BEYOND BORDERS: CAFTA'S ROLE IN SHAPING LABOR STANDARDS IN FREE TRADE AGREEMENTS

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INTRODUCTION

The world in which we live is becoming more intertwined as each day passes—this is evident in aspects as elementary as an individual's choice of clothing for the day: a dress shirt manufactured in Singapore, khaki pants made in Morocco, fashionably completed by a matching belt and shoe set from the finest leather in Brazil. As the international intermingling of products persists, the disparities between those wearing the stylish ensemble and those providing the outfit become more pronounced. In recent years, stories of sweat shops in South Asia[1] and "maquiladora"[2] workers in Mexico have caught the attention of many and brought to the forefront a concern for the sub-standard working conditions of foreign laborers.

At the same time, the U.S. executive and legislative branches have ardently pushed for the expansion of bilateral and multilateral Free Trade Agreements (FTAs) to bolster the American economy, stabilize national security, and promote democracy.[3] In this context,

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[1] *See* BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 6 n.13 (2005) ("The term 'sweatshop' was coined in the 19th century in Britain to describe establishments in unorganised trades where wages and conditions were considered exploitative . . . .").

[2] Maquiladoras, or Export Processing Zones, are defined by the International Labour Organization (ILO) as "industrial zones with special incentives set up to attract foreign investors." International Labour Organization, Export Processing Zones, http://www-ilo-mirror.cornell.edu/public/english/dialogue/sector/themes/epz.htm (last visited Apr. 4, 2007). In the maquilas of Mexico and Central America, the special incentives are "low wages, a lack of environmental or labour regulations, low taxes, and few if any duties." Maquila Solidarity Network, Maquilas: What Is a Maquila?, http://www.maquilasolidarity.org/resources/maquilas/whatis.htm (last visited Apr. 4, 2007).

[3] *See* Bipartisan Trade Promotion Authority Act, 19 U.S.C. § 3801(b)(1) (Supp. IV 2004).

> The expansion of international trade is vital to the national security of the United States. Trade is critical to the economic growth and

the issue of labor conditions in countries viewed as prospective trading partners is inextricably intertwined with the United States' democratically rooted philosophy of promoting free trade.[4] As barriers to trade are reduced due to the proliferation of FTAs, the attendant duties and obligations of trading partners become an issue of key importance.

In light of the strong efforts to expand international trade and reduce tariff barriers to American products, the dawn of the twenty-first century has produced a new era of FTAs between the United States and individual countries,[5] as well as collective regions,[6] throughout the world. August 2, 2005 marked the newest addition to the ever-expanding list of FTAs as the U.S.-Dominican Republic/Central American Free Trade Agreement (CAFTA) was entered into force and became public law.[7]

This Comment addresses the United States' promulgation and passage of CAFTA, with particular focus on, and analysis of, the labor provisions contained therein. Part I discusses the history leading up to the enactment of CAFTA, including the arguments for and against the agreement.[8] Part II focuses specifically on the labor provisions and capacity building mechanisms contained in Article 16 of CAFTA, including criticisms and defense of the provisions.[9] Part III provides

> strength of the United States and to its leadership in the world. Stable trading relationships promote security and prosperity. Trade agreements today serve the same purposes that security pacts played during the Cold War, binding nations together through a series of mutual rights and obligations. Leadership by the United States in international trade fosters open markets, democracy, and peace throughout the world.

Id.

[4] *See id.* § 3802(a)(6)–(7). The overall trade negotiating objectives of the United States include "to promote respect for worker rights and the rights of children consistent with core labor standards . . . and an understanding of the relationship between trade and worker rights." *Id.* § 3802(a)(6).

[5] *See, e.g.*, Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63 [hereinafter U.S.-Jordan FTA]; United States–Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 117 Stat. 909 (2003) [hereinafter U.S.-Chile FTA]; Australia-United States Free Trade Agreement, U.S.-Austl., May 18, 2004, 118 Stat. 919 (2004).

[6] *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8, 1992, 107 Stat. 2057 (1993).

[7] Dominican Republic-Central America-U.S. Free Trade Agreement Implementation Act, Pub. L. No. 109-53, 119 Stat. 462 (2005) (codified in scattered sections of 19 U.S.C.).

[8] *See infra* Part I.

[9] *See infra* Part II.

an analysis of the present day labor conditions with which CAFTA must contend.[10] Finally, Part IV tracks the progression of American FTAs and CAFTA's place in this succession, and suggests a model of success for crafting the labor provisions of future FTAs.[11]

I. THE ROAD TO CAFTA

CAFTA, the most recently enacted FTA, encompasses the Central American countries of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua, as well as the Caribbean nation of the Dominican Republic.[12] CAFTA represents the Bush administration's ("Administration") focus on promulgating tariff-reducing agreements with a multitude of nations.[13] The push for establishing FTAs throughout the world is supported by the objectives outlined by Congress in the Bipartisan Trade Promotion Authority Act of 2002 (TPA, or "fast-track").[14]

Prior to CAFTA, all of the countries now party to the agreement were beneficiary countries to the Caribbean Basin Economic Recovery Act (CBERA),[15] pursuant to presidential designation.[16] Under CBERA, beneficiary countries enjoyed tariff-free exports to the United States for certain articles.[17] In determining whether to designate a nation as a beneficiary country, CBERA outlined various factors for the president to consider in granting beneficiary status:

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[10] *See infra* Part III.

[11] *See infra* Part IV.

[12] 19 U.S.C.A. § 4001 (West 2005).

[13] *See, e.g.*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, STATEMENT ON HOW THE DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES FREE TRADE AGREEMENT MAKES PROGRESS IN ACHIEVING U.S. PURPOSES, POLICIES, OBJECTIVES AND PRIORITIES 2 (2005), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Transmittal/asset_upload_file122_7816.pdf ("The Agreement forms an integral part of the Administration's larger strategy of opening markets around the world through negotiating and concluding global, regional, and bilateral trade initiatives.").

[14] Congress justifies the promulgation of FTAs on the basis that

> [t]rade agreements maximize opportunities for the critical sectors and [are]building blocks of the economy of the United States . . . . Trade will create new opportunities for the United States and preserve the unparalleled strength of the United States in economic, political, and military affairs. The United States, secured by expanding trade and economic opportunities, will meet the challenges of the twenty-first century.

19 U.S.C. § 3801(b)(2) (Supp. IV 2004).

[15] 19 U.S.C. § 2702(b) (2000).

[16] *Id.* § 2702(a)(1)(A).

[17] *Id.* § 2701. "The President may proclaim duty-free treatment (or other preferential treatment) for all eligible articles from any beneficiary country in accordance with the provisions of this chapter." *Id.* § 2701.

