THE CIRCLE OF LABOR: THE NAALC, ILO, FTAA AND LABOR DISPUTE RESOLUTION MECHANISMS

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Introduction

Globalization is "the process by which a business or company starts operating on an international level."[1] Some experts believe that international commerce has led to globalization. But many would argue that globalization is no longer effective, because it has been corrupted by "powerful nations and powerful interests within such nations."[2] In fact, 20 percent of the world controls 80 percent of the gross domestic product, thus furthering the gap between the rich and the poor.[3] Perhaps one of the hottest debates governing globalization revolves around labor,[4] around finding politically acceptable solutions for implementing fair labor standards and improving working conditions within various nations of the globalized world.[5]

In an effort to create an even smoother transition into a globalized world, in 1992, Canada, Mexico, and the United States (US) entered into an agreement that would allow free trade among them: the North American Free Trade Agreement (NAFTA).[6] Under NAFTA, the three member states are obliged to lower their tariff barriers and to allow for free trade arrangements.[7] Two years

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[1] WEBSTER'S NEW WORLD COLLEGE DICTIONARY 574 (4th ed. 1999).

[2] Tina Rosenberg, *Globalization*, N.Y. TIMES, Aug. 18, 2002, at 28.

[3] *Globalisation Has Widened the Gap between Rich, Poor*, BUS. LINE, Jan. 14, 2004, *citing* Velma Veloria, State Representative and Head of Joint Legislative Oversight Committee on International Trade Agreements [hereinafter *Globalisation*].

[4] *See* Joel R. Paul, *The New York University-University of Virginia Conference on Exploring the Limits of International Law: Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT'L L. 285, 286 (2003).

[5] Kimberly Ann Elliott, *Labor Standards and the FTAA*, Institute for International Economics, Working Paper 03-7, *at* http://www.iie.com/publications/wp/wpauthor.htm#elliott (last visited Mar. 29, 2004).

[6] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-US, 32 I.L.M. 289 (1993).

[7] Craig L. Jackson, *The Free Trade Agreement of the Americas and Legal Harmonization*, AM. SOC. INT'L. L. NEWSLETTER [hereinafter Jackson]. In addition, NAFTA involves arrangements involving areas of economic cooperation. The idea of free trade can best be articulated via an example of an individual entrepreneur: when this entrepreneur decides to sell his product in

later, in December of 1994, a formal declaration was made in Miami, disclosing plans to expand the tripartite free trade area to countries in the Caribbean and Central and South America via the creation of a Free Trade Area of the Americas (FTAA).[8] With roughly a year remaining until the 2005 proposed deadline,[9] a significant challenge lies ahead: how will the member countries resolve disputes that arise involving alleged violations of labor norms?

Labor is a complex topic with many facets, ranging from its cost, which varies in each country, to the enforcement of domestic labor standards that ensure worker rights. In the initial FTAA discussions, labor standards were somewhat of a vague yet prominent topic.[10] Although the initial lack of specificity was not shocking, it was somewhat surprising, as many believed that the FTAA would be a larger version of NAFTA and the North American Agreement on Labor (NAALC), commonly referred to as NAFTA's right arm.[11] While free trade advocates have espoused the argument that labor standards have no place in multi-national trade agreements because they can act as a smokescreen that allows the penetration of a nation's sovereignty, many have countered that there is a certain absurdity in claiming that labor has no place in trade when "labor is commerce, and commerce is trade."[12]

Despite the heavy rhetoric surrounding the inclusion of labor standards, the FTAA opted to place the heavy burden in the hands of the International Labor Organization (ILO or Organization).[13] On November 1, 2002, at the Seventh Meeting of the Ministers of Trade held in Quito, Ecuador, the Ministers responsible for trade in the hemispheres proposed the following regulation:

> . . . in accordance with our respective laws and regulations, the observance and promotion of internationally-recognized core labor standards, renewing our commitment to observe the International Labour Organization 1998 Declaration of Fundamental Principles and Rights at Work and its follow-up, acknowledging that this organization is the competent body to promote, set and deal with these core

another country with which his home country has a free trade agreement, the product will, ideally, be allowed to enter the other country tariff free. In contrast, compare the result of a product sold in a third country, with which the entrepreneur's home country has no free trade agreement: the tariff imposed on the product will be passed along to the consumer via a price increase. The free trade agreement allows the entrepreneur to sell his goods at a cheaper price, and thus fosters an advantage to both the consumer and the entrepreneur.

