4

Labor Standards and Trade Agreements

The WTO does not recognize the link between trade and labor. . . . That is intellectually indefensible, and over time, it will weaken public support for global trade.
—US Trade Representative Charlene Barshefsky, November 1999

Down the pike, global labor standards through international organizations like the WTO will make more sense than private efforts.
—Larry Graham, president, Chocolate Manufacturers Association, November 2001

Labor rights activists want trade agreements and World Trade Organization (WTO) rules to include social clauses, with trade sanctions to enforce core labor standards, because they believe that globalization creates a race to the bottom in working conditions. Like the corporations that wanted to move enforcement of intellectual property rights to the WTO, many of these activists believe that the WTO is an extraordinarily powerful and effective agency—the "tough cop" who could enforce labor standards with the nightstick of sanctions. Make labor standards part of the international rules of trade, their argument goes, and countries will lose the incentive to repress standards. Burma will give up forced labor. Central America will clean up factories in its export processing zones. China will allow the creation of independent workers' associations. In the view of these activists, labor standards would improve and trade would still grow because the threat of sanctions would be so powerful that sanctions would never have to be implemented.

To globalization enthusiasts, however, the race to the bottom is a myth and the notion that the WTO should use trade sanctions to enforce global

labor standards is anathema. Unions and import-competing firms in advanced countries would capture the process of enforcing standards for protectionist purposes. Less developed countries (LDCs) would lose market access, resulting in less trade, less growth, and worse working conditions. Even talking about a link between trade and labor rouses these enthusiasts' hackles. A WTO study group on trade and labor standards? Joint meetings of the WTO and International Labor Organization (ILO) to discuss cases in which egregious labor violations attract investment and spur trade? Never! The barbarians are at the door, seeking to sacrifice free trade to protect their high-wage jobs.

The evidence rejects both these views. Standards advocates exaggerate the WTO's power and the extent to which linking standards to trade can remedy labor standards violations. The worst conditions are typically outside the traded goods sector and cannot be directly influenced by manipulating trade flows. The threat of economic sanctions has worked modestly under some conditions, but it is not as all powerful as many think. And in its first decade, the WTO's vaunted dispute settlement system is under strain and in need of reform to handle politically sensitive, nontraditional issues arising from existing trade agreements.[1]

For their part, globalization enthusiasts ignore the fact that there are *trade-related* violations of core labor standards. They also exaggerate the likelihood that trade measures to address these violations would inevitably be abused for protectionist purposes. There may not be a generalized race to the bottom, but there are enough examples of countries that explicitly waive or ignore standards to attract foreign investment or to promote exports to be of concern. These cases logically fit under WTO rules because they distort flows of goods and capital. Moreover, experience with labor linkages in existing trade agreements and with the WTO dispute settlement system to date suggests that safeguards are possible to guard against protectionist abuse.

Thus, the WTO's role in enforcing trade-related labor standards should not turn on ideology but on pragmatic issues regarding the appropriate target of trade measures, the conditions under which such measures might be effective, and the ways in which policymakers can prevent protectionist abuses. Moreover, trade negotiators can no longer ignore labor issues. In August 2002, the US Congress approved "trade promotion authority," which includes labor standards as trade negotiating objectives and endorses "equivalent" dispute settlement procedures and remedies for labor and environmental as well as for commercial objectives. To do their job properly, policymakers must understand how trade measures

1. Both Charnovitz (2001) and Lawrence (forthcoming) are critical of the use of trade sanctions in the WTO dispute settlement system and propose alternatives, including monetary fines or compensation; for a broader analysis of problems in the system, see Barfield (2001).

can improve standards and the risks of protectionism implicit in their use. The US Generalized System of Preferences (GSP) and other trade agreements that incorporate labor standards provide the basis for such an understanding.

What Do Sanctions Do?

