national institution-building. With the help of ILO expertise and U.S. funding, Cambodia has established a National Arbitration Council. The ILO is also in charge of monitoring the agreement, with maximum transparency, as well as of factory-level training for workers and managers. The ILO monitors nearly all 200 factories. First, factory by factory, a confidential report on violations will be prepared, with suggestions for remedial action. There will be a second inspection six months later, and the report based on this inspection will be made public.¹²⁹ Factories must participate in order to receive special quota increases, but the annual increases depend on sector-wide improvements, and this means that there will be peer pressure on non-complying factories. Sandra Polaski argues that the agreement aligns positive incentives for companies and the government, and thus individual firms stand to benefit and

It is up to the U.S. administration to pursue enforcement, and the business-friendly George W. Bush administration has not shown any interest in doing so.

Threats of punishment are not very effective in resource-strapped countries, because their ‘success depends too greatly on the government’s capacity to inspect workplaces and its political will to prosecute violators’.

126 Cf. Robin Alexander, Peter Gilmore, 1999: A Strategic Organizing Alliance Across Borders, in: Ray M. Tillman, Michael S. Cummings (eds.), *The Transformation of U.S. Unions. Voices, Visions, and Strategies from the Grassroots*, Boulder, Colorado: Lynne Rienner, 255-266.

127 AFL-CIO, 2004c [op cit].

128 Aaron Glantz, 2003: *Jordan’s Sweatshops: The Carrot or the Stick of US Policy* (CorpWatch, <http://globalpolicy.org>, February 2003) [September 2004].

129 Elliot 2004 [op cit] 9.

A large proportion of Cambodia's 200 garment factories now have independent unions, which are supported by the U.S. textile workers' union UNITE and the AFL-CIO's Solidarity Center.

have an incentive to comply voluntarily. Each government relies a great deal on voluntary compliance because otherwise enforcement would be too expensive. Threats of punishment are not very effective in resource-strapped countries, because their "success depends too greatly on the government's capacity to inspect workplaces and its political will to prosecute violators."¹³⁰

There have been "significant and widespread improvements in wages, working conditions and respect for workers' rights."¹³¹ This is in part due to the presence of strong local actors: A large proportion of the country's 200 garment factories now have independent unions, which are supported by the U.S. textile workers' union UNITE and the AFL-CIO's Solidarity Center, which has been active in Cambodia since 1994, with a strong focus on organizing. The provisions of the trade agreement are "key to ensuring the success of organizing drives," says the AFL-CIO's Jason Judd. Remarkably, independent unions are also growing in the hotel and tourism sectors.¹³²

In business terms, the agreement "has helped Cambodia carve out a niche for itself in terms of a reputation as a place where apparel is produced under acceptable conditions."¹³³ However, it is questionable whether this "ethical niche" will continue to be a benefit in the market, especially after the expiration of the Multifiber Agreement at the end of 2004. In other words, will customers reward Cambodia's increasing respect for workers' rights, especially if competitors can undercut Cambodia's price levels?¹³⁴ The Cambodia Garment Manufacturers Association seems to think so. It argues that the agreement is more cost-effective than paying for factory audits under the many voluntary codes of conduct schemes such as the Fair Labor Association (FLA) and Social Accountability International (SAI). This cost effectiveness, however, depends on whether the U.S. continues to fund the lion's share of the ILO monitoring costs. The U.S. has invested US\$ 2 million over five years to promote, verify and sustain progress. The Cambodian government and the private sector have made smaller contributions. At an annual cost per worker of US\$ 3.50, Sandra Polaski states, this makes this "program arguably the best investment the United States has ever made in promoting international labor rights".¹³⁵

Some, including Polaski, consider the U.S.-Cambodia agreement and monitoring scheme to be a model. However, it is limited to one sector and may be too expensive in the long run. In addition, it may be an unlikely model because of the consensus it requires between unions, employers and the governments involved.¹³⁶

¹³⁰ Polaski 2004 [op cit] 22.

¹³¹ Ibid.

¹³² Cf. Timothy Ryan, 2003: Building Global Solidarity, in: Human Rights Dialogue, Spring <http://www.carnegiecouncil.org>, [April 2004].

¹³³ Allen, 2003 [op cit], 30.