> 1) an expression by such country of its desire to be so designated;
> 2) the economic conditions in such country, the living standards of its inhabitants, and any other economic factors which he deems appropriate;
> 3) the extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country;
> 4) the degree to which such country follows the accepted rules of international trade provided for under the WTO Agreement and the multilateral trade agreements (as such terms are defined in paragraphs (9) and (4), respectively, of section 2 of the Uruguay Round Agreements Act [19 U.S.C. § 3501(9) and (4)]);
> 5) the degree to which such country uses export subsidies or imposes export performance requirements or local content requirements which distort international trade;
> 6) the degree to which the trade policies of such country as they relate to other beneficiary countries are contributing to the revitalization of the region;
> 7) the degree to which such country is undertaking self-help measures to promote its own economic development;
> 8) whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights.[18]

Expanding upon the criteria laid out in 19 U.S.C. § 2702, § 2703 further defines these factors, including an assessment of "the extent to which the country provides internationally recognized worker rights."[19] These internationally recognized rights include:

> (I) the right of association;
> (II) the right to organize and bargain collectively;
> (III) a prohibition on the use of any form of forced or compulsory labor;
> (IV) a minimum age for the employment of children; and
> (V) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[20]

The same above-named factors are also to be considered when determining if a country should be withdrawn or suspended from its

[18] *Id.* § 2702(c)(1)–(8).
[19] *Id.* § 2703(b)(5)(B)(iii).
[20] *Id.* § 2703(b)(5)(B)(iii)(I)–(V).

beneficiary status.[21] CBERA provides a mechanism for the president to proscribe complete or selective sanctions if a beneficiary country is not in compliance with the objectives set forth therein.[22] CBERA therefore, promotes tariff-free imports into the United States, while at the same time providing for a unilateral withdrawal mechanism by the United States should a country not comply with levels articulated by CBERA.[23]

To many, CBERA represented a one-sided trade preference program to Central American countries without duty-free reciprocity for United States goods and services, thereby perpetuating an unequal playing field between the United States and designated beneficiary countries.[24] In response to this view, early in 2001, Robert Zoellick, former United States Trade Representative, commenced discussions

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[21] *See Id.* § 2702(f)(1)(B).

[22] *Id.* § 2702(e)(1)(A)–(B).

> (1)(A) The President may, after the requirements of subsection (a)(2) of this section and paragraph (2) have been met–
>
> (i) withdraw or suspend the designation of any country as a beneficiary country, or
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> (ii) withdraw, suspend, or limit the application of duty-free treatment under this chapter to any article of any country, if, after such designation, the President determines that as a result of changed circumstances such country would be barred from designation as a beneficiary country under subsection (b) of this section.
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> (B) The President may, after the requirements of subsection (a)(2) of this section and paragraph (2) have been met–
>
> (i) withdraw or suspend the designation of any country as a [Caribbean Basin Trade Partnership Act] beneficiary country; or
>
> (ii) withdraw, suspend, or limit the application of preferential treatment under section 2703(b)(2) and (3) of this title to any article of any country, if, after such designation, the President determines that, as a result of changed circumstances, the performance of such country is not satisfactory under the criteria set forth in section 2703(b)(5)(B) of this title.

Id.

[23] *Id.*

[24] *See Implementation of the Dominican Republic–Central America Free Trade Agreement: Hearing Before the H. Comm. on Ways and Means*, 109th Cong. (2005) (statement of Hon. Peter F. Allgeier, Acting U.S. Trade Rep., Office of the U.S. Trade Rep.), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=view&id=3061 [hereinafter Allgeier].

> But while these Central American countries and the Dominican Republic buy many goods and services from the United States, we currently face an unlevel playing field. . . . Under unilateral preference programs begun by President Reagan and expanded under President Clinton with broad bipartisan support, nearly 80 percent of imports from Central America and the Dominican Republic *already* enter the United States duty-free.

Id.

with Central American leaders for the negotiation of a regional FTA between the countries and the United States for reciprocity of duty-free imports and exports.[25] Thereafter, on "January 16, 2002, President George W. Bush announced his administration's objective to explore a free trade agreement . . . with the five countries that are members of the Central American Common Market."[26]

The motivations for the enactment of CAFTA are numerous and varied from the United States' perspective.[27] The principal goal of CAFTA, however, is that it forms a "part of the broader US strategy of 'competitive liberalization' as well as of supporting democratic developments in the Western Hemisphere and building economic alliances with countries crucial to US national security."[28]

The United States' emphasis of building economic alliances manifests itself to the utmost degree in the proposed, yet highly debated, Free Trade Agreement of the Americas (FTAA), which seeks to establish an FTA with all of Central and South America, as well as Caribbean nations.[29] CAFTA represents an alternative approach to FTAA.[30] Many argue, however, that CAFTA is a "divide and conquer" approach because of failed FTAA negotiations due to lack of support for the broad agreement from important countries such as Brazil, Venezuela, and Uruguay.[31] Additionally, it has been argued that this strategy "lessens the scope of coalitions negotiating the FTAA and puts tremendous stress on the remaining countries to get in line after . . . Central America."[32]

The competing perspectives on the motivations for CAFTA are also indicative of the diverse opinions in the U.S. legislature over

[25] José M. Salazar-Xirinachs & Jaime Granados, *The US–Central America Free Trade Agreement: Opportunities and Challenges*, *in* FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES 225 (Jeffrey J. Schott ed., 2004).

[26] *Id.*

[27] *Id.* at 229–30.

[28] *Id.* (citing Robert Zoellick, US Trade Rep., Globalization, Trade, and Econ. Security, Remarks at the Nat'l Press Club (Oct. 1, 2000).

[29] Jeffrey J. Schott, *Assessing US FTA Policy*, *in* FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES 361 (Jeffrey J. Schott ed., Inst. For Int'l Econ. 2004). *See also* Salazar-Xirinachs & Grenados, *supra* note 25, at 234 ("The number of players and the accompanying proliferation of sensitivities ensure that the FTAA is an ambitious and complex negotiation, and its precise outcome remains uncertain.").

[30] *Id.* at 230.

[31] *See* SCOTT SINCLAIR & KEN TRAYNOR, PUBLIC SERVICES INTERNATIONAL, DIVIDE AND CONQUER: THE FTAA, US TRADE STRATEGY, AND PUBLIC SERVICES IN THE AMERICAS, at iii (2004), *available at* http://www.world-psi.org/TemplateEn.cfm?Section=Home&Template=/ContentManagement/ContentDisplay.cfm&ContentID=4145.