The GSP program provides duty-free market access for specified imports from eligible LDCs subject to certain conditions, including that countries have taken steps or are taking steps to ensure that workers have "internationally recognized" rights.[2] The US legal definition of these workers' rights, which was incorporated into the GSP legislation in 1984, differs in important respects from the subsequent ILO definition in its Declaration on Fundamental Principles and Rights at Work. The US list includes freedom of association and the right to organize and bargain collectively, and the need to end forced labor and child labor. But it ignores discrimination in employment and includes "acceptable conditions of work, including minimum wages, hours of work, and occupational health and safety."[3]

Officials determine what is covered under the GSP program in part via a petition process that allows private-sector groups, businesses, unions, and nongovernmental organizations to challenge the eligibility of either specific products or beneficiary countries. How the United States and foreign governments have responded to these petitions sheds light both on the utility of trade leverage in promoting workers' rights and on the risk that linking labor standards to trade will result in protectionism. To assess these two issues, we supplement evidence on the impact of GSP conditionality on workers' rights with evidence on the effectiveness of trade sanctions in other areas.[4]

GSP Conditionality on Workers' Rights

In the first decade after Congress added labor conditionality to the GSP program, more than 100 petitions were filed that challenged the adequacy of workers' rights in nearly 50 countries. Union organizations, usually ones belonging to the AFL-CIO, filed most of the petitions. The International

2. For the history and evolution of labor rights in the GSP program, as well as detailed discussion of several cases, see Compa and Vogt (2001).

3. Trade legislation in 2002 extended GSP and amended the definition to reference the ILO's new convention on the "worst forms" of child labor, but did not address the inconsistencies in the two lists.

4. For more details on the GSP program and the analysis summarized here, see appendix C and Elliott (2000d).

Labor Rights Fund, which had lobbied in the 1980s for adding this conditionality to GSP, also filed a substantial number of petitions. As of 1998, the interagency Trade Policy Staff Committee, which oversees the program, had accepted 47 of these petitions for review, had rejected 35, and had folded the remainder into previously initiated reviews (see table C.3 in appendix C).

Of the 47 petitions that the committee accepted for review, we exclude 15 cases because they either did not involve a trade threat or conditions changed for reasons clearly unrelated to GSP conditionality, for example a change in government (appendix C). The 32 remaining cases are almost evenly divided between successes (15), where conditions improved, and failures (17), where there was no discernible progress. The failures, in turn, are nearly evenly divided between those in which the government made no effort to improve workers' rights and those in which the government promised changes but did not implement them.

Table 4.1 summarizes the results and provides insight into what works and what does not in applying trade pressures to improve labor rights. The table shows relatively higher success rates when human rights groups are involved in the petition, perhaps suggesting that they bring greater legitimacy to the demands for improved workers' rights. The degree of democracy in a country also is associated with the success of petitions. Only 2 successful cases involved countries that Freedom House, which assesses political freedoms around the world, judged to be "not free." By contrast, among the 17 failures, 9 were in countries judged "not free," with Freedom House giving the worst possible ranking (a 7) to 3 of the 9. In addition, political conditions deteriorated in a third of the failures, while they improved in nearly a quarter of the successful cases.

Another factor that affects the probability of success is the category of workers' rights the petition emphasizes. The cases that failed to achieve improvements involved practices—forced and child labor—that are more likely to be rooted in political, institutional, and social conditions than issues such as minimum wages and safety. Union rights are politically sensitive in many countries, but our assessments provide no information on that issue because every petition included complaints about inadequate protection of freedom of association.

The data in table 4.1 also indicate that greater trade increases the leverage provided by GSP in determining outcomes. Target countries where the GSP petition succeeded in changing behavior sent 30 percent of their exports to the United States, as compared with 20 percent for target countries where the process did not change behavior. Similarly, countries where the trade pressures succeeded in changing behavior had a larger share of exports that received duty-free GSP treatment than countries where the trade pressures did not work.

Moreover, the data in table 4.1 suggest that the problem in countries that promised to improve workers' rights but failed to do so may have

Table 4.1 Cases of success and failure with workers' rights conditionality under the Generalized System of Preferences

Key characteristics	Little or no discernible change (9 cases)	Change not implemented or enforced (8 cases)	All failures (17 cases)	Change apparently due to US pressure (15 cases)
Petitioner type				
Union (usually AFL-CIO)	5	8	13	9
Union plus human rights groups	3	0	3	3
Human rights groups	1	0	1	3
Target respect for civil liberties				
Average Freedom House rating[a]	6	4	5	4
Number judged "not free"	4	0	4	2
Number judged "free"	0	1	1	1
Change in status[b]	3–	1+	3–, 1+	4+, 1–
Rights targeted in complaint[c]				
Forced labor	4	1	5	2
Child labor	1	4	5	2
Subminimum working conditions	3	5	8	7
Average target trade, size, and income[d]				
Total target country exports (billions of dollars in year of petition)	2	9	5	17
Percent of target exports going to United States	15	29	20	30
Duty-free GSP exports as percent of total target exports (1992)	8	19	14	19
Population of target (percent)	30	40	33	28
Per capita income in target (dollars)	873	1,267	1,045	2,754