[8] *Id*.

[9] *Id*; *see also* Robert B. Zoellick, *US to Promote Active, Comprehensive Trade Agenda in 2004*, AFR. NEWS, Mar. 2, 2004 (explaining that America's agenda in 2004 is "to push firmly forward toward the vision set out by President Bush of 'a world that trades in freedom'").

[10] *See* Jackson, *supra* note 7.

[11] *See id.*

[12] Chantall Taylor, *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Worker's Rights*, 28 DENV. J. INT'L. L. & POL'Y 401, 434 (2000) [hereinafter Taylor].

[13] *Ministerial Declaration of Quito*, *at* http://www.ftaa-alca.org/ministerials/quito/minist_e.asp (last visited Nov. 19, 2003).

labor standards.[14]

In essence, this Ministerial meeting proclaimed that the FTAA intends on following the labor standards of the ILO and that the ILO should serve as the competent body to monitor labor disputes.

The FTAA has been criticized for its failure to adequately address the issue of labor standards and to remedy the inefficacies of the NAALC's labor dispute resolution mechanism. Accordingly, this comment will begin by briefly detailing the history of the NAALC and its procedural mechanism used to resolve a labor dispute. Next, it will compare the ILO's dispute resolution mechanism to that of the NAALC in order to better understand the possible advantages and disadvantages of implementing one over the other. Finally, this comment will highlight the debate surrounding the inclusion of workers' rights provisions in the FTAA and a potential remedy that has arisen from the recently enacted US-Chile Free Trade Agreement (FTA).

The History of NAALC and the Process Behind Resolving a Labor Dispute

The evolution of NAALC can be attributed to politics.[15] Many American labor unions and pro-labor politicians strongly opposed a NAFTA that lacked explicit provisions for labor standards.[16] US Congressional opponents[17] lobbied for an alternative NAFTA agreement that would "harmonize labor norms in all participating countries, sanction violations from these norms as 'actionable unfair trade practices,' and create a dispute resolution mechanism that would enforce North American labor standards."[18] Accordingly, it was the 1992 presidential campaign that fostered the birth of NAALC.[19] When President Clinton decided to condition his acceptance of NAFTA on the provision that it

[14] *Id*.

[15] Sarah Lowe, *The First American Case Under the North American Agreement for Labor Cooperation*, 51 U. MIAMI L. REV. 481, 487 (1997) [hereinafter Lowe].

[16] *Id*.

[17] *See id*. at 487-88. The labor advocates' opposition to NAFTA stemmed from the fear that the US job market would be negatively affected in two ways: first, that the elimination of tariffs and other trade regulations on both sides of the border would lead to import surges from Mexico, which would create losses in the US job market; and second, Mexico would have a competitive advantage over the US because of Mexico's lack of enforcement of its labor laws, which would also result in the loss of US jobs.

[18] *Id*., *citing* Michael J. McGuinness, *The Protection of Labor Rights in North America: A Commentary on the North American Agreement on Labor Cooperation*, 30 STAN. J. INT'L L. 579, 579 (quoting H.R. 1445, 103d Cong. (1st Sess. (1993))).

[19] Lowe, *supra* note 15 at 487; *see also* Hannah L. Meils, *A Lesson from NAFTA: Can the FTAA Function as a Tool for Improvement in the Lives of Working Women?*, 78 IND. L. J. 877, 888-89 (2003) (explaining that the administration of senior President George Bush advocated the exclusion of labor standards from NAFTA for two reasons: first, Mexico, for example, already had comparable labor standards to the US; and second, although the financial resources to implement labor standards were lacking, NAFTA would remedy that problem by generating the necessary economic resources to allow for the effective enforcement of such standards) [hereinafter Meils].

was accompanied by a supplemental labor agreement, it was not long before Congress passed and the President signed the North American Free Trade Agreement Implementation Act on December 8, 1993.[20]