[32] Salazar-Xirinachs & Granados, *supra* note 25, at 230 n.2.

whether or not CAFTA was a viable and supportable agreement.[33] Beginning with the narrow passage of the TPA in 2002, which restored so-called "fast-track" negotiating authority for trade agreements to the president,[34] the road to negotiating and approving agreements such as CAFTA has been dramatically split between supporters and opponents.[35] Fast-track negotiations allow "the president [to] submit the trade agreement and legislation making the necessary changes in domestic law, and Congress [can] vote expeditiously on the package without the possibility of amendment."[36] President Bush ardently pushed for restoration of fast-track negotiation ability, arguing that "Trade Promotion Authority will give me the flexibility I need to secure the greatest possible trade opportunities for America's farmers, workers, families and consumers."[37] However, many members of Congress, especially Democrats, were nervous at the prospect of restoring such broad trade negotiating powers, giving the "president open-ended authority to negotiate trade deals as he sees fit."[38]

The divide between Democrats and Republicans in both the House of Representatives and the Senate continued to characterize the road to the passage of CAFTA.[39] It could be argued that the skepticism of the president's increased trade negotiation authority of the TPA carried over into the debate regarding CAFTA, possibly leading to stricter scrutiny of the proposal of CAFTA, the first FTA negotiated post-TPA.[40]

In addition to granting fast-track authority, the TPA lays out specific trade negotiating objectives and designates the groups to be involved in the negotiation of trade agreements and the sequence of

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[33] Joseph Kahn, *House Supports Trade Authority Sought by Bush*, N.Y. TIMES, Dec. 7, 2001, at A1.

[34] Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002); *see also* CIS No. PL2002-107-210, Div. B (The TPA "[r]estores and modifies Presidential authority to negotiate trade agreements under an expedited procedure for Congressional approval.").

[35] *See* Kahn, *supra* note 33 (reporting that TPA passed approval in the House by a narrow vote of 215 to 214).

[36] DOUGLAS A. IRWIN, FREE TRADE UNDER FIRE 171 (2002).

[37] Kahn, *supra* note 33 at A1.

[38] *Id.* (Democrats arguing that TPA "failed to mandate that trade agreements set labor and environmental standards as well as tariff and quota levels").

[39] *See, e.g.*, Edmund L. Andrews, *Pleas and Promises by G.O.P. as Trade Pact Wins by 2 Votes*, N.Y. TIMES, July 29, 2005, at A1 ("[T]he House approved the trade pact by the paper-thin margin of two votes, 217 to 215."); Edmund L. Andrews, *Senate Approves Free Trade Pact*, N.Y. TIMES, July 1, 2005, at A1 (reporting that Senate approved CAFTA by a vote of fifty-four to forty-five).

[40] *See infra* notes 46–61 and accompanying text.

events for proposal of an FTA.[41] Other than the president, the major actors in the process of trade negotiation prior to submission for congressional approval include the United States Trade Representative (USTR) and the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC).[42] On October 1, 2002 the USTR officially notified Congress of the intent to pursue an FTA with countries of Central America, and on August 4, 2003, the USTR amended its notification to integrate the Dominican Republic into the agreement as well.[43]

On February 20, 2004, the President informed Congress of his intent to sign the proposed agreement with the Central American countries, and on March 24, 2004, he apprised Congress that the agreement would include the Dominican Republic.[44] Pursuant to the provisions of the TPA, the president must inform the LAC of his intent to submit a trade agreement to Congress.[45] The LAC then reviews the proposed agreement and compiles a report adjudging whether the objectives of the TPA have been met.[46] On March 19, 2004, the LAC submitted its report regarding the proposed CAFTA bill:

> It is the opinion of the LAC that CAFTA neither fully meets the negotiating objectives laid out by Congress in TPA, nor promotes the economic interest of the United States. The agreement clearly fails to meet some congressional negotiating objectives, and it barely complies with others. The agreement repeats many of the same mistakes of the North American Free Trade Agreement (NAFTA), and is likely to lead to the same deteriorating trade balances, lost jobs, and workers' rights violations that NAFTA has created.[47]

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[41] 19 U.S.C. § 3803 (Supp. IV 2004).

[42] *Id.*

[43] Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, H.R. REP. NO. 109-182, at 8–9 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 337, 344 [hereinafter Ways and Means Report].

[44] *Id.*

[45] § 3803(c)(3)(A).

[46] *Id.* § 3803(c)(3)(A)(i).

[47] LABOR ADVISORY COMMITEE FOR TRADE NEGOTIATIONS AND TRADE POLICY, REPORT TO THE PRESIDENT, THE CONGRESS AND THE UNITED STATES TRADE REPRESENTATIVE ON THE U.S.-CENTRAL AMERICA FREE TRADE AGREEMENT 1 (2004), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA_Reports/asset_upload_file63_5935.pdf [hereinafter LAC REPORT].

Despite the negative opinion from the LAC and its recommendation to change the agreement, CAFTA was submitted for congressional approval largely unmodified from its original form.[48]

CAFTA was officially introduced in the House on June 23, 2005, and referred to the House Committee on Ways and Means.[49] The vote of the Committee yielded twenty-five votes in favor of the bill and sixteen votes in opposition. The majority, therefore, recommended the bill for House approval, stating:

> The Committee believes that the Agreement meets the objectives and priorities set forth in the Bipartisan Trade Promotion Authority Act of 2002 (TPA). The Agreement covers all agricultural and industrial sectors, opens DR-CAFTA markets to U.S. services, contains robust protections for U.S. investors and intellectual property rights holders, and includes strong labor and environment provisions. In addition to the new commercial opportunities, DR-CAFTA will help cement many of the recent democratic, legal, and economic reforms in the DR-CAFTA countries.[50]

The minority of the House Committee on Ways and Means expressed their dissenting view by referring to the Administration's proposed bill as a "missed opportunity . . . to negotiate and submit to Congress for approval an agreement that would have ensured that the benefits of trade flow broadly to working people, small farmers and society at large, as well as to larger businesses."[51] The distinctly different conclusions of the LAC, the minority of the House Committee on Ways and Means, and the majority of the Committee, in determining whether CAFTA, as proposed, was in compliance with the objectives of United States trade policy would prove to be a contentious issue on the House floor as well.[52]

The House, as well as the Senate, was largely split regarding the desirability of implementing CAFTA, especially concerning labor provisions[53] and the withdrawal of countries that were parties to CAFTA from CBERA.[54] The multitude of opposing and supporting

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[48] *See* Ways and Means Report, *supra* note 43, at 1.

[49] 151 CONG. REC. H5100 (daily ed. June 23, 2005).

[50] Ways and Means Report, *supra* note 43, at 2.

[51] *Id.*

[52] *See* Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, 151 CONG. REC. H6884 (daily ed. July 27, 2005) (statements of Rep. Thomas et al.).