a. Freedom House is a nongovernmental organization that ranks countries on two scales, one for political rights, such as the right to vote in free and open elections, and civil rights, such as freedom of association and the right to form unions. Each scale is measured from 1 to 7, with 1 or 2 indicating that a country is largely free and 6 or 7 indicating that it is not free.
b. A minus sign indicates that a country went from being free to only partly free or from partly free to not free. In the case of Peru, which was judged to have failed to implement promised changes, it moved from being almost not free (a score of 5) at the time of petition, to being almost free (a score of 3) in 1997, so it is included even though it did not change categories.
c. Either freedom of association or the right to organize and bargain collectively, and usually both, are cited in every petition.
d. These figures exclude Bahrain because it is an outlier in terms both of size and of wealth.

Source: Elliott (2000d).

been one of inadequate resources rather than lack of will. These countries look similar to the countries that improved workers' rights in their level of democracy and dependence on the US market for exports. The glaring difference between them and the countries in which the petitions produced improvements is that the countries that promised but failed to implement improvements are much poorer. They have an average per capita income of just under $1,300, compared with more than $2,700 for countries that did improve the protection of workers' rights.

Economic Sanctions for Foreign Policy Reasons and for Trade Reasons

Coercive trade sanctions, or the threat thereof, will change the behavior of a foreign government when that government *perceives* that the costs of the sanctions will be greater than the *perceived* costs of complying with the sanctioner's demands. Thus one reason that workers' rights conditionality works reasonably well in the GSP program is because the target countries are mostly small and poor, and they perceive that defying US demands will have higher costs than complying with them. The prevalence of "acceptable conditions of work" complaints among the successes suggests further that countries were able to satisfy US demands by tweaking minimum wages or technical standards in their labor codes, thereby keeping down the cost of compliance.

An analysis of sanctions imposed for foreign policy reasons and of trade threats in commercial disputes, summarized in table 4.2, tells a similar story about the determinants of success in using sanctions to alter behavior.[5] The upper half of the table shows that in cases involving unilateral US sanctions in the period 1985–94 (the period for which we have data for all three types), foreign policy sanctions were successful 20 percent of the time; that US trade threats under Section 301 of the Trade Act of 1974 were successful 61 percent of the time; and that GSP workers' rights cases were successful 47 percent of the time. The table's bottom panel shows that in foreign policy cases involving "modest goals"—such as releasing a political prisoner or reversing or compensating an investor in an expropriation case—sanctions contributed to at least partial success a third to half of the time. By contrast, demands involving "major"

5. Hufbauer, Schott, and Elliott (forthcoming) examine economic sanctions involving a broad range of foreign policy goals, and sanctioning countries and targets, ranging from World War I to the UN sanctions against the Taliban regime in Afghanistan in 1999. Bayard and Elliott (1994) and Elliott and Richardson (1997) examine the use of trade threats by the United States in commercial disputes from 1975 to 1994. The targets in these cases are typically larger and richer than in the foreign policy cases or GSP cases, with the European Union, Japan, South Korea, and Taiwan accounting for more than half the cases studied.

Table 4.2 Use and effectiveness of economic sanctions

Type of case or goal	Total number of cases	Number of successes	Success rate (percent)
Overall results:			
Foreign policy cases[a]			
All cases, 1914–99	185	63	34
All cases, 1985–94	54	18	33
Unilateral US cases	127	40	31
1945–69	19	12	63
1970–99	54	8	15
1985–94	15	3	20
US Section 301 cases			
All cases, 1975–94	87	45	52
Cases, 1985–94	62	38	61
Workers' rights and GSP			
All cases, 1985–94	32	15	47
Goals and categories of:			
Foreign policy cases, 1914–90			
Modest goals	51	17	33
Major goals	30	7	23
Adjusted modest goals[b]			~50
Adjusted major goals[b]			~20
Human rights cases, 1970–99	48	7	15
US Section 301 cases, 1975–94			
Border measures	25	19	76
Other market barriers	47	16	34
GSP workers' rights, 1985–94			
Forced or child labor	14	4	29
Subminimum working conditions	15	7	47

~ = approximately
GSP = Generalized System of Preferences

a. These results are preliminary and subject to change. The authors do not expect the basic story.
b. The original analysis probably does not adequately account for differences in the intensity of interest between the sender and target with respect to some of the goals defined as "modest." The adjustment shown here involves moving some human rights and nuclear nonproliferation cases from the modest to the major category. This issue will be revisited in more detail in the third edition of Hufbauer, Schott, and Elliott (forthcoming).