Although on paper this may have been a political victory for the advocates of worker's rights, the language of the NAALC is purposely vague in order to ensure that the member countries retain their sovereign rights to establish and control their own domestic labor laws.[21] For example, Article II of the NAALC guarantees full respect for each Party's constitution, and recognizes the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws.[22] Furthermore, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productive workplaces, and shall continue to strive to improve those standards in that light.[23] Nevertheless, the signatories of the NAALC resolved to promote and incorporate eleven principles into their domestic labor law and practice.[24] The eleven principles are: (1) freedom of association and protection of the right to organize; (2) the right to bargain collectively; (3) the right to strike; (4) prohibition of forced labor; (5) labor protection for children and young persons; (6) minimum employment standards; (7) elimination of employment discrimination; (8) equal pay for women and men; (9) prevention of occupational injuries and illnesses; (10) compensation in cases of occupational injuries and illnesses; and, (11) protection of migrant workers.[25] If any interested person believes that a member country is violating one of these eleven standards, then the recourse available is contingent upon where the norm falls within a three-tiered hierarchy.[26] The three-tiered hierarchy classifies the norms as follows: tier one includes labor protections for children, minimum employment standards, including minimum wage, and the prevention of occupational injuries and illnesses; tier two consists of prohibition of forced labor, compensation in cases of occupational injuries and illnesses, protection of migrant labor, elimination of employment discrimination, and equal pay for men and women; and, tier three addresses violations of freedom of association, the right to bargain collectively, and the right to strike.[27]

With respect to the procedural aspects of the NAALC, each member country

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[20] Lowe, *supra* note 15 at 487; *see also* Bobbi-Lee Meloro, *Balancing Goals of Free Trade with Worker's Rights in a Hemispheric Economy*, 30 U. MIAMI INTER-AM. L. REV. 433, 441-42 (1999) [hereinafter Meloro].

[21] Taylor, *supra* note 12 at 415.

[22] Agreement on Labor Cooperation, Sept. 13, 1993, US-Mex.-Can., art. II, 32 I.L.M. 1499, 1503 [hereinafter NAALC].

[23] *Id.*

[24] *Id.* Annex 1 at 1515-16.

[25] *Id.*

[26] Meils, *supra* note 19 at 890.

[27] *Id.*

must maintain a National Administrative Office (NAO), which receives complaints from any interested party.[28] The NAO of the country where the complainant resides must receive the complaint, and it maintains the discretion to determine if the complaint warrants review.[29] If the NAO determines that the complaint merits review, then it will begin consultations, which take the form of government-to-government talks, with the accused NAALC member.[30] This procedure may be the final stage of the complaint process depending on the tier within which the alleged norm violation falls.[31] Accordingly, for any alleged violations that fall within the third tier (i.e. a violation involving the prohibition of freedom of association, the right to organize, the right to bargain collectively, or the right to strike), the best outcome results in cooperation between NAALC member nations and a non-binding recommendation by the NAO as to which avenues are likely to lead to a remedy.[32]

If the alleged violation falls within the first or second tier and the negotiations between the NAO and the violating country are not successful, then the complainant can request the creation of an Evaluation Committee of Experts (ECE), which is composed of people from each of the three nations.[33] Once again, the ECE can only issue a "'non-adversarial and non-binding recommendation[s] on the issue.'"[34] For alleged violations that fall within the second tier, this is the sole remaining remedy.[35]

As to alleged violations that fall within the first tier, a complainant, if displeased with the results of the ECE, may submit the matter to a Council of Ministers for mediation.[36] If this mediation proves unsuccessful, then the complaint may be submitted to an arbitration panel, which is capable of imposing fines and suspending benefits of member countries.[37] While the arbitration panel wields more power than any other mechanism in the dispute resolution process, it will only impose such sanctions when a pattern of

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[28] *Id.*; *see also* NAALC, *supra* note 22, art. 16, 3 at 1057 (providing "each NAO shall provide for the submission. . .of public communications on labor law matters arising in the territory of another Party. Each NAO shall review such matters, as appropriate, in accordance with domestic procedures").

