

Comparative Advantage and Economic Reform: Making Labor Provisions Trade Agreements Practical and Effective

Michael Aleo

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INTRODUCTION

The tension between competitiveness in international trade and the improvement of living standards has become a central controversy in negotiating trade agreements. Under pressure from the labor rights movement over the course of the last twenty-five years, the United States has regularly advocated for the inclusion of labor standards in trade relationships. Generally, governments in developing countries resist the incorporation of labor protections in trade agreements because of a belief that labor protections diminish a nation's competitiveness in the international marketplace. Labor rights advocates, particularly in the United States, have fought for the inclusion of labor rights in trade agreements as a means of lifting living standards in developing countries, and preserving them in developed countries, to avoid an international "race to the bottom" where countries try to out-compete each other by keeping labor costs as low as possible.

This article argues that trade agreements should include labor provisions that provide effective protection for core labor rights. Such protection should ensure that countries have domestic laws protecting core labor rights and that those countries enforce those laws. Further, the labor standards provisions must include (1) a compelling incentive program to

reward developing nations that improve labor conditions and comply with labor standards and (2) an effective enforcement mechanism to penalize countries that violate the labor provisions.

Section one of this article provides a short summary of the history of labor standards in United States trade policy and some of the debates surrounding the movement to include labor protections in the North American Free Trade Agreement (NAFTA) and the Central American-Dominican Republic Free Trade Agreement (CAFTA-DR, referred to in this article simply as "CAFTA"). Section two provides an overview of traditional economic theory supporting free trade and several arguments that call that theory into question. Finally, section three offers a defense regulating trade and makes specific policy recommendations regarding the inclusion of labor standards provisions in future trade agreements.

I. U.S. Trade and Labor Agreements

Labor stipulations have been included in United States trade negotiations for more than twenty years.¹ This section presents a brief overview of the United States' inclusion of labor standards in trade policy in the Generalized System of Preferences (GSP), NAFTA and CAFTA.

A. The Generalized System of Preferences

In 1984, after considerable lobbying by the International Labor Rights Fund and the American Federation of Labor-Congress of Industrial Organization (AFL-CIO), congressman Donald Pease successfully pushed for the inclusion of five labor standards in the GSP Renewal Act of 1984.² This represented a landmark in U.S. trade policy. The GSP, designed to “promote economic growth in the developing world,”³ conditions granting developing countries trade preferences on compliance with certain labor conditions.⁴ The five labor standards included the right of association, the right to organize and bargain collectively, a prohibition against forced labor, and the right to acceptable working conditions.⁵ Though imperfect, the GSP has yielded positive results in creating dialogue and at times effecting changes in labor policy in beneficiary countries and continues to do so today.⁶

B. NAFTA

During the early part of their presidencies, United States President George Bush, Sr. and Mexican President Carlos Salinas began negotiating a free trade agreement⁷ that would include the United States, Mexico and Canada.⁸ NAFTA’s architects intended to remove restraints on trade between the three countries in order to encourage trade, investment and growth.

As President Bush's 1992 reelection campaign neared, controversy over NAFTA grew. The Bush administration pushed NAFTA, but many constituencies feared the agreement would have a detrimental impact on the United States. The labor movement feared that NAFTA would result in job losses in the United States.⁹ As a presidential candidate, Bill Clinton did not reject NAFTA, but he conditioned his support for the trade pact on NAFTA's inclusion of provisions protecting certain labor rights.¹⁰

Labor rights advocates and members of labor unions in the United States argued that the inclusion labor rights in trade agreements ensured dignity for workers in developing countries while also preserving rights for workers in the United States.¹¹ However, critics of such protections claimed that labor provisions were disguised protectionist measures, designed merely to protect the United States from competition with developing countries where labor costs provided those countries with a comparative advantage in producing many goods. Clinton was in the midst of a presidential campaign, and therefore catering to voters in the United States, when explaining his rationale for supporting the inclusion of labor standards in NAFTA, but his argument for why labor provisions were necessary was markedly protectionist in nature.

Speaking in North Carolina one month prior to the election, Clinton said, "because money, and management, and production are mobile and can cross national borders quickly, we face unprecedented competition from developing countries."¹² He cautioned that the benefits of expanding trade "can be offset at least in part by the loss of income and jobs as more and more multi-national corporations take advantage of their ability to move . . . production away from a high wage country to a low wage country."¹³ He specifically referenced Mexican maquiladora plants "right across the border" as certain "cause for concern" and claimed that "[w]e've got to stop using our own taxpayers' money to export [U.S.] jobs."¹⁴ Clearly there were some protectionist impulses behind the United States' push to include labor provisions in NAFTA.¹⁵

After the 1992 election, independent presidential candidate Ross Perot continued his public opposition to NAFTA. While President Clinton negotiated the terms of NAFTA, Perot popularized the fear of job losses, predicting that once passed, NAFTA would make a "large sucking sound" as it drained jobs from the United States to Mexico.¹⁶ In 1994, Clinton signed NAFTA and, as promised, included labor protections through a "labor side agreement."¹⁷ The labor side agreement, the North American Agreement on Labor Cooperation (NAALC),¹⁸ called on signatories

to enforce their own domestic labor law and included protection of certain labor rights.¹⁹

The inclusion of NAALC in NAFTA was a milestone in trade and labor history. Labor rights had been considered in the Generalized System of Preferences for a decade, but this was the first time that labor conditions were included in a regional trade agreement.²⁰ Unfortunately, NAALC left labor rights advocates a lot to be desired.