¹³⁴ Kimberly Ann Elliott, Richard B. Freeman, 2001: White Hats or Don Quixotes? Human Rights Vigilantes in the Global Economy. Working Paper 8102, National Bureau of Economic Research.

¹³⁵ Polaski 2004 [op cit] 25.

¹³⁶ Allen, 2003 [op cit] 32.

4.3 Labor Rights Provisions in Canadian Bilateral Trade Agreements

The labor rights side agreement to the 1996 Canada-Chile free-trade agreement was modeled on the North American Agreement on Labor Cooperation (NAALC).¹³⁷ Its objective is the effective enforcement of domestic labor law, and there is a submissions process and a three-tiered structure concerning different levels of enforcement of eleven labor principles. The Canada-Chile agreement caps possible fines at US\$ 10 million, but no trade sanctions are provided for. Instead, the agreement sets out detailed procedures on the use of the findings of arbitration panels in domestic courts.¹³⁸

In contrast, the 2001 Canada-Costa Rica agreement, which also aims at enforcement of domestic labor law, provides for greater competence for the arbitral panels, i.e. the third tier of enforcement. The panels can review cases concerning all rights recognized in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, and the review procedure is streamlined. This agreement, however, does not provide for fines or trade sanctions, focusing instead on cooperative measures.¹³⁹

Canada is currently negotiating FTAs with four Central American countries, and the labor provisions will emphasize cooperative programs even more strongly than in the Costa Rica and Chile agreements.¹⁴⁰

As of yet, no petitions have been filed under any labor rights provision in Canadian bilateral agreements.¹⁴¹

4.4 Labor Rights Provisions in Bilateral Agreements of the European Union

Arvind Panagariya has identified seven layers of EU economic integration: the European Union; the European Economic Area (including EFTA members); various agreements to form Customs Unions; various Free Trade Areas (e.g. with Mexico and Chile); Mediterranean Partnerships (Association Agreements according to the so-called Barcelona Process, e.g. with Jordan); ACP Preferences (the Cotonou Agreement with 77 African, Caribbean and Pacific countries, the successor to four Lomé conventions); the GSP Preferences. The Most Favored Nation status applies to just six countries: Australia, Canada, Japan, New Zealand, Taiwan, and the U.S.¹⁴² According to Jagdish Bhagwati, this can be described as a “spaghetti bowl of tariffs,” and it does have obvious consequences for policies geared to establishing international labor rights regimes.

137 Agreement on Labour Cooperation between the Government of Canada and the Government of the Republic of Chile, 1996.

138 Human Rights Watch 2001 [op cit].

139 José Manuel Salazar-Xirinachs, 2001: Trade, Labor Standards and Global Governance: A Developing Country's Perspective, Paper presented at the conference “International Economic Governance and Non-Economic Concerns: Transparency, Legitimacy and International Economic Law,” Research Institute for European Affairs, Vienna University of Economics and Business Administration, December 10-11, 11-12.

140 Stern 2003 [op cit].

141 Human Rights Watch 2001 [op cit].

142 Panagariya 2002 [op cit].

The requirements of membership extend to a number of social responsibilities, including equal treatment for men and women and certain health and safety standards.

Obviously, the EU has great leverage vis-à-vis prospective member countries. Prior to the most recent enlargement, some argued that new member countries were to join a “common social space.”¹⁴³ However, there was a wide variety of social conditions and understandings even between the member countries before the 2004 enlargement. Still, the requirements of membership extend to a number of social responsibilities, including equal treatment for men and women and certain health and safety standards.

The EU signs ‘stabilization and association agreements’ with countries considered candidates for membership, in order to prepare these countries for full compliance with all EU rules and regulations.¹⁴⁴ There was no reference to ILO core conventions in the agreements with the central and eastern European countries.¹⁴⁵ Neither was there any explicit conditionality in the PHARE system of aid, prior to enlargement.¹⁴⁶

Internally, the EU still governs labor relations mostly with reference to national law. In addition, there is the 1989 Charter on the Fundamental Rights of Workers, which was incorporated into the 1992 Maastricht Treaty as a “social policy protocol.” While it is not binding, some clauses form the basis for EU directives, through the process of social dialogue, e.g. regarding minimum harmonization of occupational health and safety standards. In the Treaty of Nice, 2001, the EU agreed not to harmonize social legislation.¹⁴⁷ So far, ETUC has thus failed in its attempt to include a “EU Bill of Rights” regarding human rights and international labor rights in the EU treaty.¹⁴⁸

In terms of general human rights, which could serve as a basis for labor rights complaints, the European situation is made complicated by the parallel existence of the European Union and the Council of Europe. The Council of Europe’s European Convention on Human Rights is the basis for proceedings of the Court of Human Rights in Strasbourg. The European Social Charter, modified in 1996, covers a broader range of social rights. While it allows for public complaints, it has so far not been a source of significant political pressure.