Sources: Hufbauer, Schott, and Elliott (2d ed., 1990, and 3d ed., forthcoming); Bayard and Elliott (1994); Elliott (2000d).

objectives—such as ending apartheid or inducing Iraq to withdraw from Kuwait—were successful less than a quarter of the time.

Another factor that may help explain the differences in success rates between cases with limited objectives and those with more ambitious goals is the greater ease of defining and observing compliance in the former case. When the objectives are limited, it is easier to judge outcomes: a political prisoner is or is not released; a tariff is or is not lowered. Within the universe of trade cases, US Section 301 investigations were more than twice as likely to result in some market opening if the barrier was tariffs or quotas than if the barrier was an agricultural subsidy, which the subsidizer could change in form without having the actual effect altered. The broader and more complex the issue, the more difficult to define and measure success—and the easier for a country to maintain the status quo.

Finally, compliance in cases involving regulatory issues often requires the target government to adopt costly measures to create or strengthen enforcement mechanisms. In such cases, as in half the failures in the GSP cases, trade threats may elicit promises to change but without the capacity to fulfill them.

In sum, our analysis shows that trade sanctions are not the deus ex machina in the enforcement of labor standards. Trade sanctions succeed in some situations and not in others. They are more likely to be effective when they directly target imports of particular goods produced under identifiably abusive conditions and where it is relatively easy to define the remediation measures. In the labor rights area, the weakness of administrative agencies enforcing labor codes is likely to be a major problem, so that countries promising improvements may be unable to deliver them. In these cases, threats of sanctions would presumably work best if they were coupled with technical and financial assistance to strengthen the relevant ministries and institutions seeking to protect workers.

The Danger of Protectionist Capture

The major worry of globalization enthusiasts is that including labor standards in the WTO and trade agreements, and authorizing trade sanctions to enforce them, would lead to protectionist abuse. Industries or unions would allege that there were labor standards violations in LDCs in order to deny them access to US or other advanced country markets. These fears are based on suspicions about the motives of proponents of a social clause, particularly unions, and on the experience with commercial antidumping rules, which have been diverted for protectionist purposes.

We reject these fears on four grounds. First, we demonstrate that antisweatshop activists and the international union movement have little

direct protectionist motivation when promoting global labor standards. Second, we show that the petitions in the GSP workers' rights process and in other bilateral and regional trade agreements have not followed the rationale of protectionist intent. Third, we show that the US government has implemented trade-labor linkages in the GSP program in a nonprotectionist fashion, even under a pro-labor Democratic administration. Fourth, we note that international rules can be written to constrain the protectionist use of trade remedies by governments tempted in this direction.

Are Demands for a Social Clause Protectionist?

Opponents of labor standards in trade agreements recognize that some advocates of a social clause want only to improve working conditions for LDC workers. But they believe that these advocates are naive participants in an antisweatshop movement driven by protectionist labor unions. This attitude is reflected in the Third World Intellectuals' and NGOs' Statement Against Linkage and in the Academic Consortium on International Trade (ACIT), a group formed to oppose the antisweatshop movement on college campuses because they concluded that "much of the social activism in the United States regarding labor standards was motivated by protectionist considerations especially on the part of organized labor."[6]

These academics hold these views despite clear statements from major activist groups, such as Charles Kernaghan's National Labor Committee, that what they seek in campaigns (in this case regarding toy production in China)

> is *not* a boycott. We certainly do not want to hurt the U.S. toy industry or to take needed jobs out of China. What we are asking is that U.S. companies treat the three million toy workers in China—who produce 80 percent of the toys sold in the United States—as human beings and that their human and worker rights be respected. (www.nlcnet.org; emphasis in original)

ACIT is particularly uneasy about potential protectionist sentiment in the Workers' Rights Consortium (WRC), created by the United Students Against Sweatshops (USAS) to help enforce university codes, because these groups are linked to the Union of Needletrades, Industrial, and Textile Employees (UNITE). But WRC explicitly states that it would be a serious violation of its principles for a corporation to "cut and run" when confronted with problems of low labor standards (www.workersrights.org/key.asp). WRC also backed up its words with actions in the 2001 Kukdong

6. See www.columbia.edu/~jb38/twin_sal.pdf (April 13, 2001); www.fordschool.umich.edu/rsie/acit/documents/anti-sweatshopletterpage.html (March 26, 2003); and Brown, Deardorff, and Stern (forthcoming). Deardorff and Stern are on the ACIT steering committee.

case involving alleged code violations at a Korean-owned factory in Mexico that produced for Nike and Reebok. In this case, "WRC and many of our affiliate schools encouraged Nike to stay and work for change and that is the course the company chose" (www.workersrights.org/about_faq.asp). Though there may be some protectionist motivation in the quest for a social clause, it is not the ever present bogeyman that global enthusiasts believe it to be.