[53] *Id.*

[54] CBERA was amended to provide that upon passage of CAFTA, any country that is a party to CAFTA would be withdrawn automatically from CBERA and subject strictly to the provisions of CAFTA. ("The term 'former beneficiary country' means a country that ceases to be designated as a beneficiary country under this title because

sentiments of CAFTA culminated on July 27, 2005, with a volatile floor debate between strong Democratic and Republican representatives, echoing the divergent views of the House Committee on Ways and Means.[55] Representative Cardin from Maryland was opposed to CAFTA, principally with regard to its labor provisions, stating:

> This will be the first agreement that I will vote against.
>
> This is the first agreement in which we actually move backwards on advancing international labor standards. Currently, with the Central American countries, we had the Caribbean Basin Initiative. . . . They get preference. But in order to get that preference, they must move towards international labor standards. . . .
>
> We use the threat of withholding trade benefits if they do not adopt international labor standards . . . and it is working. . . . CAFTA repeals those obligations. . . . [W]hat is in place is enforcing your own rules without any adequate enforcement.[56]

Representative Cardin's argument, however, was strongly rebutted by a host of CAFTA supporters, including Representative Moran from Virginia, positing that without CAFTA the conditions of Central America would continue to deteriorate:

> [F]rom the standpoint of policy, certainly this could and should have been a much better agreement. We should have addressed labor conditions in a more robust way. . . . But on the whole this agreement does much more for Central America than we will have the opportunity to do in a long time to come, and that is the reality.[57]

Representative Davis of Alabama responded that without CAFTA the United States would not be assisting the countries of Central America, positing:

> [I]nstead of taking these nations that struggle so much day in and day out, instead of challenging them to move to a better place, we gave up and we accepted the status quo. And one of the cruelest and strangest arguments . . . is that somehow we are not standing by these countries if we defeat this agreement.[58]

Compelling arguments from both sides emerged in the debate over the passage of CAFTA, and at the end of the debates CAFTA passed

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the country has become a party to a free trade agreement with the United States."). 19 U.S.C.A. § 2702(a)(1)(F) (West 2005).

[55] *See* 151 CONG. REC. H6884 (daily ed. July 27, 2005) (statements of Rep. Thomas et al.).

[56] *Id.* at H6897 (statement of Rep. Cardin).

[57] *Id.* (statement of Rep. Moran).

[58] *Id.* at H6908 (statement of Rep. Davis).

in the House by the narrowest of margins: 217 to 215, with two abstaining.[59]

Rapidly thereafter, the bill officially passed in the Senate by a vote of fifty-four to forty-five and was presented to the President on July 28, 2005.[60] The President signed the bill on August 2, 2005, bringing CAFTA into force under Public Law 109-53.[61] CAFTA is now officially codified under Title 19, chapter 26 of the United States Code, section 4001.[62]

II CAFTA LABOR PROVISIONS AND CONCERNS

The contentious debate seen in the House, and to a lesser extent in the Senate, necessitates a closer examination of the labor provisions of CAFTA that created such strong dissention to the agreement. The preamble to CAFTA lists, among other objectives, that the countries resolve to "[protect], enhance, and enforce basic workers' rights and strengthen their cooperation on labor matters . . . [and build] on their respective international commitments on labor."[63] Specifically, the labor provisions are contained in chapter 16, which details the countries' statement of shared commitment, provisions for enforcement of labor laws, as well as an annex outlining labor cooperation and capacity building.[64]

The overarching labor requirement of CAFTA is that the countries "reaffirm their obligations as members of the International Labor Organization (ILO) . . . [and] strive to ensure that such labor principles . . . are recognized and protected by its law."[65] The ILO Fundamental Principles and Rights at Work are essentially incorporated into the definition of labor laws in CAFTA; they include:

(a) the right of association;
(b) the right to organize and bargain collectively;
(c) a prohibition on the use of any form of forced or compulsory labor;

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[59] *Id.* at H6927–28.

[60] 151 CONG. REC. S9253 (daily ed. July 28, 2005).

[61] Dominican Republic–Central America–United States Free Trade Agreement Implementation Act, 109 Pub. L. No. 53, 119 Stat. 462 (2005).

[62] 19 U.S.C.A. § 4001 (West 2005).

[63] Central America-Dominican Republic-United States Free Trade Agreement, Preamble (Aug. 5, 2005), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html?ht= [hereinafter CAFTA].

[64] *Id.* ch. 16.

[65] *Id.* ch. 16.1, para. 1.

> (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and
> (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[66]

CAFTA also recognizes, however, the sovereignty of each country party to the agreement and therefore allows for "the right of each Party to establish its own domestic labor standards," but requires that "its laws provide for labor standards consistent with the internationally recognized labor rights" established by the ILO.[67]

The essential criticism regarding the basic minimum labor requirements called for by CAFTA is that, even though Central American countries are parties to the ILO and have signed onto the Declaration on Fundamental Principles and Rights at Work, the actual practices in the countries fall far below achievement of this standard.[68] Congresswoman Jackson-Lee of Texas opposed CAFTA on the basis that "omission of labor standards will result in continuation of awful and unconscionable labor conditions for both adults and children."[69]

The rebuttal to this argument is that there has been great progress made by the Central American countries to raise their labor standards as their democracies emerge and continue to strengthen.[70] Supporters of CAFTA note that each of the Central American countries has incorporated into their constitutions and civil law systems the core ILO standards and contend that they will continue to progress by being parties to CAFTA.[71] The argument about the existence or non-existence of effective labor laws, however, inherently calls into question the enforceability of such laws.

CAFTA enforcement provisions require that:

> (a) A Party shall not fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction,

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[66] *Id.* ch. 16.8, paras. (a)–(e).

[67] *Id.* ch. 16.1, para. 2.

[68] *See* LAC REPORT, *supra* note 47, at 3 ("Under CAFTA, governments in Central America will be free to maintain their labor laws far below ILO standards.").

[69] 151 CONG. REC. H6884, H6912 (daily ed. July 27, 2005) (statement of Rep. Jackson-Lee).

[70] *See* Allgeier, *supra* note 24 ("Administration's own, more detailed analysis of the labor rights situation . . . confirms that their labor laws are generally ILO-consistent.").

[71] *See* INT'L LABOUR OFFICE, INT'L LABOUR ORG., FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK: A LABOUR LAW STUDY: COSTA RICA, EL SALVADOR, GUATEMALA, HONDURAS, AND NICARAGUA (2003), *available at* http://www.ilo.org/public/english/dialogue/download/cafta.pdf.

> in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.
>
> (b) Each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions, regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.[72]

CAFTA's enforcement measures require only that countries enforce their own labor standards, not that they create or upgrade any laws.[73] The opponents of CAFTA worry that requiring only the enforcement of current laws amounts to an endorsement of the current substandard labor conditions in Central American countries.[74] The dissenting opinion from the House Committee on Ways and Means criticized the CAFTA enforcement requirements by stating, "even the best enforcement of inadequate laws can never yield acceptable results."[75]

Additionally, CAFTA outlines the available recourse should a country fail to enforce its existing laws.[76] The first step in dispute resolution for labor violations begins with government-to-government consultations, progressing then to discussion between labor ministers of the respective countries.[77] If the labor ministers cannot agree on a course of action, the matter is referred to an arbitral panel.[78] CAFTA provides for the establishment of a roster of individuals to serve as panelists in matters of labor dispute.[79] Labor roster members are to be chosen on an objective basis,[80] not to be affiliated with any party,[81]

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[72] CAFTA, *supra* note 63, ch. 16.2, paras. 1(a)–(b).

[73] *See id.* ch. 16.1, para. 2 ("[r]ecognizing the right of each Party to establish its own domestic labor standards").

[74] *See* Ways and Means Report, *supra* note 43, at 47–50 (arguing that "[r]equiring only that countries 'enforce their own laws' with regard to labor standards is equally inappropriate").

[75] *Id.* at 50.