Labor Rights Provisions in EU Bilateral Trade and Investment Agreements

In its response to the May 2004 ILO report (Communication on the Social Dimension of Globalization), the EU Commission indicated it was “firmly opposed to any sanctions-based approaches and initiatives to use labor rights for protectionist purposes.” Instead, the Commission supports the (voluntary) inclusion of labor rights in the Trade Policy Review Mechanism (TPRM) for WTO members, and will include labor rights in its own report. The EU also continues to support greater cooperation between the ILO, the WTO and the IFIs (World Bank and IMF). Labor rights will also be supported in EU bilateral relations: “The recognition and promotion of the social rights are integral parts” of agreements with Chile, South Africa, and the ACP countries (Cotonou Agreement, see above). Technical assistance will be provided to complement their promotion.¹⁴⁹

143 Deacon 1999 [op cit].

144 European Commission 2003 [op cit] 12.

145 Großmann et al. 2002 [op cit] 61.

146 Deacon [op cit] 26.

147 Harald Großmann et al. 2002 [op cit] 58.

148 ETUC, 1999: Executive Committee Position paper: The Incorporation of Fundamental Civic, Social and Trade Union Rights into the European Union Treaties, September 16-17.

149 European Commission, 2004b [op cit].

But while EU policy calls for incorporating core labor standards in all bilateral agreements, the EU in fact focuses on human rights and development to a greater extent than on labor rights. Even the Common Foreign and Security Policy includes a human rights dimension. In theory, human rights provisions can serve as a basis for labor rights complaints, but this has not been tested.

Since 1992, the EU has included a human rights clause in all agreements with third countries. The clause defines respect for human rights and democracy (as laid out in the Universal Declaration on Human Rights) as an “essential element,” and it applies to more than 120 countries today. “A violation of human rights may allow the EU to terminate the agreement or suspend its operation in whole or in part.”¹⁵⁰

In its bilateral trade negotiations, the EU thus promotes broader development issues instead of a strict and explicit linkage between labor rights and trade. There are affirmations of a commitment to human rights, but the focus is on political dialogue, information exchange and technical support.¹⁵¹ For example, in its three-pillar approach to relationships with Latin American countries, the EU focuses on political dialogue, cooperation, and the liberalization of trade.

EU-South Africa Agreement

In 2000, the EU and South Africa concluded a bilateral agreement, which provides for free trade within 12 years.¹⁵² It includes a reference to ILO core conventions, but no explicit linkage and no sanctions. The focus in terms of labor standards is on information exchange and technical assistance to improve domestic legislation and enforcement.¹⁵³

EU-Mexico Agreement

The EU-Mexico Agreement, which entered into force in July 2000 and secured NAFTA parity for the EU, includes aspects of a political dialogue but no specific labor rights provision, despite considerable union pressure.¹⁵⁴ A European Union-Mexico Civil Society Dialogue has been established and is working toward a Social and Environmental Observatory to study the effects of the agreement.¹⁵⁵

EU-Chile Free Trade Agreement

The EU-Chile agreement, which entered into force on February 1, 2003, covers general human rights but also includes an Article 44 on Social Cooperation which recognizes the importance of the ILO’s core conventions for social development. There is, however, no explicit mention of union rights, and there is no linkage between the provisions on social cooperation and the commercial sections of this very broad agreement. Thus it is unclear how respect for the ILO conventions will be anchored and guaranteed within the confines of this agreement.¹⁵⁶

While EU policy calls for incorporating core labor standards in all bilateral agreements, the EU in fact focuses on human rights and development to a greater extent than on labor rights.

150 Horng 2003 [op cit].

151 Großmann et al. 2002 [op cit] 61.

152 European Commission, 2003 [op cit] 14. Since South Africa is part of a customs union, SACU, the FTA will effectively be SACU-EU.