[29] Meils, *supra* note 19 at 890.

[30] *Id*. at 890-91.

[31] *Id*. at 891.

[32] *Id*.

[33] *Id.*; *see also* Lowe, *supra* note 15 at 492 (explaining that the second tier "provides for evaluation and recommendations by a tri-national Evaluation Committee of Experts").

[34] Meils, *supra* note 19 at 891 (quoting Joel Solomon, *Mexico, Labor Rights and NAFTA*, 8 HUM. RTS. WATCH/ AMS 2 (1996)).

[35] *Id*.

[36] *Id*. The Council of Ministers consists of labor ministers from each signatory country. For a further discussion on this topic, *see* Lowe, *supra* note 15 at 490-91.

[37] Lowe, *supra* note 15 at 493-94.

violations has been established.[38] Consequently, only consistent failures to provide labor protections for children, to provide minimum employment standards, and to provide the action and enforcement necessary to prevent occupational injuries and illnesses will warrant sanctions under the NAALC.[39]

One of the first illustrations of the NAALC's resolution mechanism occurred when a complaint alleged that Mexico failed to enforce its law preventing antiunion discrimination.[40] On February 14, 1994, the International Brotherhood of Teamsters (IBT) and the United Electrical Radio and Machine Workers of America (UE) filed a complaint with the US NAO, alleging that antiunion discrimination had occurred at a Honeywell plant in Chihuahua and a General Electric plant in Juarez.[41] Because antiunion discrimination falls within the third tier of labor norms, the best remedy available in this situation would have been an agreement or compromise between the governments of Mexico and the US regarding Mexico's enforcement of its anti-discrimination law.[42] Instead, despite the fact that the US NAO "conducted hearings, communicated with the Mexican NAO, commissioned studies of Mexican labor law and administrative procedures, and recommended a series of cooperative programs regarding associational and organizing rights, it did not, in its final report, conclude that Mexico failed to enforce its domestic labor law."[43]

ILO Core Labor Standards and Processes

While "[t]he NAFTA/ NAALC debate provides evidence that some form of workers' rights provisions in the future FTAA will be necessary to garner the requisite support in Congress for the passage of any new free trade agreement,"[44] it is evident that the FTAA has decided to defer labor standards to the ILO. The consequences of such a deferral remain to be seen.

Historically, the roots of the ILO began to find ground when delegates from a fifteen-member Commission on International Labor Legislation met at the Paris Peace Conference at the end of World War I.[45] In order to maintain social peace, the delegates sought to develop the structure of a permanent international organization that would be able to promote labor standards and protect labor

[38] *Id*.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] Meils, *supra* note 19 at 891.

[43] Lowe, *supra* note 15 at 493-941.

[44] Meloro, *supra* note 20 at 442.

[45] Robert W. Gilbert, 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS 40-1 (William L. Keller ed., BNA Books 2d ed. 1999) (1997) [hereinafter ILEL].

legislation worldwide.[46] Moreover, a significant portion of the efforts dedicated to creating this body stemmed from the fear that with an increasingly global marketplace of free trade, the absence of international labor standards would precipitate a "race to the bottom."[47] In 1919, under Part XIII of the Treaty of Versailles, the Commission established the ILO as an autonomous body within the League of Nations.[48] The League of Nations later transferred all of its assets and power to the UN in 1946.[49]

Structurally, the ILO includes an International Labor Conference, a Governing Body, and an International Labor Office.[50] Commonly, the ILO is referred to as a tripartite organization because the three branches are composed of government, employee, and worker representatives from the various member nations.[51] The International Labor Conference (henceforth "Conference") is the "legislative body" of the ILO, and some of its obligations include: "adopt[ing] new Conventions and Recommendations to be submitted to member countries, monitor[ing] the application of existing labor standards, and provid[ing] a world forum for the discussion of social and labor matters."[52] The Conventions range from topics dealing with social security to maternity protection, and, at the choice of the member nations, may be ratified within each nation.[53] Recommendations, on the other hand, are not subject to ratification because they set non-binding guidelines that either supplement a Convention or cover a labor-related topic area.[54]

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[46] *Id.*

[47] Michael J. Trebilcock, *Trade Policy and Labour Standards: Objectives, Instruments, and Institutions*, LAW AND ECONOMICS RESEARCH PAPER NO. 02-01, 10 (2001), *at* http://ssrn.com/abstract_id=307219 (explaining that the "race to the bottom" occurs when exporting countries with low labor standards undermine higher labor standards in importing countries, which eventually results in all countries relaxing their standards for fear of a loss of market share) [hereinafter Trebilcock].