NAALC's labor provisions obligate countries to enforce domestic labor laws. While acknowledging certain international labor principles,²¹ NAALC fails to provide any real enforcement mechanism to remedy violations of those principles.²² NAALC does not provide protections for the right to association and the right to organize and bargain collectively. Further, the complaint process is long and complicated, making redress of wrongs almost impossible for workers.

NAALC provides each country with a National Administrative Office (NAO), empowered to scrutinize other member countries' enforcement of domestic labor laws.²³ A NAO may file a complaint when it believes another member has failed to enforce its labor laws adequately. Remedies for failure to enforce domestic labor law may include fines and loss of NAFTA benefits, but typically have been limited to "consultations."²⁴ Labor rights advocates

have criticized NAALC for being ineffective.²⁵ The Wall Street Journal's assessment:

[b]oth supporters and opponents of NAFTA agree that the side agreements have had little impact, mainly because the mechanisms they created have no enforcement power. . . . Not a single worker was ever reinstated, not a single employer was ever sanctioned, no union was ever recognized.²⁶

The United States' experience with NAO submissions confirms these assessments - NAALC lacks the enforcement power necessary to make its labor protections real.

Workers at Han Young, a Hyundai manufacturing plant in Tijuana, Mexico, attempted to form a union.²⁷ The workers, despite Han Young's threats and retaliations, organized a union election and prevailed by a wide margin.²⁸ A local Mexican administrative board nullified the election and demanded that the workers conduct a second election if they wished to have their union recognized. The workers organized and conducted a second election and again prevailed, winning official recognition for their independent union. Han Young, however, continued its campaign against the worker's union. The U.S. NAO, finding that the Mexican Board responsible for enforcing Mexican labor law failed to protect the Han Young workers, submitted a complaint. Han Young continued to harass workers and disregard the certified union. Neither the workers at Han Young, nor those that had been fired, directly benefited from

the U.S. NAO submission. However, some gains were made through this process. Through discussions springing from the submission, the Mexican government committed to supporting secret ballot elections for workers in the future as a means to protecting workers from employer reprisal.²⁹

Whatever gains may have been made in following the Han Young submission, the Duro Bag submission proved how slim they were. Duro Bag, a manufacturer of retail bags, entered into a "protection contract" with an employer-friendly union. The union did not allow employees to vote for a union representative; instead, the union would appoint the representative itself. This effectively left the workers without an independent voice. When workers began to organize to reform the union, Duro Bag fired workers affiliated with the organizing drive. Subsequently, workers attempted to create a new, independent union, and to select that union officially through a secret ballot election. However, Duro Bag and the local Mexican Federal Conciliation and Arbitration Board, despite the gains following Han Young, denied the workers request for a secret ballot election.³⁰ Jim Morgan, in defending his company's labor practices, argued that under NAFTA's labor provisions, he did not have an obligation to do any more than Mexican law demanded in terms of honoring workers' right to

associate.³¹ Duro Bag prevailed and the workers did not win the right to a secret ballot election.

C. CAFTA - Even Weaker than NAFTA

President Bush, Jr., after several years of public and congressional debate, signed CAFTA into law on August 2, 2005.³² Like NAFTA, CAFTA calls on signatories to enforce domestic labor law.³³ Signatories include the Dominican Republic, Guatemala, Honduras, El Salvador, Nicaragua, and Costa Rica.

CAFTA negotiations came under a lot of scrutiny from both labor rights advocates as well as conservatives nervous that the trade agreement would bleed the United States of jobs. Then the United States Trade Representative (USTR), Robert Zoellick dismissed CAFTA's opponents who called for enhanced labor protections as "a bunch of economic isolationists using labor as an excuse."³⁴

In the end, CAFTA passed the House by a mere two vote margin. Last minute negotiations between the Administration and two House Republicans saved the CAFTA and the Administration from an embarrassing defeat. Representative Robin Hayes of North Carolina was opposed CAFTA, but voted for it "after House Republican leaders promised that new safeguard quotas would be approved for products like men's trousers, knit fabrics and brassieres."³⁵ Similarly, Representative Robert B. Aderhol of Alabama, "abandoned his opposition a few hours before the vote

when the administration promised to seek new protection against imported socks. Mr. Aderholt represents Fort Payne, Ala., which, with nearly 100 local sock mills, has called itself the sock capital of the world."³⁶

President Bush was not alone in his resistance to strengthen CAFTA's labor protections. The Central American and Dominican Republic governments have expressed opposition to including strong labor provisions in the WTO in the past, and they indicated no change of heart during CAFTA negotiations. Nicaraguan Minister of the Economy and Development, speaking at the Singapore WTO Ministerial, articulated the sentiment common to each of the Central American governments:

the comparative advantage of the developing world, including labour costs, should not and cannot justify, in any circumstances, the imposition by the trading powers of conditions of any kind that have the effect of blocking market access.³⁷

Honduran Vice-Minister of Trade and Economics emphasized that the International Labor Organization "should be the only body authorized to deal with social and labour issues" because labor standards "could be used as a *pretext for introducing protectionist trade measures against countries which enjoy comparative advantages.*"³⁸ These prominent representatives of Central American governments echo Zoellick's accusation.

Of course, labor rights advocates and workers in Central America, like those in the United States, often disagree with

the pronouncements of their government officials. Labor conditions in Central America and the Dominican Republic, as the United States State Department has documented year after year in its Country Reports, are far from ideal.³⁹ Henry Frundt documents the stories of a number of Central American workers who insist that international pressure is necessary to reform the domestic policies in their own countries.⁴⁰

The question for developing countries is a matter of balancing concerns of worker welfare with economic growth and unemployment. This is an uneasy calculus. A developing country fears that by adopting higher labor standards the competitive advantage of the economy diminishes resulting in less growth and possibly more unemployment.