153 Großmann et al. 2002 [op cit] 61.

154 ICFTU 2002 [op cit].

155 First Forum of the „European Union-Mexico Civil Society Dialogue, Brussels, Belgium, Nov. 26, 2002.

156 ICFTU 2002 [op cit].

Both the U.S. and the EU are trying to establish freer trade relations with Latin America.

EU-Mercosur Negotiations

Both the U.S. and the EU are trying to establish freer trade relations with Latin America. Negotiations are underway to conclude a biregional Association Agreement between the EU and Mercosur, the South American Common Market comprised of Argentina, Brazil, Paraguay, and Uruguay. The proposed agreement will cover trade and investment and also issues like intellectual property rights and foreign investment. Negotiations have proved to be difficult, as have U.S. negotiations in the context of the proposed Free Trade Area of the Americas (see above), but articles in support of fundamental labor rights have been drafted. As in the EU-Chile agreement, there is no explicit linkage to trade privileges, despite lobbying efforts of international labor federations.¹⁵⁷ It is still open whether the labor provisions will constitute a chapter of the agreement or a protocol attached to it. Legally, both would have the same standing, except for non-member countries associated with either the EU or Mercosur (such as Chile), which would not be covered by a protocol.

Barcelona Process

In the context of the so-called Barcelona Process, the EU has signed Association Agreements with Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestine Authority and Tunisia. These agreements are part of the preparation of a Euro-Mediterranean free-trade area, scheduled for 2010. They tie benefits to compliance with human rights principles, but not specifically to labor standards. However, there are provisions on technical support and cooperation on labor standards.¹⁵⁸ For instance, the EU-Jordan association agreement covers three broad areas: political affairs, economic and financial partnership, and partnership in social and humanitarian affairs. There is no mention of labor rights among the trade-related issues.¹⁵⁹ Following the same principles, a free-trade area will also be established with the Gulf Cooperation Council (GCC), which is comprised of Bahrain, Kuwait, Qatar, Oman, Saudi Arabia, and the United Arab Emirates.¹⁶⁰

Asia-Europe Meeting (ASEM)

Asian countries are among the most vocal opponents of labor rights linkages, although some have argued that China's entry into the WTO has changed the dynamic of the debate.

ETUC and ICFTU have been pushing for a social dimension of the agenda of the Asia-Europe Meeting (ASEM), including a dialogue on the promotion of core labor standards. Asian countries are among the most vocal opponents of labor rights linkages, although some have argued that China's entry into the WTO has changed the dynamic of the debate.¹⁶¹ ASEM may be the precursor of future free-trade or association agreements.¹⁶² As a first step in the development of a social dimension, trade unions from Asia and Europe convened in Copenhagen in 2002 and held an Asia-Europe Trade Union Forum in Hanoi in 2004.

Summary

In sum, there has been limited progress in terms of enforceable labor rights provisions in EU bilateral agreements. The focus is clearly on general human rights, development issues, technical cooperation and political dialogue. This is not to say that progress on labor rights can not be achieved in the confines of these agreements. As of yet, however, there is no evidence of significant progress linked to them.

157 ETUC/ICFTU/WCL European Union-Mercosur Working Group, 2001: Trade Unions and Mercosur-European Union Relations, Brussels.

158 Großmann et al. 2002 [op cit] 61.

159 The Jordan-European Union Association Agreement, *www.eicc.jo* [August 2004].

160 European Commission, 2003 [op cit] 12-14.

161 EU Trade Commissioner Pascal Lamy went as far to predict that because of the "Chinese steamroller," labor rights may be back on the WTO agenda, "this time probably at the request of the very developing countries who successfully resisted it at Doha" (quoted in Bridges No. 4, 2004, *www.ictsd.org* [July 2004])

162 ICFTU/ETUC/ICFTU-APRO, 2002: Building a Social Pillar for ASEM, Brussels.

5. Options for Trade Unions

Globalization is not new. In many ways, the situation at the beginning of the 21st century is similar to that around the turn of the 19th to the 20th century. Unfettered 19th century capitalism led to intense social conflict within nations, and contributed to conflict between nations. Growing social inequality and a lack of social security led to a backlash against this wave of globalization. It took many decades of social conflict to tentatively “civilize” national market economies, and to ensure that wealth was divided more equitably.