[48] ILEL, *supra* note 45 at 40-1.

[49] *See* http://worldatwar.net/timeline/other/league18-46.html) that sits, to this day, in Geneva, Switzerland.

[50] ILEL, *supra* note 45 at 40-3.

[51] *Id*; *see also* Dinah Shelton, *Symposium: Globalization & the Erosion of Sovereignty in Honor of Professor Lichtenstein: Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 315 (2002).

[52] ILEL, *supra* note 45 at 40-4.

[53] *Id.* at 40-8. If ratified, the countries must supply the ILO Director-General, who runs the International Labor Office and is elected to a five-year term by the Governing Body, with documentation and a plan to undertake five specific treaty obligations: "1) To maintain national law and practice in full conformity with the Convention's provisions; 2) To report periodically (between one-year and five-year intervals) to the Organization on the national measures taken to carry out those provisions; 3) To report implementing measures taken to ensure compliance with the Convention; 4) To report whether employer or worker organizations have sent the government concerned comments on the practice under the Convention and its application; and 5) To accept the supervisory system of the Organization."

[54] *Id.* at 40-10.

The issues that become the topic of the Conventions or Recommendations can be made by any government, employers', or workers' representative to the Governing Body.[55] If the Governing Body determines that the issue has merit, it will place the issue on the agenda; while, in the meantime, the International Labor Office researches it, conducts surveys from other member governments, and analyzes the comments that have been made.[56] These findings and draft Conventions and Recommendations are presented to the Governing Body, which then determines those that shall be referred for debate and consideration at the annual Conference.[57] Normally, the Convention or Recommendation will be debated and examined by a tripartite technical committee in two successive annual Conferences.[58] A two-thirds majority vote of all the Conference delegates is necessary to pass the Convention or Recommendation.[59] If such a Convention or Recommendation is ratified, then the member nations of the ILO have 18 months to report to the Organization the steps that are being taken to ratify the Convention.[60] Notable, however, is the fact that "the individual countries are not required to ratify Conventions and are not bound by Recommendations in any event."[61]

In 1998, the ILO adopted a Declaration of Fundamental Principles and Rights at work (ILO Declaration), which provided that all member nations have an obligation to promote and respect four core labor standards: "(1) freedom of association and right to engage in collective bargaining; (2) the elimination of forced and compulsory labor; (3) the abolition of child labor; (4) elimination of discrimination in employment."[62] Although there are six subsidiary bodies[63] that monitor the implementation of these standards, the ILO member nations have not surrendered any sovereignty to the Organization, and thus, the ILO has no power to impose these standards on any member country.[64] Rather, the effectiveness of the ILO's power stems from "exercising persistent moral persuasion and shaming, in the 'court of world opinion,' governments that fail to live up to their voluntarily undertaken international obligations, reinforced by a

[55] *Id*. at 40-6.

[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] *Id*.

[60] *Id*. at 40-7.

[61] *Id*.

[62] ILO Declaration of Fundamental Principles and Rights at Work art. 2, International Labor Conference, 86th Sess., Geneva, June 1998, *available at* http://echo.ilo.org/pls/declaris/DECLARATIONWEB.INDEXPAGE?var_language=EN (last visited February 13, 2004) [hereinafter ILO Declaration].

[63] *See* ILEL, *supra* note 45 at 40-12-19.