[76] *See* CAFTA, *supra* note 63, ch. 20.

[77] OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, CAFTA FACTS: DISPUTE SETTLEMENT: EQUIVALENT PROCEDURES & REMEDIES FOR COMMERCIAL AND LABOR DISPUTES 1 (2005), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file812_7869.pdf.

[78] *Id.*

[79] CAFTA, *supra* note 63, ch. 16, art. 16.7, para. 1.

[80] *Id.* para. 2(b).

[81] *Id.* para. 2(c).

and to "have expertise or experience in labor law or its enforcement, international trade, or the resolution of disputes arising under international agreements."[82]

The panel then conducts a review of the alleged labor violation.[83] If the panel finds that a country is not in compliance with the labor standards, the parties themselves have a chance to determine the appropriate resolution.[84] If no resolution is to be had, then a monetary penalty of up to fifteen million dollars annually may be imposed until the violating country comes into compliance.[85] The fine paid will be deposited in a fund whereby the monies shall be used for appropriate labor initiatives in the country of the violating party.[86] If the party in violation fails to pay the fine, the complaining party may take steps to collect the monies due, including temporary suspension of tariff benefits equivalent to the value of the fine.[87] However, the decision to suspend trade benefits should only be made bearing in mind the "objective of eliminating barriers to trade and while seeking to avoid unduly affecting parties or interests not party to the dispute."[88]

The labor violation remedies under CAFTA are markedly different from the unilateral sanction provisions in its predecessor, CBERA.[89] Unilateral trade preference programs, such as CBERA, provide stricter standards of enforcement than those found in CAFTA because they allow for "the withdrawal of trade benefits if steps are not taken to meet international labor standards." [90] Opponents to CAFTA cite the success of the sanction imposition measures contained in CBERA, noting that "most of the labor law reforms of the past twenty years in the CAFTA countries has been due to the leverage of workers rights conditionality under [CBERA]."[91] As previously mentioned, however, supporters of CAFTA view CBERA as an unequal trade preference program because the United States does not receive reciprocal reduced tariff exports to Central American countries.[92]

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[82] *Id.* para. 2(a).
[83] CAFTA, *supra* note 63, ch. 20, art. 20.13, paras. 3(a)–(c).
[84] *Id.* art. 20.15, para. 3.
[85] *Id.* art. 20.17, para. 2.
[86] *Id.* para. 4.
[87] *Id.* para. 5.
[88] *Id.*
[89] *See* 19 U.S.C. § 2703(e)(1)(A)–(B) (2000); *see also supra* note 22.
[90] LAC Report, *supra* note 47 at 10.
[91] Ways and Means Report, *supra* note 43, at 49.
[92] Allgeier, *supra* note 24.

Critics of CAFTA take issue with its enforcement provisions, arguing that (1) the maximum fine for a labor violation is capped exceedingly low at fifteen million dollars and (2) any fine paid is actually returned to the violating country, in essence paying themselves for their own violations, with little supervision for fund appropriation.[93] Supporters of CAFTA counter that a fifteen million dollar fine is a significant amount to the developing countries of Central America and that the threat of having to pay this fine until the situation is rectified is a powerful incentive to uphold the obligation of enforcing their domestic labor laws.[94]

Additionally, supporters of CAFTA point to the unique "Capacity Building" provisions embodied in Article 16 to reinforce their position that CAFTA actually does more for workers' rights than other FTAs.[95] CAFTA recognizes that "cooperation on labor issues can play an important role in advancing development in the territory of the Parties and in providing opportunities to improve labor standards."[96] Annex 16.5 provides for the creation of a Labor Cooperation and Capacity Building Mechanism (CBM), composed of contact points from each country.[97] The purpose of the CBM is to "initiate bilateral or regional cooperative activities on labor issues,"[98] addressing issues such as the effective application of the ILO fundamental rights,[99] outlining inspection systems to improve labor enforcement,[100] and appropriate methods for supervising compliance of working conditions.[101] The annex additionally suggests certain means for the implementation of cooperative activities, although the parties may agree to use whatever means they deem appropriate,[102] as long as the means "operate in a manner that respects each Party's law and sovereignty."[103] Opponents to CAFTA acknowledge that while these provisions are "crafted to encourage enforcement of labor rights, [they] fall short of the strength needed to reverse years of indifference and

[93] LAC Report, *supra* note 47, at 12 ("[L]abor enforcement procedures cap the maximum amount of fines and sanctions available at an unacceptably low level, and allow violators to pay fines to themselves with little oversight.").

[94] *See* Ways and Means Report, *supra* note 43, at 42.

[95] *Id.* at 43.

[96] CAFTA, *supra* note 63, ch. 16, art. 16.5, para. 1.

[97] *Id.* Annex 16.5, para. 1.

[98] *Id.* para. 3.

[99] *Id.* para. 3(a).

[100] *Id.* para. 3(d).

[101] *Id.* para. 3(g).

[102] CAFTA, *supra* note 63, ch. 16, annex 16.5, para. 4.

[103] *Id.* para. 1.

systematic neglect."[104] This neglect is embodied in "bureaucratic impediments, ineffective legal systems and insufficient resources"[105] such that the CBM's potential for success is reduced because the benefit of CAFTA is given before workers rights are firmly rooted in Central American countries.[106]

III. THE FUTURE FOR FTAS

The construction and content of CAFTA differ from its predecessor FTAs, evidencing an acknowledgement that the past models were not successful in securing adherence to labor standards. These changes, although progressive, constitute a mere starting place for the structuring of future FTAs. This foundation, coupled with further restructuring, will ensure that labor rights espoused in prospective agreements are given a stronger chance of effectuation. This final section of the Comment will briefly survey the character of FTA evolution, outline CAFTA similarities and differences to these agreements, and suggest a model on which future FTAs should be based.

A. Evolution of FTAs

The North American Free Trade Agreement (NAFTA) was the first U.S. FTA to recognize the inherent connection between trade and labor, outlining certain provisions in the North American Agreement on Labor Cooperation (NAALC).[107] The NAALC is a side agreement to NAFTA that details the labor requirements of the agreement, although not in the main agreement itself.[108] The NAALC set the stage for future FTAs' recognition of labor provisions; however, it is unique in that the evolution of FTAs progressed away from side agreements that outlined the labor provisions (such as the NAALC) to an actual incorporation of the labor standards into the main body of the agreements.[109]

Although NAFTA initiated the awareness of labor rights, the substantive provisions of the NAALC are distinct from the provisions

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[104] 151 CONG. REC. H6884, H6919 (daily ed. July 27, 2005) (statement of Rep. Van Hollen).

[105] *Id.*

[106] *See id.*

[107] *See* HEPPLE, *supra* note 1, at 107.