D. The ILO and WTO

Those who oppose the inclusion of labor standards in trade agreements, particularly in the context of WTO discussions, suggest that the International Labor Organization (ILO) already exists to handle such issues. While this argument is sound, it is also flawed. First and foremost, while most members of the WTO are also members of the ILO, the ILO has no effective enforcement mechanism.⁴¹ Second, if a country has independent obligations under two different international agreements, then there is a very strong chance that obligations under those agreements will conflict with each other. The ILO could not

adopt regulations allowing one country to penalize another for unfair labor practices without putting that country at risk of sanction under the WTO. The ILO could arguably take such action itself, shielding its members from allegations of unfair trade practices, but that is unlikely. The ILO, consisting predominantly, if not exclusively, of WTO members, is unlikely to adopt a policy that it believes conflicts with obligations under the WTO to not burden trade.

II. Comparative Advantage: The Economic Debate

This section addresses in some of the economic underpinnings of the debate about whether to include labor protections in trade agreements. This section will first look at traditional economic theory, and then at alternative viewpoints and critiques of that theory.

A. Traditional Economic Theory and Comparative Advantage

In recent years, liberal journalist and economist Paul Krugman, responding in part to the chorus of international protests against the WTO, helped to popularize support for the notion of liberalized trade.⁴² Dispelling criticisms of liberalized trade and attempting to allay fears of the WTO, Krugman, along with many other economists, began writing accessible pieces about the benefits of trade as explained through the theory of comparative advantage.⁴³ Liberalized trade would not result in a race to the bottom where living standards

in both developing and developed countries would deteriorate as countries competed with each other to produce at the lowest possible cost. Rather, liberalized trade should lift living standards in developing countries without a necessarily adverse effect on living standards in developed countries.⁴⁴ Krugman claims that U.S. demands for international standards on wages and working conditions in trade agreements "is protectionism in the guise of humanitarian concern."⁴⁵

The concept of comparative advantage sprung in part from the great 18th century economist, Adam Smith. In his words: "[i]f a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage."⁴⁶ Adam Smith's comment is known more commonly as the theory of "absolute advantage." If a country can make something cheaper than another country, then it should make that product itself. If not, then by the product from the country that produces it cheapest. If the United States can produce software at a lower cost than Guatemala, and if Guatemala can produce tee shirts at a lower cost than the United States, then each country should make those respective products and then trade with each other. Comparative advantage built on that concept to find that a country should produce whatever it is *best* at producing. Even if the United States,

because of productivity advantages, can produce tee shirts cheaper than Guatemala, it should focus on producing software if its advantage on producing software is greater than its advantage in making tee shirts.

Krugman explains that the productivity ratio between competing nations within an industry represents the wage ratio between the two nations within that industry. Generally, developed countries specialize in and monopolize high-tech production (e.g., building airplanes and microprocessors) where the productivity ratio between developed and developing countries is greater and developing countries specialize in low-tech, labor-intensive production (e.g., shirts and sneakers) where the productivity gap is lesser. Developed countries have a greater productivity advantage in high-tech production, explaining their monopolization over high-tech industries. But developed countries also have a productivity advantage over developing countries in low-tech industries where developing countries tend to dominate.

Two factors provide developing countries with an overall advantage over developed countries in low-tech industries. First, although the productivity gap favors developed countries, the gap in low-tech industries is relatively low. Second, wages in developing countries are much lower than in developed countries. Though the developed countries are more productive,

the developing countries maintain a comparative advantage in low-tech production due to lower wages.⁴⁷

The Economist, a periodical founded primarily for the purpose of advocating for liberalized trade, provides a succinct and intelligible numerical model that demonstrates the advantages of trade between countries. The Economist's example demonstrates the trading relationship between two countries - Alpha and Omega. Alpha and Omega each have 1,000 workers in their respective countries and they produce only two goods - computers and cars. Alpha, the more developed of the two countries, has a productivity advantage over Omega in each industry.

To make a car, Alpha needs two workers, compared with Omega's four. To make a computer, Alpha uses 10 workers, compared with Omega's 100. If there is no trade, and in each country half the workers are in each industry, Alpha produces 250 cars and 50 computers and Omega produces 125 cars and 5 computers.

But, the Economist asks, "[w]hat if the two countries specialize?" Alpha has an absolute advantage in both industries, but it has a larger advantage in making computers. If it dedicates more of its work force to making computers, say 700 workers instead of 500, and fewer to making cars, only 300, then Alpha would produce a total of 70 computers and only 150 cars - increasing the number of Alpha-produced computers by 20 and decreasing the number of Alpha-produced cars by 100. If

Omega switches entirely to producing cars, then it would produce an additional 125 cars. The result - global production of both goods has risen, from 55 computers to 70 and from 375 cars to 500 cars, due to each country deciding to produce the good for which it had a comparative advantage.⁴⁸

B. A Race to Wage Stagnation near the Bottom?

This article does not suggest that international trade is undesirable. Rather, international trade contributes to improving living conditions across the globe. Trade aids growth and increased growth tends towards improvements in living conditions. But this article questions traditional economists' seeming blind faith in comparative advantage and free trade. Presidents Teddy and Franklin Roosevelt did not claim that the free market was evil should cease to exist. Rather, each President identified shortcomings of an unrestrained market and led great legislative movements to cure some of those shortcomings through regulation. Similarly, proponents of the inclusion of labor standards in trade agreements only argue that unregulated international trade has some shortcomings and that nations should compensate for those shortcomings through regulation. This section discusses potential shortcomings of unregulated international trade.

i. Growth in the developing world does not necessarily mean better wages

According to the International Labor Organization (ILO), in 2004 there were approximately 190 million unemployed people in the world.⁴⁹ Additionally, approximately 535 million people lived on \$1 per day, and about 1.4 billion survived on \$2 per day.⁵⁰ The ILO has found that in real numbers, the population of impoverished workers, earning more than \$2 per day but still living in poverty, increased between 1986 and 1997 to approximately 534 million people, 95% of whom live and work in developing countries.⁵¹ Approximately one in every four workers (25%) in developing countries is poor.⁵² In sum, there are at a minimum, about 2.7 billion people in the world living in poverty.