[64] *Id*. at 40-5.

consensus established among governments, employer, and workers. . . ."[65]

In 1994, one of the subsidiary monitoring bodies, the Committee of Experts, reported that in the previous three decades, over 2,000 cases involved the alteration of national legislation or practice in order to comply with a ratified Convention.[66] According to the Committee of Experts, the criticism stemming from the various ILO supervisory bodies is what fostered such changes.[67] Furthermore, the ILO Declaration provides that labor standards "should not be used for protectionist trade purposes, or call into question a country's comparative advantage."[68] The idea is that if a country violates a core labor standard, which, in the view of many, is a gross human rights violation, then the worldwide community will accordingly respond with the appropriate trade sanctions.[69] Thus, although there appears to be no legal mechanism that forces compliance, the ILO has been efficacious, at least on some level, in unifying international labor standards via moral and economic pressure in the worldwide community.[70]

Comparative Analysis between the NAALC and the ILO

When comparing the end results of labor disputes under the NAALC with those under the ILO, one difference is that only violations of tier one standards will actually result in trade sanctions under the NAALC.[71] While that tier includes standards for labor protections for children, minimum employment standards, including minimum wage, and the prevention of occupational injuries and illnesses, trade sanctions will only be warranted when there is a pattern of violations.[72] Otherwise, any other tier two or tier three violations will, at best, result in a non-binding recommendation to resolve the issue.[73]

A similar result is scene under the ILO, where a violation of a core labor standard can result in a Convention, which the violating country has the choice to ratify.[74] If the violating country ratifies such a Convention, then there are

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[65] *Id*. at 40-13.

[66] *Id*.

[67] *Id*.

[68] ILO Declaration, *supra* note 62, art. 5.; *see also* Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 133 (1999) (explaining that the ILO Declaration seeks to enforce trade sanctions in order to penalize a country for gross human rights violations rather than "level the playing field" for protectionist purposes) [hereinafter Howse].

[69] *See* Howse, *supra* note 68 *at* 133.

[70] *Id*.

[71] *See* Lowe, *supra* note 15 at 493-94.

[72] *See id*.

[73] *See* Meils, *supra* note 19 at 890-91.

[74] *See* ILEL, *supra* note 45 at 40-7.

further steps of inquiry and implementation to ensure that the problem is corrected.[75] However, if a violating country chooses not to ratify a Convention or follow the advice of a Recommendation, then the only other form of punishment is for the global trading partners of the violating country to voluntarily impose trade sanctions.[76] Ideally, this would then force the violating country to succumb to moral and economic pressures.[77]

Moreover, both bodies rely on a certain sense of formality. While the NAALC has a formal dispute resolution mechanism that can result in trade sanctions, the ILO engages in a formal procedure for investigating and issuing its Conventions and Recommendations.[78] Although the ILO has subsidiary bodies to monitor the implementation and enforcement of core labor standards, such investigations only begin when there is a complaint or an inquiry into a member nation's specific actions.[79] The same situation occurs under the NAALC, where a formal complaint must first be made before further steps can be taken.[80]

Neither body contains the resources or the manpower to implement its non-binding recommendations.[81] The best remedy occurs when trade sanctions impose economic pressure on the violating country to alter its errant ways.[82] Nevertheless, a violating country only has to prove its willingness and plans to better its labor norms in order to lift a sanction.[83] Thus, what began as an attempt to foster equal labor standards on the international level through trade agreements, has circled back to the starting point, where a country may recognize the variance in its labor standards as compared to other countries, but only espouses its hope of remedying such differences.[84]

Brief History of the Debate On the Inclusion of Workers' Rights Provisions in the FTAA and Implications for the Future

Opponents of including workers' rights in the FTAA argue not to include such rights is because "benefits to social welfare will automatically accrue from

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[75] *See* ILEL, *supra* note 45, additional text.

[76] *See* Howse, *supra* note 68 at 133.

[77] *Id*.

[78] *See e.g.* Lowe, *supra* note 15 at 493-94; *see also* ILEL, *supra* note 45 at 40-7.

[79] *See id*. at 40-12-19.

[80] *See* Meils, *supra* note 19 at 890.

[81] *See* Kimberly Ann Elliott, *The ILO and Enforcement of Core Labor Standards*, International Economics Policy Briefs, No. 00-6, 6 (July 2000), *at* http://www.iie.com [hereinafter Elliott].