Union motivation for promoting a social clause stimulates the greatest suspicion, but it is not monolithic and not necessarily protectionist. The International Confederation of Free Trade Unions represents unions around the world, including unions in LDCs. These unions support policies that would give them greater leverage in negotiating with firms or their governments, but some worry that trade sanctions would cost them jobs. The confederation favors enforcement of international labor standards but does not want a mechanism that would harm some of its members, and its proposals for a social clause contain safeguards against protectionist abuse. One proposal calls for the ILO to review and monitor member states' compliance with the core conventions. It allows for a period of up to two years' consultation on how to rectify failure to comply with the core standards before referring the matter to the WTO for action. The WTO would then determine the appropriate action, with trade sanctions reserved as a last resort (International Confederation of Free Trade Unions 1999, 44–47).[7]

The observed implementation of the GSP program also contradicts fears that protectionist motivation underlies the desire for improved labor standards on the part of US unions.[8] The more than 100 petitions for improvements in workers' rights contrast with only 13 petitions to remove products from eligibility for competitive reasons, which would seem a more direct route to reducing access to the US market.[9] Unions, usually AFL-CIO members, submitted 73 percent of petitions accepted for review, and about half the petitions alleged violations of the "minimum conditions" of work, including lack of or inadequate minimum wages.

But the primary focus of petitions was the core rights of freedom of association and the right to organize and bargain collectively, which suggests this was the key motivation rather than reducing developing-country

7. The crucial difference between this proposal and a similar one that we make below is that we limit the WTO's enforcement role to *trade-related* violations of the core labor standards and leave broader enforcement of international standards with the ILO.

8. More detail on the GSP data set is given in appendix C.

9. The difference in activity levels is probably not due to a higher rejection rate for product removal petitions than for workers' rights petitions. The opposite is more likely, because a product petition will only be rejected if it has been submitted and denied in the previous three years. By contrast, the standards for accepting workers' rights petitions have been harshly criticized as nontransparent and overly stringent; see GAO (1994, 77).

competitiveness. In those same years, 246 petitions to *add* products to the eligible list were accepted for consideration, so that the overall pattern was for increased market access rather than reduced imports.

In addition, unions do not complain about the largest GSP-eligible exporters, which they might be expected to do if they had protectionist goals. On average, in the year the petition was filed, countries targeted in petitions involving unions exported 40 percent less than countries targeted in petitions with no union involvement ($2.4 billion vs. $4.1 billion). Moreover, only 3 of the top 10 beneficiary countries in 1998 had been subject to a workers' rights review, and the other 7 had never been the subject of a petition (see appendix C). If unions were seeking to reduce imports under the GSP, why would they spend resources on such small targets?

As for other groups advocating labor standards, far from trying to use the GSP to deny market access to LDCs, several workers' rights groups have suggested using partial GSP eligibility withdrawal as an alternative to complete suspension from the program, which they regard as too blunt. Bill Clinton's administration did this for the first time when it suspended Pakistan's eligibility for exports of hand-knitted and woven carpets, sporting goods, and surgical instruments—industries in which abusive child labor was found to be a problem *(International Trade Reporter,* November 8, 1995, 1853).

The reality is that, while globalization enthusiasts regard protectionism as so terrible that they expect protectionists to disguise it, protectionist unions or politicians usually do not hide their intent. They brag about it. Unions are not defensive about supporting protectionist activity if they believe it will protect their members' jobs.[10] And politicians want credit for saving their constituents' jobs from foreign competitors. In 2002, when George W. Bush's administration used tariffs to protect the steel industry, the policy was sold as protecting American jobs. It was a simple protectionist deal, supported by unions and firms in the sector, with no disguising of its intent.[11]

Protectionism in Action?