Today, after the “Fordist break” (Christoph Scherrer), we are again faced with a globalizing capitalism that is unfettered in many ways. In fact, ever increasing institutional competition between nation-states, on top of product competition between market actors, is even further unfettering capitalism, with domestic actors pushing for liberalization and deregulation with the standard argument of a need to increase global competitiveness.

However, a number of safeguarding institutions have been established over the years in response to crises in the governance of the world economy. There have been important attempts to reregulate social affairs at levels beyond the nation-state, i.e. the labor rights provisions in bilateral and regional trade agreements presented and evaluated here, but a serious and ultimately dangerous gap persists between such efforts and the dominant agenda of liberalization and competitiveness. This gap is dangerous even from the perspective of liberalizers, although few of them have so far realized this, because support for, or tolerance of, their agenda depends on the social security of the many.¹⁶³ There already is a serious and growing backlash against globalization, and against the “reforms” it supposedly forces on national governments, in the developed world. And in those parts of the developing world that are the beneficiaries of so-called “offshoring” we increasingly find the social conflicts traditionally associated with industrialization and development.¹⁶⁴ This two-tiered resistance against the dominant form of globalization is bound to take on more populist, or even extreme, forms as pressures and insecurities increase for more and more people.¹⁶⁵

So what can unions do to contribute to the reregulation of global capitalism, to what Deacon has called “global social reformism,” in the context of trade agreements and trade legislation?¹⁶⁶

Globalization is not new. In many ways, the situation at the beginning of the 21st century is similar to that around the turn of the 19th to the 20th century.

163 It is no accident that surveys show that the majority of people value long-term security over short-term wage levels.

164 Cf. Beverly J. Silver, 2003: *Forces of Labor. Workers' Movements and Globalization since 1870*, Cambridge: Cambridge University Press (Cambridge Studies in Comparative Politics)

165 Cf. Thomas Greven, 2005: *Die Globalisierungsdebatte und der Rechtsextremismus*. In: Thomas Greven, Thomas Grumke (eds.) *Globalisierter Rechtsextremismus* (in preparation).

166 Deacon 1999 [op cit].

Arguments Against Labor Rights Provisions

First, some empirically based arguments against the instrument of labor rights provisions need to be discussed more thoroughly within the labor movement.

Based on their analysis of the NAALC (see above), Dombois et al. argue that the justification for international labor rights regimes is flawed.¹⁶⁷ Specifically, they doubt the validity of the “race to the bottom” hypothesis in North-South trade and investment relations. Labor rights advocates, however, have pointed to the South-South dimension of international competition. If countries and/or companies compete in similar product markets, and do so on the basis of a similar set of production factors (most often: cheap labor), systematic violations of labor rights can be used as source of competitive advantage, even if such advantage is marginal. Some countries then may have to refrain from raising standards because of concerns regarding international competitiveness. These arguments need to be studied empirically.

Dombois et al. argue that violations of labor rights, especially freedom of association, are often politically motivated, because unions may be a source of political opposition for authoritarian regimes. While I would argue that outside political and economic pressure can still be effective in changing political calculations of authoritarian or quasi-democratic regimes, the political nature of violations must indeed be taken into consideration. Sometimes, action under a labor rights provision may not be advisable, because the targeted regime is unlikely to respond with rational economic calculations.

Reflecting the arguments of many advocates of comprehensive company-based codes of conduct, Dombois et al. argue that the focus on core labor rights in trade agreements leaves out important labor standards which may be more relevant to the lives of employees (such as health and safety or wages). The core labor rights, however, are considered “enabling rights” that put domestic actors in the position to fight for improved standards in other areas.

Many have argued that “labor standards in trade agreements will always be susceptible to being used to pressure intransigent governments for political purposes.”¹⁶⁸ But Dombois et al. present a more comprehensive challenge to international labor rights regimes: As long as the establishment of such regimes is extremely controversial, they argue, it would be wrong to assume conditions like those used in rather simplistic models like the “boomerang model” (which assumes that domestic actors can use the internationalization of a conflict to produce external pressure), and the “transnational advocacy coalition” model (which assumes common values). They stress that in an international regime there will always be “bargaining between states” and “bargaining within states,” and not just in the negotiating phase of an agreement. Nationally specific domestic structures and cultures, particularly in the complex case of industrial relations, always filter enforcement processes, whether the pressure applied is internal or external. This has to do with asymmetries of power, conflicting interests of state and civil society actors, and the common interest of state actors in minimizing the constraints a regime places on their actions.