[82] *See id*. at 5-7 (detailing the critique of the ILO's enforcement capability through the example of forced labor problems in Burma, Myanmar).

[83] *See generally Breaking the Labor-Trade Deadlock*, Inter-American Dialogue and the Carnegie Endowment for International Peace, Working Paper 17 (Feb. 2001) *at* http://www.thedialogue.org/publications/ (for a critique of the use of trade sanctions in enforcing labor standards).

[84] *See id*.

the economic prosperity free trade is promised to bring."[85] The idea is that free trade creates new jobs and new income, and thus, the benefits will "trickle down" to all levels of society.[86] Moreover, opponents believe that free trade has an inherent self-correcting mechanism that will force countries with lower labor standards to raise their standards to an equal level with other countries.[87] Furthermore, the placement of labor standards in a free trade agreement would be an infringement on a nation's sovereignty; labor issues are a domestic concern.[88] Finally, opponents argue that labor standards are a social issue, completely independent from trade.[89]

In contrast, advocates of the inclusion of workers' rights believe that with free trade comes further stratification between the social classes.[90] For example, contrary to the anticipated self-correcting mechanism furthered by opponents, since the passage of NAFTA, the rich have been getting richer, while the poor are getting poorer.[91] As to the infringement upon a nation's sovereignty, the advocates argue that the decision to enter into a free trade agreement is completely voluntary.[92] Moreover, the basic idea of a trade agreement houses the concept that a nation will have to forego a certain amount of sovereignty in order to participate.[93] Finally, advocates of the inclusion of workers' rights strongly highlight the fact that labor provisions and trade are interdependent—trade impacts labor and labor impacts trade.[94]

Perhaps the best illustration of this dispute can be understood through what has been termed by one commentator as "the ambiguous legal issue" that surrounds the World Trade Organization (WTO) and the ILO.[95] While the WTO delineates what constitutes a violation of a worldwide trade obligation and the "ILO commitments impose legal obligations regarding labor rights, there is no international legal instrument that addresses the connection between the two issues."[96] Although there is some debate as to whether Article XX of the

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[85] Meils, *supra* note 19 at 881.

[86] *Id*.

[87] Howse, *supra* note 68 at 132-33.

[88] Meils, *supra* note 19 at 883.

[89] *Id*.

[90] *Id*. at 882.

[91] *Id*. Meils explains that in Mexico, the number of people living in poverty has increased and wages have decreased; *see also Globalisation*, *supra* note 3 (explaining that the minimum and manufacturing wages have dropped by 25 and 12 percent, respectively, since NAFTA came into force).

[92] Meils, *supra* note 19 at 883.

[93] *Id*.

[94] *Id*. at 884.

[95] Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885, 889 (2003).

[96] *Id*.

General Agreement on Tariffs and Trade (GATT) implicates labor rights, the general consensus is that there is no explicit provision nor any WTO panel or Appellate Body (AB) ruling on the issue.[97] Thus, what exists for the member countries is a set of worldwide trading obligations alongside an international organization that has adopted core labor standards, without any entity connecting the two. Commentators on trade and labor acknowledge this ambiguity,[98] and yet what is even more ironic is the fact that the FTAA has deferred all labor disputes to the ILO.[99] Thus, what could potentially exist in the future is a regional agreement, seeking to impose trading obligations alongside an international organization that strives to enforce core labor standards, with no mechanism that connects the two bodies together.[100] Hence, the perennial debate continues, despite any lessons learned from the ambiguity surrounding the WTO and the ILO.

Even more compelling is the question of whether the FTAA will require a side agreement on labor in order for its passage in Congress, as did its predecessor NAFTA. If so, then perhaps the different committees should begin focusing their energies on finding a proposed dispute resolution mechanism that will attempt to effectively enforce labor standards without enflaming the many opponents who seek to separate trade from labor. But even then, one must question the efficacy of the NAALC. If an alleged labor dispute does not fall within the first tier, then the implications are no different from the remedies found under the ILO non-binding recommendations.