[108] *Id.*

[109] *See id.* (NAFTA and the NAALC "have been the model, with some significant variations, for later [FTAs] negotiated by the US with Jordan (2000), Chile and Singapore (2003) , . . . Australia (2004), and . . . [CAFTA]."); *see also id.* at 116.

of future FTAs, including CAFTA.[110] The NAALC's main focus was on the "enforcement of *domestic* labour law by each of the parties, and not the application of *international* labour standards."[111] The main obligations of parties to the NAALC include the establishment and maintenance of high labor standards, the promotion of compliance and public awareness, and the effective enforcement of domestic labor laws.[112] Although these obligations appear stringent, the purpose behind NAFTA/NAALC did not facilitate strict adherence,[113] as there are certain glosses throughout the NAALC that temper adherence to the obligations. For example, Article 49(1) provides that a state has not failed to effectively enforce its labor laws if the state makes a "bona fide decision[] to allocate resources to . . . other labour matters determined to have higher priorities."[114]

The evolution of FTAs has built upon the foundational elements established by the NAALC principles and heightened the labor provisions prescribed.[115] One of the most significant changes is the incorporation of labor standards directly into the main body of the agreement:

> The US-Jordan FTA . . . is the first to contain labour rights and environmental obligations in the text of the main agreement instead of a side agreement. The significance of this is that disputes over labour rights are subject to the same dispute settlement procedures and remedies as the rest of the agreement.[116]

The U.S.-Jordan FTA set the stage for incorporating labor provisions directly into the agreement as reflected in the subsequent U.S.-Chile, U.S.-Singapore, and U.S.-Australia FTAs, as well as in CAFTA.[117]

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[110] *See id.* at 108.

[111] *Id.*

[112] *See* HEPPLE, *supra* note 1, at 112–13.

[113] Gary Clyde Hufbauer & Ben Goodrich, *Lessons from NAFTA*, *in* FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES 37, 45–46 (Jeffrey J. Schott ed., 2004) ("The labor side agreement is little more than a toothless list of hopes and aspirations.").

[114] HEPPLE, *supra* note 1, at 113–14.

[115] *See* Marianne Hogan, Note, *DR-CAFTA Prescribes a Poison Pill: Remedying the Inadequacies of Dominican Republic-Central American Free Trade Agreement Labor Provisions*, 39 SUFFOLK U. L. Rev. 511, 523–27, 532–34 (2006). For examples of FTAs that have built upon the NAALC structure, see Agreement on Trade in Textiles and Textile Products, U.S.-Cambodia, Jan. 20, 1999, Hein's No. KAV 5781[hereinafter CBTA]; U.S.-Jordan FTA, *supra* note 5; U.S.-Chile FTA, *supra* note 5; U.S.-Singapore Free Trade Agreement, U.S.-Sing., May 6, 2003, 42 I.L.M. 1026.

[116] HEPPLE, *supra* note 1, at 116.

[117] *Id.* at 117.

Furthermore, the U.S.-Jordan agreement slightly, though quite significantly, expanded the scope of labor provisions by not only prescribing enforcement of domestic labor laws (as called for in NAFTA/NAALC), but also by expressly linking domestic labor law standards to international standards called for by the ILO.[118] The U.S.-Jordan FTA calls for the "parties . . . to strive to ensure that such [domestic] labour principles and the internationally recognised labour rights set out in Article 6(6) of the agreement are 'recognised and protected by domestic labour law.'"[119] This provision may help to strengthen the focus on international labor standards and a uniformity among labor standards between the parties to the agreement; however, because the language of "striving to ensure" recognition is merely aspirational, it has been suggested that "the mortar 'may be too thin and watery to do the job' of closing the gaps in NAALC."[120]

One of the most distinct features of the U.S.-Jordan FTA is the compliance measures available should a party derogate from the labor provisions established by the agreement.[121] The U.S.-Jordan FTA first calls for all disputes to be referred to a Joint Committee and then subsequently a dispute settlement panel.[122] If no resolution by either the Joint Committee or the dispute settlement panel is to be had, "the affected Party shall be entitled to take *any appropriate and commensurate measure*."[123] This provision gives wide latitude to the injured party to respond with open-ended sanctions, benefit withdrawal, or any other "appropriate" measure for an indefinite period of time and with no dollar amount limitation.[124] As shall be seen, the FTAs that followed the U.S.-Jordan agreement regressed from this broad standard and more narrowly tailored the availability and magnitude of penalties on parties who violate labor standards.[125]

B. The CAFTA Phase

CAFTA has followed suit with the FTAs that were established after the U.S.-Jordan agreement. CAFTA provisions have progressed from original NAALC standards by first incorporating the labor re-

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[118] *Id.* at 116.

[119] *Id.*

[120] *Id.* at 117 (citing Marley S. Weiss, *Two Steps Forward, One Step Back—or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 718 (2003)).

[121] *See* HEPPLE, *supra* note 1, at 118.

[122] U.S.-Jordan FTA, *supra* note 5, art. 17, para. 1.

[123] *Id.* art. 17, para. 2(b) (emphasis added).

[124] *See* HEPPLE, *supra* note 1, at 117.

[125] *See infra* Part IV.B.

quirements directly into the main agreement, following suit of the U.S.-Jordan FTA and its progeny.[126] Furthermore, although the construction of CAFTA has retained the NAALC's promotion of state sovereignty over labor laws, CAFTA, like the U.S.-Jordan FTA, has also incorporated international labor standards into the agreement by recognition of ILO Principles.[127] This is especially significant as the "[eleven] labour principles in NAALC are similar to but not the same as those in ILO conventions. They are less specific and sometimes lower than ILO obligations."[128] As noted above, however, the actual effectiveness of this recognition is limited by the aspirational language of "striving to ensure,"[129] as well as by the retention of an escape clause that provides an out even if a party does violate the standards called for in the agreement.[130]

Although CAFTA in many ways mirrors the U.S.-Jordan FTA, it does depart from this model in a very significant way. Agreements subsequent to the U.S.-Jordan FTA, including CAFTA, relaxed the permissible party responses to the derogation of labor rights.[131] CAFTA greatly restricts the availability and magnitude of penalties available should a party violate the labor provisions.[132] CAFTA calls for enforcement measures to be taken when a party "fail[s] to effectively enforce its labor laws . . . in a manner affecting trade."[133] Whereas the U.S.-Jordan agreement does not have a ceiling for the amount of fine imposed,[134] under CAFTA the imposition of fines on the offending party is capped at fifteen million dollars per year, adjusted for inflation.[135] Additionally, where the U.S.-Jordan FTA does not limit the time, duration, or magnitude of benefit withdrawal,[136] CAFTA prescribes that benefits may only be suspended for failure to

[126] *See* CAFTA, *supra* note 63, ch. 16

[127] *Id.* art. 16.1 para. 2.

[128] HEPPLE, *supra* note 1, at 114.

[129] *See supra* note 120.

[130] HEPPLE, *supra* note 1, at 114. This escape clause states that a party does not violate domestic or international labor standards if it can show that the derogation of labor rights was a result of a bona fide decision regarding the allocation of resources or a reasonable exercise of discretion over matters determined to have higher priorities. CAFTA, *supra* note 63, ch. 16, art. 16.2, para. 1(b).