167 Dombois et al. 2004 [op cit].

168 Karamat Ali, 1996: Social Clauses and Workers in Pakistan, in: New Political Economy, Vol., 2, 269-273.

The fundamental question is how to make international labor rights regimes less controversial.

If this assessment is correct, the fundamental question is how to make international labor rights regimes less controversial. The legitimacy of such regimes, I would argue, depends in some part on the relative power of the labor movement vis-à-vis states and business. A more practical challenge is thus how to improve the labor movement's bargaining power in both arenas, within states and between states. I will restrict myself here to some considerations as to how the labor movement should reposition itself in terms of labor rights provisions in trade and investment agreements.

Long-Term Perspective: Global Rules for Trade

Despite considerable internal divisions regarding a WTO labor rights provision, which have been largely overcome with China's accession to the WTO and the subsequent move of investment to China, the international labor movement has remained committed to such provisions. However, the lack of enthusiasm not just in developing and newly industrialized countries has so far impeded any serious mobilization.¹⁶⁹ There are simply too many other, seemingly more urgent, matters to attend to. As a side effect of the ICFTU campaign, some success was achieved at the International Financial Institutions, in particular the World Bank, which withheld credits for Haiti and the Dominican Republic because of labor rights violations. Unions need to continue to push for enforceable core labor rights in all multilateral forums, including the UN Human Rights Commission.¹⁷⁰

In the long term, what may prove most successful in this respect is the prospect of a serious anti-globalization backlash, perhaps in the form of protectionism, perhaps even in the form of isolationist right-wing extremism. This, plus the economic argument of a long-term lack of consumer demand in the context of a continuous "race to the bottom," may convince policymakers and business representatives alike of the need for a more socially responsible world trading order.

Mid-term Perspective: Shaping and Reforming Regional Governance

The second-best option seems to be to pursue labor rights provisions in regional and bilateral trade agreements. These may have the potential to change the quality of regional governance. Thus far, however, they have often been largely unwelcome additions to a liberalizing agenda. One important theme for the labor movement must thus be "coherence." As long as conflicting agendas are pursued by multilateral institutions or within one agreement, introducing core labor rights will not solve the larger problems of the world trading order. In other words, if the substance of FTA rules continue to put pressure on labor rights by promoting or locking-in neoliberal reforms, then labor rights provisions will be little more than fig leaves. Thus the willingness to include redistributive elements in any new trade policy or agreement is not only imperative to increase developing country governments' support for the inclusion of labor rights, it is also an element of a more coherent approach to protecting labor rights in the global economy in general. I believe

¹⁶⁹ Kjeld Jakobsen, n.d., Reflections about the Strategy of the International Union Movement to Defend the Basic Labor Rights in the World Trade Organization. Presentation at Cornell University.

¹⁷⁰ IBFG 2003: Wirtschaftliche und soziale Fragen, Vorstand (119EB/G/9(a)), December 8-10; TILS, 2003 – Task Force der Global Unions für Handel, Investitionen und Arbeitsnormen, Discussion Paper, November 26-27.

In these and other future trade and investment negotiations, unions should push for combinations of positive incentives and punitive measures in the form of sanctions and fines.

Cornell University's Sean Sweeney is correct when he argues that ultimately any effort at domestic labor movement reform is futile if it does not include a "global justice" perspective.¹⁷¹