One commentator has suggested that perhaps the drafters of the FTAA should begin looking to the recent US-Chile FTA for guidance on this issue.[101] In that agreement, the formula for the minimal protection of environment and labor issues has two attributes: the first is that the US and Chile have agreed to effectively enforce their own domestic labor standards; the second, is that such enforcement is limited to a "sustained pattern of failure to enforce."[102] If such a pattern is found to exist, then it must affect trade between the two countries, such

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[97] *Id*. at 888-91.

[98] Elliott, *supra* note 81 at 6.

[99] *See* Gary J. Wells, *Trade Agreements: a Pro/Con Analysis of Including Core Labor Standards*, US Department of State Summary, *at* http://fpc.state.gov/6119.htm (explaining that the FTAA could follow the sunshine, carrots, and sticks approach of the ILO at the regional level. Sunshine, carrots, and sticks refer to openness, technical assistance and reward for compliance, and penalties for non-compliance, respectively. Regardless of the method, many critics have pointed to the ILO's incapability of enforcing core labor standards).

[100] *See* Elliott, *supra* note 81 at 6.

[101] Stephen J. Powell, *A Clear Formula Has Emerged for Including Minimal Protections of Environment and Labor in Trade Agreements*, Lecture (Jan. 23, 2004) [hereinafter Powell]; *see also* Marley S. Weiss, *Symposium: 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 USF. L. REV. 689, 721-23 (2003) [hereinafter Weiss].

[102] *See* Powell, *supra* note 101; *see also* Weiss, *supra* note 101 at 721-23.

as the imports and exports.[103] Moreover, the penalty for such a violation is not a normal trade sanction,[104] but rather a monetary penalty, limited solely to the sector of trade that is affected and is effective so long as the offending country is noncompliant.[105]

In essence, this type of agreement remedies the sovereign contention of many opponents by allowing for the enforcement of the country's domestic standards. Moreover, the agreement parallels the NAALC by incorporating procedural obligations that deal with labor rights.[106] However, it ingeniously provides an impetus to follow labor and environmental standards.[107] If a country offends its own domestic laws, then a monetary penalty for that particular sector will drain the offending country's budget until it complies with its own standards.[108]

Conclusion

The trade-labor dispute is not an issue that will quickly be resolved. Rather, this debate will continue so long as there are parties who believe that the issues are completely unrelated, and thus continue to argue vehemently against those who cannot forge a barrier between the issues, finding them inextricably linked. Nevertheless, this comment has sought to draw distinctions between what was, what is, and what might be. Under NAFTA and the WTO, the NAALC and the ILO are what was and what is. Under the FTAA, the question of what might be is somewhat more difficult. To defer all labor-related issues to the ILO further fuels the perennial, yet ambiguous, debate as to whether trade and labor should be intertwined. And, although the NAALC sought to provide a dispute resolution mechanism that could provide a legal and binding form of sanctioning for violations of a limited category of core labor standards, it did not satiate the appetites of its opponents who believe that international penalties for labor violations clearly infringe on domestic sovereignty. Perhaps the best remedy then is to recognize the fact that there is a better avenue to appease the sovereign opponents—the agreement that imposes penalties for violations of a country's own domestic labor standards, as evidenced by the US-Chile FTA. In the end, there is no easy solution, but one thing is clear: with an ever-increasingly globalized marketplace and the erasure of borders with free trade, the trade and labor dispute cannot continue to lurk in the shadow. The only way to resolve an ambiguity is to take steps to recognize its existence and generate potential solutions.

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[103] *See* Powell, *supra* note 101; *see also* Weiss, *supra* note 101 at 721-23.

[104] *See* Powell, *supra* note 101 (explaining that the normal trade sanction is a 100% tariff on imports from other sectors).

[105] *Id.*; *see also* Weiss, *supra* note 101 at 722.

[106] *See* Free Trade Agreement, US-Chile, *at* http://www.ustr.gov/new/fta/Chile/final/.

[107] Weiss, *supra* note 101 at 722.

[108] *Id*; *see also* Kimberly Ann Elliott, *Fin(d)ing Our Way on Trade and Labor Standards?*, Institute for International Economics, Policy Brief 01-5 (Apr. 2001) *available at* http://www.iie.com/publications/pb/pb01-5.htm.