Sandra Polaski of the Carnegie Endowment for International Peace observes, "if *all* U.S. jobs were moved to China, there would still be surplus labor in China."⁵³ Her point - that the global surplus of labor complicates the argument that liberalized trade will necessarily mean improved living standards for workers throughout the globe. John Weeks criticizes traditional economists' notions of international trade, claiming that deregulation of markets and growth account for very little in terms of rising wages.⁵⁴ He quips that observers "should not be surprised to discover that making it easier to fire workers ('flexibility') resulted in less employment, not more."⁵⁵ Relying on substantial data, Weeks

concludes that market liberalization has not resulted in an increase in either real wages or standards of living.⁵⁶

With so many unemployed, underemployed and poorly paid workers in the world, employers have a virtually unlimited labor supply. Until the demand for labor is great enough to give labor more bargaining power, there is little reason for wages to increase.

ii. Capital is very mobile

On top of the world's staggering unemployment and poverty, capital is already very mobile, and liberalized trade agreements only increase that mobility. The mobility of capital allows businesses to locate wherever labor is cheapest and then to relocate if labor costs increase. The mobility of capital alone does not necessitate stagnation of wages, but with the combined factor of such high levels of global poverty, the ability of capital to flee from regions where workers demand higher wages ensures that wages in developing countries rise no time soon.

**iii. Guatemala does not have a comparative advantage over
China or India**

In the comparative advantage scheme, countries generally specialize in what they produce best - developed countries produce high-tech/skilled labor products and developing countries produce low-tech/unskilled labor products. Between the United States and Guatemala, the United States would produce

microprocessors and airplanes and Guatemala would produce shirts and calculators. However, amongst developing countries, how does one developing country compete with another developing country in international trade? In other words, if Guatemala, El Salvador, Viet Nam, Ghana, India and China (and 150+ other countries) all compete with each other to sell low-skilled labor products to developed countries, how does Guatemala succeed over China? What can Guatemala competitively produce that China cannot? The only way for developing countries to each reap substantial benefit from international trade is for production to reach levels high enough that the most efficient developing countries (China and India) are unable to substantially dominate production.

iv. Inequality in wages in developed countries

As trade increases, invariably considerable numbers of low-skilled labor jobs will leave developed countries and find home in developing countries. This is not all bad as it allows specialization in higher skilled and higher paying jobs in developed countries. But a consequence of the flight incentive for businesses producing low-skilled labor products is that the demand for low-skilled labor diminishes in developed countries. This means that low-skilled labor wages decrease in developed countries. In Krugman's own words:

Increased trade with the Third World, then, while it may have little effect on the overall level of First World wages, should in principle lead to *greater inequality* in those wages . . . with wages of low-skilled workers in the North declining toward Southern levels.⁵⁷

If the possibility for wage increases in poor countries for unskilled labor is slim due to global unemployment and poverty, and wages for unskilled labor are bound to decrease as a result of increased and unregulated trade, why not regulate trade to attempt to ameliorate this situation?

III. In Defense of Regulating Trade

This section presents arguments in favor of including labor standards in trade agreements. The first part of the section presents commentary by economists from many of the world's leading economic institutions. The section then addresses some of the obstacles confronting acceptance of such standards. And finally, the section proposes necessary elements for labor standard provisions.

A. Labor Standards Will Not Necessarily Hurt Developing Countries

The World Bank recently issued a report suggesting that unionization is not only good for workers, but for the economies of both industrialized and developing countries.⁵⁸ The report claimed that unionized workers in developing countries earned

higher wages than non-unionized workers. Further, the World Bank reported that in countries featuring stable relations with labor unions had "lower and less persistent unemployment, lower earnings inequality, and fewer and shorter strikes."⁵⁹ Robert Holzmann, also of the Bank, claimed that unions can increase a firm's productivity levels.⁶⁰

According to *Unions and Collective Bargaining*, a book published by the World Bank, though "[t]extbook reasoning suggests that the alternative to a unionized labor market is one characterized by . . . perfectly competitive structure," the reality may demonstrate otherwise.⁶¹ The absence of labor unions, the book claims,

may not reveal an underlying perfectly competitive situation in the labor market; instead, it may expose market imperfections on the *labor demand side* in the form of monopsony, that is, a situation in which there is only one buyer of the relevant labor services.⁶²

In fact, "the presence of unions in such circumstances may offer a second-best alternative to free competition . . . closer to the competitive equilibrium than those that would result from competition on the supply side."⁶³

The World Bank is not a protectionist institution, yet they entertain a proposition similar to that of Sandra Polaski of the Carnegie Endowment for International Peace and other labor rights advocates - that liberalized trade may expose market imperfections inherent to an economy where capital is highly

mobile and a virtually limitless supply of poor people exists. The Bank stops short of endorsing labor standards, but Zafiris Tzannatos concedes, without alarm, that "labor standards are now a prominent item on the international agenda and are likely [to remain so] for a long time to come."⁶⁴

Interestingly, in their WTO Position Paper, Robert M. Stern and Katherine Terrell, Professors of Economics at the University of Michigan, while arguing against the inclusion of labor standards in the WTO's charter, claim that poor labor standards are not as primary a factor in terms of attracting foreign direct investment as labor rights advocates claim.⁶⁵ Citing four different studies, the authors suggest that rather than attracting foreign investment, low labor standards may in fact discourage investment.⁶⁶ If this proposition were true, then the claim that labor standards are merely protectionist and will hurt developing countries' economies appears weaker. According to Stern and Terrell, raising standards, rather than discourage investment, might actually attract it.