In terms of concrete negotiations, unions should push for more explicit and enforceable labor rights protections in the EPAs that will be negotiated on the basis of the Cotonou Agreement.¹⁷² In these and other future trade and investment negotiations, unions should push for combinations of positive incentives and punitive measures in the form of sanctions and fines. Both incentives and sanctions should be targeted to specific industries. The US-Cambodia textile agreement could serve as a model, because of its developmental elements (market-access incentives and externally funded ILO monitoring) and the active role of the U.S. labor movement. Research has shown that labor rights provisions work best – regardless of whether they are based on penalties or sanctions or both – when there are strong local actors that can make use of the political space gained from outside pressure.¹⁷³ Of course, the absence of such strong and responsive local actors – unions in particular – is often what makes outside pressure necessary in the first place. The solution to this dilemma is to include in the international labor movement's agenda a commitment to always cooperate with local actors in any research, communication or legal action regarding labor rights violations, and to vigorously assist such actors in their organizing and campaigning efforts once outside pressure is being exerted. Local unions should also be supported in their domestic reform efforts, in particular in their efforts to become more democratic and more responsive to women, unorganized workers etc. Short of such assistance, efforts to include core labor rights in trade agreements will be futile, because unions are subject to many cross-pressures, and securing their organizational survival – which remains threatened because of the dominance of neoliberal policies – may prevent any efforts to fight for the rights of, i.a., women workers. Capacity-building in developing-country civil society can simply not be limited to legal efforts.¹⁷⁴

As the resistance or indifference of many developing country unions regarding labor rights provisions shows, there is also a need for investment in the building of trust. In this respect, the especially tainted AFL-CIO has come a long way: Today it "would welcome sanctions against the USA for consistently violation international labor standards because it promotes labor's political agenda, challenges unions' protectionist image ... and the threat of sanctions changes government policy and behavior."¹⁷⁵

In terms of trade agreement language on enforcement, the forming of a dispute settlement panel should not be the prerogative of any government involved. Complaints pursuant to a labor rights provision should be immediately reviewed by a body of experts independent of any government involved, on the lines of the mechanisms used by the ILO; i.e. the panel should draw on a roster of renowned experts agreed upon by all parties when the original agreement is signed. It would be up to

171 Sean Sweeney, 2004: The Case for Global Justice Unionism, in: *New Labor Forum*, 13(3) Fall, 57-66.

172 IBFG 2003 [op cit].

173 Frundt 1998 [op cit]; Scherrer/Greven/Frank 1998 [op cit].

174 Cook 2004 [op cit].

175 Allen 2003 [op cit].

this body to dismiss obviously frivolous complaints, but also to pursue all legitimate complaints regardless of the political will of any of the governments involved.

Short-term Perspective: Enforcing Framework Agreements Through Transnational Corporate Campaigns

Unions are limited in their ability to influence trade and investment negotiations. As one alternative, unions in Europe have worked with several Global Union Federations to negotiate so-called international framework agreements (IFAs) with a number of transnational enterprises. So far, more than 25 IFAs have been concluded, all with European-based TNEs.¹⁷⁶ This cooperative approach, however, has met with only limited success, in part because of serious monitoring problems. Also, if the strategy is to be comprehensive, less cooperative TNEs will ultimately have to be convinced to sign and enforce IFAs.

Thus unions may need to consider more aggressive strategies such as the “corporate campaign” developed by unions in the U.S.¹⁷⁷ This approach focuses on gaining leverage vis-à-vis the employer beyond the realm of local labor relations, i.e. through consumer pressure and international labor solidarity. While U.S. unions have not been very successful in building cooperative relationships with employers, European unions generally refrain from aggressive strategies other than strikes. Both can learn from each other ways to increase the effectiveness of their respective approaches. In his study on various efforts to improve corporate social responsibility, Michael Santoro finds that “the radically divergent tactics of confrontation and cooperation ... prove ... to be highly complementary. Neither tactic would be as effective without the other.”¹⁷⁸

In sum, union strategy for the governance of the global economy needs to be comprehensive and coherent. It will be successful only if the industrialization struggles in developing and newly industrialized countries can be tied to the resistance against the neoliberal globalization agenda in the developed world.¹⁷⁹ In both worlds, labor needs to overcome the dominant competitiveness agenda, at least in part, in order to write new rules for the global economy which will provide minimum rights and standards that will not be undercut in the quest for competitiveness.

176 Nikolaus Hammer, 2004: International Framework Agreements: Global Union Federations and Value Chains, Paper presented at the International Colloquium “Union Renewal,” Montreal, Canada, November 18-20.

177 Greven 2003 [op cit].

178 Michael A. Santoro, 2003: Defending Labor Rights: On the Barricades and in the Boardroom, in: The Brown Journal of World Affairs, Vol. IX, Issue 2, 303-319.

179 Silver 2004 [op cit].

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