[131] *See* HEPPLE, *supra* note 1, at 114.

[132] *See* CAFTA, *supra* note 63, ch. 20.

[133] CAFTA, *supra* note 63, ch. 16, art. 16.2, para. 1(a).

[134] U.S.-Jordan FTA, *supra* note 5, art. 17 (noting the absence of any monetary limit on enforcement measures).

[135] CAFTA, *supra* note 63, ch. 20, art. 20.17, para. 2.

[136] U.S.-Jordan FTA, *supra* note 5, art. 17, para. 2(b) (The US-Jordan FTA only calls for a reasonableness standard where "the affected Party shall be entitled to take any appropriate and commensurate measures.").

comply with the payment of fines and the monetary value of benefits suspended may not exceed the value of the outstanding fine.[137]

CAFTA is also distinct from the U.S.-Jordan FTA in that it calls for a CBM, annexed to the labor provisions.[138] The CBM outlines the principal functions, capacity building priorities and implementation of cooperative activities between the parties with regard to labor cooperation.[139] The CBM further integrates international standards for labor by advocating that the parties seek support from the ILO,[140] undertake cooperative labor activities regarding the ILO's fundamental principles,[141] and work cooperatively on labor issues.[142]

C. Recipe for Success in FTAs

Although CAFTA has progressed substantially from its predecessor NAFTA/NAALC, as well as the more contemporary agreements such as the U.S.-Jordan FTA, CAFTA should not be used as an exact model for future FTAs. As Howard Rosen notes, "FTAs become obsolete as soon as they are signed. Most agreements look to the past and do not anticipate the future,"[143] and it is therefore important to have a strong agreement at the outset. As FTAs inevitably proliferate, measures are needed to effectively shape future agreements. Key components to the structuring of future FTAs include agreements conditioned on greater institutional upgrading prior to concluding an FTA, deeper integration of internationally recognized labor rights and human rights into the agreements, and a wider latitude of enforcement measures in the agreements themselves. In developing a successful model for efficient and effective labor rights, recourse to the provisions of other FTAs, both domestic and international, provides helpful insight to the structuring of the ideal FTA.

The countries party to the agreement need to have sufficient institutional capacity to take full advantage of being a member to an FTA.[144] This necessarily requires that parties make the requisite investment into institutions linked to labor to insure the compliance

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[137] *See* CAFTA, *supra* note 63, ch. 20, art. 20.17, para. 5.

[138] CAFTA, *supra* note 63, ch. 16, Annex 16.5.

[139] *Id.*

[140] *Id.* para. 2(d).

[141] *Id.* para. 3.

[142] *Id.* para. 4.

[143] Howard Rosen, *Free Trade Agreements as Foreign Policy Tools: The US-Israel and US-Jordan FTAs, in* FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES 51, 75 (Jeffrey J. Schott, ed., 2004).

[144] *See* Salazar-Xirinachs & Granados, *supra* note 25, at 262.

with the provisions laid out in an FTA.[145] Such investment includes improving "the rule of law, the judicial system, and corporate governance and social responsibility."[146] One way to accomplish this institutional upgrading is by integrating provisions into the FTA that reward countries with increasing preferential trade treatment for their demonstrable improvements in labor and working conditions.

The Cambodia Bilateral Textile Agreement (CBTA) is an example of a domestic trade agreement that incorporates such conditions.[147] The labor standards set forth in the CBTA provide that:

> The Parties seek to create new employment opportunities and improve living standards and working conditions through an enhanced trading relationship; affirm respect for each Party's legal system and seeking to ensure that labor laws and regulations provide for high quality and productive workplaces; and seek to foster transparency in the administration of labor law, promote compliance with, and effective enforcement of, existing labor law, and promote the general labor rights embodied in the Cambodian labor code.[148]

To this end, the Cambodian government shall undertake to "support the implementation of a program to improve working conditions in the textile and apparel sector, including internationally recognized core labor standards."[149] The agreement further calls for semi-annual consultations between the governments to determine the progress of program implementation.[150] "If the United States makes a positive determination" that "working conditions . . . substantially comply with such labor law and standards . . . , then the Specific Limits [on Cambodian annual exports] shall be increased by 14 percent for the Agreement Year . . . ."[151] This increase will only be sustained or increased in following years upon subsequent positive determinations.[152] If Cambodia fails "to take major action resulting in a signifi-

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[145] *Id.* at 262–63 ("Improving compliance with international labor . . . standards first and foremost needs substantive investments in institutional capacities and in a variety of specific projects.").

[146] *Id.* at 263 (Improvement in institutional capacity building is required for countries to "attract sufficient investment to grow and take full advantage of the new market access opened up by [an FTA].").

[147] CBTA, *supra* note 115.

[148] *Id.* art. 10, para. A.

[149] *Id.* para. B.

[150] *Id.* para. D.

[151] *Id.*

[152] *Id.* art. 10, para. D.

cant change in working conditions, then the . . . United States may withdraw such an increase."[153]

Another essential step to strengthening the labor provisions of FTAs is not only the recognition of international labor standards, but also the inclusion of human rights protection in general. In this regard the external trade agreements of the European Union (EU) provide a helpful model for the incorporation of human rights into FTAs. Most notably, the Cotonou Agreement, signed in June 2000 in Cotonou, Benin, is a partnership agreement between the African, Caribbean, and Pacific Group of States (ACP) and the EU, including, among other objectives, trade preferences between the blocks of states.[154] The preamble to the Cotonou Agreement details the parties' willingness to implement a "comprehensive and integrated approach for a strengthened partnership . . . [including] trade relations."[155] As part of this "integrated approach," the preamble incorporates reference to various human rights documents, including the United Nations Charter and the Universal Declaration of Human Rights, among others.[156] Article Nine further delineates the essential elements of the agreement which include "[r]espect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance [as] an integral part of sustainable development."[157] In addition to the human rights clauses, the agreement also contains provisions for recognition of ILO standards.[158]

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[153] CBTA, *supra* note 115, art. 10, para. D. The success of these provisions is demonstrated by the proactive involvement and desire of the United States and Cambodia to effectuate the agreement. After the passage of CBTA, the United States and Cambodia jointly requested the ILO's assistance in monitoring the Cambodian textile and apparel sector. HEPPLE, *supra* note 1, at 116. The ILO project undertook to observe and aid the institutional capacity of the Cambodian government to improve working conditions in these sectors. *Id.* The ILO endeavor was characterized by a tripartite Project Advisory Committee, which required that in order for businesses to be eligible for the heightened export quotas, they had to register their factories with the Committee. *Id.* at 121. In addition, these registered factories must allow the ILO inspectors access to monitor their facilities and interact with the workers. *Id.* To date, the ILO has discovered evidence of incorrect wage payment, involuntary overtime, and anti-union discrimination. *Id.* Although the ILO inspectors lack enforcement capabilities, "their work has resulted in improvements in a number of factories." *Id.* at 121–22.

[154] Partnership Agreement Between the Members of the African, Caribbean and Pacific Group and the European Community and its Member States, 2000 O.J. L317/3, art. 36, para. 1 [hereinafter Cotonou Agreement].