Stern and Terrell caution that empirical studies demonstrate a trend in developing countries that increased wages cause increased unemployment. If labor standards provisions cause wage increases, under this theory unemployment would increase, harming the working poor in developing countries, the very individuals that labor advocates aim to assist.⁶⁷ However,

this claim, made without qualification, is highly dubious. After a quick survey of studies analyzing the relationship between increases in minimum wages and either employment or poverty, every study goes through great lengths to explain that data in this field is not entirely reliable and that results vary - at times demonstrating a positive relationship between increases in minimum wages and unemployment, and at times demonstrating a negative relationship.⁶⁸

Further, though a direct relationship between increased wages and increased unemployment may exist under certain circumstances, that does not exclude the possibility of overall increased standards of living. This article recognizes that while liberalized trade may cause wages for unskilled workers in developed countries to stagnate or even decrease, greater concentration in skilled labor (coupled with more affordable imported goods) may result in an overall increase in the standard of living. Stern and Terrell do not provide for the possibility that though labor provisions, if effective, may result in higher wages and therefore increased unemployment, that the net effect for a country may be improved standards of living. The Brookings Institution study found a correlation between increased minimum wages and poverty reduction.⁶⁹ The study cautiously suggested that increased minimum wages or real wages, if gradual, may assist in combating poverty.

The Organization for Economic Cooperation and Development (OECD) published a study defending the inclusion of labor standards in trade agreements.⁷⁰ The study claimed that improved labor standards "can increase economic efficiency by raising skill levels in the workforce and by creating an environment which encourages innovation and higher productivity."⁷¹ Additionally, unionization and collective bargaining agreements independently encourage innovation and higher productivity and attract foreign direct investment.⁷²

B. Poverty and Benevolent Imperialism

While claims regarding the potential impact of labor standards are highly speculative and disputed, the claim that labor standards and workers' rights are abysmally low around the developing world is not disputed at all. There is simply no claim that labor conditions and living standards in developing countries are acceptable. If properly designed, labor standards at least stand the chance of contributing to improving these conditions. The two main obstacles to successfully including effective labor standards in trade agreements include: (1) lack of political will in developed countries and (2) fear of economic harm in developing countries.⁷³

The lack of political will in the United States manifests most clearly in the protectionist arguments advanced by both liberals and conservative regarding fears of job losses due to

competition with developing countries. Bill Clinton, when appealing to voters a month before the presidential elections, in essentially told voters that poor Mexicans were going to take their jobs and therefore they should support his call to insert labor standards in NAFTA to guard against U.S. job losses. To Clinton's credit, his argument was nuanced and his expressed desire to protect U.S. jobs did not demonstrate animus towards Mexico. Nonetheless, this appeal to U.S. voters understandably feeds into developing countries' that developed countries are merely seeking protectionist ends when advocating for the inclusion of labor standards in trade agreements. Coupled with the chorus of protectionist voices, like Patrick Buchanan, Lou Dobbs and Ross Perot, labor rights advocates, who also speak of preserving U.S. jobs and living standards, can easily come off as protectionist.

Labor standards advocates claim that independent of protecting developed country wages, the standards will help to raise standards and living conditions in developing countries. While this may in fact be true, two things make this claim dubious. First, this claim is usually overshadowed by protectionist rhetoric. Second, is the unfortunate history of structural adjustments and debt financing in the developing world. Since the inception of the Bretton-Woods institutions, virtually every developing country has taken loans from the

World Bank and/or the International Monetary Fund. These loans are often conditioned on a country following benevolent instructions from the lending institution regarding economic reform to ensure the country's economy grows effectively. These benevolently intended conditions on loans have often proved disastrous. Strapped with loans and a legacy of structural adjustments dictated by lending institutions vis-à-vis developed countries, it is nearly impossible for a developing country to see labor standards as anything but a continuation of the tradition of benevolent reform that has for so long plagued the developing world. This plague is ongoing as the IMF continues to condition lending to already debt-ridden countries on compliance with its free market prescriptions.

Western claims to developing countries that following a prescribed scheme of conditions will help the developing countries are understandably received with skepticism. This article, while recognizing that such a feat may in fact be impossible, argues that developing countries are more likely to prove amenable to such schemes if the schemes on their face demonstrate a commitment to actually helping poor countries develop. The following section provides a brief sketch of how we might take steps in that direction.

C. Labor Standards: A proposal for trade agreements

Labor standards are not a new phenomenon in modern trade agreements, and though facing challenge now, labor standards are likely to continue to effect international trade policy.⁷⁴ The following are suggestions concerning the terms of future trade agreements.⁷⁵ What is most important here is that labor standards should be catered to best assist developing nations in improving labor conditions while minimizing possible detrimental impact on developing economies.

International labor standards. A good starting point for the inclusion of labor standards would be the five standards included in the Generalized System of Preferences (GSP). Those standards include: "(1) freedom of association, (2) the right to organize and bargain collectively, (3) a prohibition on forced labor, (4) a minimum age for child labor, and (5) 'acceptable' conditions of work with regard to minimum wages, hours, and safety and health."⁷⁶ Countries should have considerable leverage to establish domestic laws and regulatory schemes to ensure the freedom of association and the right to organize and collectively bargain are protected. The basic requirement would be for a country to demonstrate its commitment to, and practice of, protecting those rights.

In terms of labor and working conditions protections, countries would not have universally applicable regulations. Rather, countries would guarantee that domestic laws comport

with general international norms, which is typically not the real issue underlying conditions in developing countries, and that the domestic laws are enforced when violated. Most WTO members already have laws that comport with international standards. The WTO would merely ask member countries to enforce those laws. For members whose laws do not comport with international norms, the countries would agree to a timeline for compliance.

Incentives. The WTO should create a system to award countries that comply with international standards and that protects countries that make good faith efforts to comply with standards. If developing countries that make such an effort suffer economic harm as a result of those efforts, then the WTO should have a mechanism to assist the member country with remedying the situation. Aiding growth in developing countries should be the centerpiece of the labor standards debate. Labor standards should not serve merely to punish those countries already most disadvantaged in the international economy.

First, signatories to international trade agreements should pool funds to be used as grants to reward nation's that demonstrate improvements in specified working conditions (e.g., minimum wage or labor organization rates). Such grants should be distributed on a competitive basis to the developing countries that demonstrate substantial compliance with, and

improvement of, labor standards. Grants could either be earmarked for infrastructure, education or improvements in productivity, or could be entirely unconditional. In addition to grants, and perhaps more sustainable and a stronger incentive, could be debt-forgiveness. This would relieve developing countries' burden of debt servicing while also improving working conditions in those countries.⁷⁷ Another approach may be to give countries increased trade preferences for a period of time as reward for good labor behavior. Measures to determine grant allocation may include compliance with minimum wage laws, increases in real wages, improvements in worker safety, unionization rates and complaints, and efforts to improve productivity.

Second, in addition to rewarding countries that demonstrate strong improvements in labor standards, the WTO should allocate funds to assist countries that suffer economic harm due to raising working standards. If a country, by enforcing its minimum wage standard, causes an increase in real wages and faces the threat or consequence of increased unemployment, the WTO should have a reservoir of funds to distribute to member's to help with relief. Such relief could be prospective - when a member either plans to raise its minimum wage or identifies increasing real wages, the country can enter into a formal process with the WTO requesting surveillance of the

circumstances and consideration of aid. A WTO administrative agency could go so far as to issue notices to employers likely to be affected by the changed circumstance and could notify them that they are eligible for tax relief or increased preferences for a transitional period if they do not either layoff workers or close up shop.

Enforcement. An effective labor standards scheme will require an effective enforcement structure. First, a trade agreement should charge an independent body with investigating and enforcing violations. Violations should be enforceable by fines and loss of trade preferences. The enforcement mechanism must be effective. The regulatory process should be easily navigable, quick, and binding.

CONCLUSION

NAFTA has proved ineffective at ensuring Mexico's enforcement of labor law. This is true primarily because no incentive or enforcement mechanism was made a part of NAFTA. The GSP has been more effective at promoting the improvement of labor conditions because it rewarded complying countries with trade preferences that provided the countries with material benefits. International trade agreements, and particularly the WTO, should adopt labor standards that call on countries to

ensure that domestic laws comply with international norms and that countries enforce their domestic labor laws. This system should be supported by a strong enforcement mechanism, but more importantly should be aided by an incentive and protection program. The incentive program should reward countries that excel in protecting and promoting labor standards. The protection program should make developing countries confident that if they affirmatively improve labor conditions funds will be available to aid the country in absorbing possible negative consequences resulting from those improvements. Labor standards designed as such would better effectuate the desired end of lifting international labor standards while at the same time make adoption of such standards more favorable to developing nations wary of the effect labor standards might have on developing economies.

¹ Steve Charnovitz, The influence of international labour standards on the world trading regime, 126 **International Labour Review** 565, 573.

² See Jenna L. Acuff, The Race to the Bottom: The United States' Influence on Mexican Labor Law Enforcement, 5 **San Diego Int'l L.J.** 387, 411 (2004); Lance Compa and Jeffrey Vogt, Labor Rights in the Generalized System of Preferences: A 20-Year Review, 22 *Comp. Labor Law & Policy Journal* 199, 202.

³ **Office of the United States Trade Representative, Generalized System of Preferences**, http://www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html.

⁴ **Generalized System of Preferences**, 19 U.S.C. § 2462.

⁵ Id.

⁶ See Compa, supra note 2 at 200.

⁷ In this article I use the term "free trade" liberally. This is the colloquial term for *liberalized trade* and countries often include in the title of international trade agreements. The word "free" can confuse observers as these trade agreements usually, if not always, involve high levels of regulation. However, the high levels of regulation are far more liberalized, a.k.a. "free," than conditions prior to the agreement.

⁸ See Acuff, supra note 2 at 412.

⁹ The labor movement was not alone in its opposition to NAFTA. Environmental groups feared that NAFTA would result in deteriorating standards and regulations. Conservative isolationists like Ross Perot also feared that NAFTA would have a detrimental impact on the United States economy.

¹⁰ Governor Bill Clinton, *Expanding Trade and Creating American Jobs*, October 4 1992 at <http://www.ibiblio.org/pub/academic/political-science/speeches/clinton.dir/c151.txt> (last visited December 6, 2005).