[155] *Id.* Preamble.

[156] *Id.*

[157] *Id.* art. 9, para. 1.

[158] *Id.* art. 50.

The significance of this two-pronged incorporation and reference to human rights is that "a grave breach of human rights or democratic principles by one party would entitle the other to terminate the [agreement] or to suspend its operation in whole or in part."[159] The Cotonou Agreement also calls for a sixty-day consultation period and that any measures taken must be "in accordance with international law, and proportional to the violation," with suspension as a last resort.[160] This higher level of adherence, not only to labor, but also to human rights standards, has given the parties to the Cotonou Agreement more latitude when violations of the rights of citizens occur.[161]

Enforceability of the designated international standards is also a key issue in structuring an FTA's labor standards. Although most FTAs acknowledge an international standard for labor rights, these provisions have "often been [seen] as aspirational standards to be achieved rather than actual commitments to be enforced."[162] In this vein, stringent enforcement measures are needed to better effectuate the labor provisions of an agreement, rendering them more than mere recitations.

The pinnacle of enforceability is "fully enforceable labor obligations that enjoy the same status as commercial and other obligations of the relevant trade agreement."[163] As an example, NAFTA/NAALC provide only that certain labor standards outlined are subject to penalties, instead of across-the-board enforceability of all provisions.[164] This undermines the strength of the labor provisions by making the commitment "to protect . . . rights merely hortatory."[165] Therefore, the strongest agreements are those that provide non-discriminatory enforcement, with a wide choice of enforcement mechanisms.

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[159] HEPPLE, *supra* note 1, at 122 (citation omitted).

[160] Cotonou Agreement, *supra* note 154, art. 96, paras. 2(a)–(c).

[161] *See* HEPPLE, *supra* note 1, at 123 ("Suspension . . . was used against Zimbabwe, together with other restrictions, because of the continued serious violations of human rights and of the freedom of opinion, of association and of peaceful assembly . . . .").

[162] Sandra Polaski, *Protecting Labor Rights through Trade Agreements: An Analytical Guide*, 10 U.C. DAVIS J. INT'L L. & POL'Y 13, 17 (2003).

[163] *Id.* at 19.

[164] *Id.* at 18 (The NAALC only provides "the possibility of dispute settlement and fines for failure to protect three of eleven labor rights covered . . . . [L]aws on child labor, minimum wage, and health and safety can be enforced . . . . However, freedom of association, non-discrimination, forced labor, rights of migrant workers, and other rights cannot be similarly enforced.").

[165] *Id.*

As previously mentioned, the U.S.-Jordan FTA provides the widest latitude of enforcement measures should a country not comply with the labor standards articulated.[166] Agreements "such as the U.S-Jordan FTA[] create a right for a country that is party to the agreement to challenge an alleged failure by another party to protect its citizens' labor rights."[167] Possible enforcement measures include withdrawal of trade benefits granted under the FTA or any other "appropriate and commensurate measure," including sanctions.[168] The U.S.-Jordan FTA does not limit enforceability to penalties, but provides for more tailored enforcement to the particular violation by allowing for any measure of enforcement that is "appropriate."[169] By establishing the availability of different options of enforcement, the punishment imposed can be structured so as to achieve the principal goals of penalties. These goals include a penalty that adequately deters a party from a violation, proportionality between the infraction and the penalty, and a penalty that helps to ameliorate the violation.[170]

CAFTA, and future FTAs, should undertake to incorporate the aforementioned provisions into the agreements to make FTAs and the labor provisions contained therein a recipe for success. The ideal FTA would begin with the fundamental structure of CAFTA, such as incorporating the labor provisions directly into the main body of the agreement[171] and articulating an international minimum standard of workers' rights by recognition of ILO principles.[172] The most meaningful FTA, however, would also call for adherence not only to ILO principles, but also to universally accepted human rights, as best demonstrated in the Cotonou Agreement.[173] This incorporation would raise the bar for countries participating in FTAs and act as a double incentive for the minimum standard of workers rights by requiring observance to human rights in general.

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[166] *See* U.S.-Jordan FTA, *supra* note 5. *See also supra* notes 131–37 and accompanying text.

[167] Polaski, *supra* note 162, at 18.

[168] U.S.-Jordan FTA, *supra* note 5, art. 17, para. 2(b).

[169] *See* HEPPLE, *supra* note 1, at 117 (referring to the "open-ended" nature of enforcement measures in the US-Jordan FTA).

[170] *See* Polaski, *supra* note 162, at 20 (suggesting standard objectives of penalties and considerations in determining an appropriate penalty when labor provisions are violated).

[171] *See supra* notes 115–17 and accompanying text.

[172] *See supra* notes 127–30 and accompanying text.

[173] *See supra* notes 154–60 and accompanying text.

The ideal FTA would also advance a CAFTA-like capacity building mechanism to help solidify governmental infrastructure for the attainment of secure working conditions. The model, however, would go beyond mere capacity-building to establish reward-based provisions, like those found in the CBTA.[174] These provisions would provide further tangible incentives for countries to improve workers' rights and fundamental labor principles by offering increased economic preferences for demonstrable improvements in these areas.

The final ingredient for success in FTAs is a reversion to wider enforcement capabilities as found in the U.S.-Jordan FTA.[175] CAFTA and other agreements have taken a step backwards from the "appropriate and commensurate" measures available in the U.S.-Jordan agreement[176] to a more "one size fits all" approach that limits enforceability to fines capped at fifteen million dollars.[177] This enforcement provision should not be eradicated in new FTAs, but rather expanded upon, so that penalties may be imposed on a case-by-case basis in order to best achieve the objectives of deterrence, proportionality, and amelioration.

Through an incorporation of the above mentioned provisions into new FTAs, the labor provisions of such agreements are given a substantial chance of accomplishing the goal of a meaningful international standard for labor rights.

CONCLUSION

As evidenced by the passage of CAFTA, the global community is becoming more intertwined as the barriers to trade are reduced and products and resources flow across borders.[178] In the continual march toward free trade, the issue of the domestic labor conditions of trading partners becomes a key element in the structuring of an agreement.[179] In order to reap the full gamut of benefits derived from free trade, a strong and enforceable standard for labor rights needs to be incorporated as one of the pinnacle objectives of an FTA.[180] Although CAFTA includes many of the foundational elements to accomplishing this goal, the future wave of FTAs should include more incentive to improve working conditions, higher stan-

[174] *See supra* notes 147–53 and accompanying text.
[175] *See supra* notes 121–25 and accompanying text.
[176] *Id.*
[177] *See supra* note 85 and accompanying text.
[178] *See supra* Part I.
[179] *See supra* Part II.
[180] *See supra* Part IV.C.

dards for citizens, and greater flexibility in enforcing the labor standards.[181] Hopefully, through this incorporation, a recipe for success may be developed to ensure that all participants in free trade are also all recipients of its benefits.

[181] *See supra* Part IV.B.