¹¹ See Henry J. Frundt, **Trade Conditions and Labor Rights: U.S. Initiatives, Dominican and Central American Responses** 65-66 (1998) (claiming that the U.S. should not offer "preferential trade advantages to nations that mistreat or penalize their own workforce.").

¹² Governor Bill Clinton, supra note 10.

¹³ Id.

¹⁴ Id.

¹⁵ Interestingly, not only did Clinton articulate the rationale that would serve as developing countries' chief objection to the inclusion of labor standards in trade agreements, but he also proposed an approach that would prove to be the greatest weaknesses in the labor provisions included in both NAFTA and CAFTA - enforcement.

¹⁶ Acuff, supra note 8 at 413; **Business Wire**, NAFTA Wins Support of Statewide Manufacturing Group, October 12, 1993.

¹⁷ Acuff, supra note 8. NAFTA survived legal challenge in Made In The USA Foundation v. United States, where petitioners claimed that NAFTA was a treaty and therefore required ratification by a two-thirds vote in the Senate. 242 F.3d 1300, 1302 (11th Cir., 2001). The Court held that whether NAFTA was a treaty or not was a nonjusticiable political question. Id.

¹⁸ 32 I.L.M. 1499 (1993).

¹⁹ Mexico and Canada at first resisted Clinton's push to included labor rights protections in NAFTA. See Marley S. Weiss, Two Steps Forward, One Step Back - or Vice Versa: Labor Rights under Free Trade Agreements from NAFTA, through Jordan, via Chile, to Latin America, and Beyond, 37 **U.S.F. L. Rev.** 689, 702 (2003).

In addition to protectionist concerns, all three parties had an interest in preserving sovereignty over traditionally domestic matters, such as labor polity. Id. at 703-04.

²⁰ See Lance Compa and Jeffrey S. Vogt, Labour Regulation and Trade: Labor Rights in the Generalized System of Preferences: A 20 Year Review, 22 **Comp. Lab. L. & Pol'y J.** 199 (2001).

²¹ NAALC limits sanctions violations of workplace health and safety, child labor, and minimum wage. Mary Jane Bolle, **NAFTA Labour Side Agreement: Lessons for the Workers' Rights and Fast-Track Debate**, Congressional Debate, Congressional Research Service 7 (2001).

²² Id.

²³ 32 I.L.M. 1499, Art. 1(b); See David M. Trubek, Jim Mosher, and Jeffrey S. Rothstein, Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks, 25 **Law & Soc. Inquiry** 1187, 1198 (2000).

²⁴ Id.

²⁵ See **International Labor Rights Fund, North American Free Trade Agreement and Labor Rights** (1995), at <http://www.laborrights.org/publications/nafta.html>.

²⁶ NAFTA's Do-Gooder Side Deals Disappoint: Efforts to Protect Labor, Environment Lack Teeth, **Wall Street Journal**, October 15, 1997, at A19.

²⁷ Public Report of Review of NAO Submission No. 9702, U.S. National Administrative Office, Bureau of International Labor Affairs, U.S. Department of Labor (April 28, 1998), at <http://www.dol.gov/ilab/media/reports/nao/pubrep9702.htm>; J.H.H. Weiler, Sungjoon Cho and Joseph Straus, **The Law of Economic Integration in the American Hemisphere** 36 (J.H.H. Weiler & S. Cho eds., 2004).

²⁸ Id.

²⁹ U.S. NAO Submission 2001-01, at <http://www.dol.gov/ilab/media/reports/nao/submissions/durosubmission.html>.

³⁰ See id.; Agreement on Ministerial Consultations, U.S. NAO Submissions 9702 and 9703 (May 18, 2000), at <http://www.dol.gov/ilab/media/reports/nao/minagreement9702-9703.htm>.

³¹ Id. Though the Mexican government's Ministerial agreement, committing to secret ballot elections, makes his argument more tenuous as the agreement arguably created contractual obligations between the nations, Jim Morgan's defense was accurate and points to NAALC's greatest weakness.

³² President Signs CAFTA-DR, Press Release, Office of the Press Secretary, August 2, 2005, at

<http://www.whitehouse.gov/news/releases/2005/08/20050802-2.html>;
19 USCS § 4001.

³³ CAFTA, § 16.2. For easy to navigate text of CAFTA, visit the United States Trade Representative's website at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html. CAFTA's labor provisions are found in Chapter 16.

³⁴ Dean Calbreath, Heavy Lifting Ahead; President Bush has Proposed a Blitz of Free Trade Agreements, But They Haven't Gained NAFTA-Like Attention, **The San Diego Union-Tribune**, June 13, 2004, at H-1.

³⁵ Edmund Andrews, Bush Administration Will Ask China to Agree to Broad Limits on Clothing Exports, *The New York Times*, August 2, 2005 at C3.

³⁶ Id.

³⁷ Pablo Pereira, Singapore WTO Ministerial 1996: Statements and Speeches Delivered during the WTO Ministerial Conference in Singapore, December 9-13, 1996, WT/MIN(96)/ST/42 (December 10, 1996) at

http://www.wto.org/English/thewto_e/minist_e/min96_e/st42.htm.

³⁸ Singapore WTO Ministerial 1996: Statements and Speeches Delivered during the WTO Ministerial Conference in Singapore, December 9-13, 1996, WT/MIN(96)/ST/104 (December 12, 1996) (emphasis added) at

http://www.wto.org/English/thewto_e/minist_e/min96_e/st104.htm.

³⁹ Mandated by Congress, the State Department publishes yearly reports that track labor conditions in countries that are trading partners with United States. See U.S. Department of Labor, Bureau of International Labor Affairs, Labor-Related Reports for U.S. Free Trade Agreements Pursuant to § 2102(c) of the Trade Act of 2002, at

<http://www.dol.gov/ilab/media/reports/usfta/main.htm>.

⁴⁰ Frundt, supra note 11 at 23-25.

⁴¹ See generally Kimberly Ann Elliott, **The ILO and Enforcement of Core Labor Standards, International Economic Policy Briefs** (April 2001), available at <http://www.iie.com>.

⁴² Paul Krugman, Does Third World Growth Hurt First World Prosperity?, **Harvard Business Review**, July 1, 1994.

⁴³ Id.; see Steven Suranovic, The Theory of Comparative Advantage, **The International Economics Study Center** (2004) at <http://internationalecon.com/v1.0/ch40/40c000.html>; Stephen S. Golub, Labor Costs and International Trade, *American Enterprise Institute for Public Policy Research* 2 (1999).

⁴⁴ Krugman, supra note 42 (conceding however that liberalized trade would likely increase income inequality between high-skilled and low-skilled labor).

⁴⁵ Id.

⁴⁶ Suranovic, supra note 43 (quoting Adam Smith's, the Wealth of Nations). David Ricardo developed the idea with greater detail and precision, and John Stuart Mill eventually popularized the concept. Id.

⁴⁷ Krugman, supra note 42.

⁴⁸ Economics A-Z, Comparative Advantage, The Economist, at <http://www.economist.com/research/Economics/alphabetic.cfm?LETTER=C#COMPARATIVE%20ADVANTAGE>.

⁴⁹ International Labor Office, Global Employment Trends Brief 1, February 2005, at <http://www.ilo.org/public/english/employment/strat/download/get05en.pdf>.

⁵⁰ Id. at 8.

⁵¹ Nomaan Majid, **The Size of the Working Poor in Developing Countries**, ILO 11 (May 2001), at <http://www.ilo.org/public/english/employment/strat/download/ep16.pdf>.

⁵² Id.

⁵³ Sandra Polaski, **Job Anxiety is Real and It's Global**, Carnegie Endowment for International Peace 1-2, 6-8 (May 2004).

⁵⁴ John Weeks, Have Workers in Latin America Gained from Liberalization and Regional Integration?, in **Critical Perspectives on Globalization and Neoliberalism in the Developing countries** 94-98 (Richard L. Harris & Melinda J. Seid eds., 2000), at <http://www.soas.ac.uk.cdprfiles/dp/DP11JW.PDF>.

⁵⁵ Id. at 98.

⁵⁶ Id. at 99-100.

⁵⁷ Krugman, supra note 42.

⁵⁸ Organization for Economic Cooperation and Development, International Trade and Core Labour Standards (2000); The World Bank Group, Economies Perform Better in Coordinated Labor Markets, Press Release 2003/211/S, February 12, 2003 (hereinafter, World Bank Group).

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Toke Aidt and Zafiris Tzannatos, Unions and Collective Bargaining: Economic Effects in a Global Environment 6 (2002).

⁶² Id.

⁶³ Id. at 6.

⁶⁴ World Bank Group, supra note 58.

⁶⁵ Robert M. Stern and Katherine Terrell, Labor Standards and the World Trade Organization, University of Michigan (August 2003), at

http://www.wto.org/english/forums_e/ngo_e/labor_standards_e.doc.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ See Nora Lustig and Darryl McLeod, **Minimum Wages and Poverty in Developing Countries: Some Empirical Evidence**, Brookings Institution at 14 (1996)

<http://www.brookings.edu/views/papers/bdp/bdp125/bdp125.pdf>.

⁶⁹ Id.

⁷⁰ Aurret van Heerden and John Salem Shubash, II, Labor Rights in China: The Role of Private Labor Rights Initiatives, United States Congressional-Executive Commission on China (last updated May 2003), at

<http://www.cecc.gov/pages/roundtables/042803/vanHeerden.php>.

⁷¹ Id.

⁷² Heather Gibbs, **Labor Standards and Poverty Reduction: International Strategies**, The North-South Institute (December 2000), at http://www.nsi-ins.ca/english/pdf/labour_eng.pdf.

⁷³ The lack of political will in the United States, demonstrated by liberals and democrats alike, too often reflects disregard for quality of life of workers in developing countries. Actually, the workers' quality of life is not disregarded. Rather, the workers are maligned for having such a low quality of life because their low living standards, unsafe work conditions, and low wages make them far more competitive than U.S. workers. Protectionist rhetoric used to advocate for labor standards in the United States rightfully sets off alarm bells for developing countries.

⁷⁴ See Steve Charnovitz, The influence of international labour standards on the world trading regime, 126 **International Labour Review** 565, 569-75 (arguing that labor standards are not only not protectionist, but that they are *anti*-protectionist as they defeat the leading claim legislator make when calling for the imposition of duties on imports - low labor standards in competing countries).

⁷⁵ While regional trade agreements should include labor protections, ideally these suggestions would be incorporated in the WTO's charter to apply to nations across the globe. If standards are only applied regionally, there is a greater chance that members complying with the standards will suffer economic disadvantage to countries not party to the agreement and therefore not complying with the labor standards contained therein.

⁷⁶ Charnovitz, supra note 74 (citing 19 U.S.C. § 2462).

⁷⁷ Developed countries might see this as also serving their own self-interest by reducing the countries' comparative advantage by improvement of working conditions.