Whatever the motivation in pushing a social clause, there is little evidence that the United States has implemented existing trade-labor linkages in

10. See, for example, the comments by AFL-CIO economist Thea Lee at an Inter-American Dialogue conference in November 2002, www.iadialog.org/publications/programreports/trade/ftaa_lee.pdf.

11. It has been noted by many observers in early 2002 that the Democratic President Clinton refused to provide import protection to the American steel industry, despite his close ties to labor, whereas the Republican President Bush did so. The rhetorically free trade Reagan administration bragged in the mid-1980s that it had imposed more trade protections than any administration since Herbert Hoover's (Baker 1987).

ways that sacrifice trade goals for labor standards. The Clinton administration favored organized labor's international agenda more than the Ronald Reagan or George H.W. Bush administrations. But none of these administrations implemented the GSP, the North American Free Trade Agreement (NAFTA) side agreement on labor, and other initiatives in ways that increased protectionism.

In dealing with GSP workers' rights petitions, the Clinton administration rejected 44 percent (8 of 18) of the labor conditionality petitions it received, similar to the 49 percent rate of rejection for the earlier George H.W. Bush administration (17 of 35), and a higher rate than the 32 percent of labor conditionality petitions rejected by the Reagan administration (11 of 34). The Clinton administration suspended the eligibility of beneficiary countries in 15 percent of cases, compared with 6 percent for Bush and 24 percent for Reagan (see appendix C).[12]

Overall, only 13 countries out of the 47 reviewed by any US administration have had their GSP eligibility terminated or suspended. Benefits were restored in 5 of these cases. Most of the cases—Burma, Chile, Liberia, Nicaragua, Romania, Sudan, and Syria—also involved foreign policy interests far beyond workers' rights, and the suspension of benefits cannot be attributed to protectionist pressures.

The countries that have lost GSP benefits as a result of inadequate protection of workers' rights tend to be smaller and poorer than the average beneficiary country. There is an even greater size and income gap between countries sanctioned and those that have never been the subject of a petition, much less a review. These facts may raise questions about the willingness of the US government to bear significant costs to promote labor standards, but they undermine the assertion that the primary motivation is to protect US workers. Globalization enthusiasts can sleep more soundly; their fears that protectionism lurks under the bed are exaggerated.

Labor Links in US Trade Agreements

US experience with bilateral and regional trade agreements that include labor issues, which are summarized in table 4.3, also leads us to reject the premise that such links inevitably lead to protectionist abuse. In the fall of 2001, the US Congress approved the US-Jordan Free Trade Agreement (FTA), with enforceable labor and environmental standards in the main body of the agreement as demanded by social clause advocates. In

12. In the summer of 2000, the Clinton administration revoked Belarus's eligibility because of inadequate protection of workers' rights. On the basis of preliminary information on other petitions investigated by the Clinton administration, this would raise the rate of suspensions only slightly, to 17 percent.

Table 4.3 Approaches to linking trade and labor standards

Approach	Pros	Cons
Social clause in trade agreements authorizing trade measures:		
• Against any violation of labor standards		Not appropriate because most labor violations are in nontraded sectors and trade experts are not competent to resolve labor standards disputes
• Against trade-related violations of labor standards	Market-improving	A political nonstarter for the foreseeable future
NAALC: Side agreement on labor	Provides mechanism for problems to be investigated and discussed; enforcement with fines possible for technical labor issues and child labor	Creates tiers for labor standards that are inconsistent with international consensus on core labor standards Provisions requiring only enforcement of national laws provide disincentive to raise standards
Canada-Chile FTA: Side agreement on labor	Similar to above	Same as above Relies on local judiciary to enforce, which could be problematic in other developing countries
US-Jordan FTA: Labor standards in main text	Treats trade-related labor standards violations equally with other potential distortions of trade and investment flows	Labor language so weak as to exert little upward pressure on labor standards Vague dispute settlement provisions risk abuse by leaving too much discretion to individual governments
US FTAs with Chile and Singapore: Labor standards in main text	Provides for "equivalent," though not identical, dispute settlement procedures Does not distinguish among the core labor standards	Excludes derogations from labor law to promote exports or attract foreign investment from dispute settlement

FTA = free trade agreement; NAALC = North American Agreement on Labor Cooperation

the spring of 2003, the Bush administration signed FTAs with Chile and Singapore that also contain labor standards in the main text, subject to the same settlement procedures as commercial disputes, albeit with fines rather than trade measures as the principal enforcement mechanism.

These three agreements contrast with earlier trade deals that addressed labor issues through supplementary "side" agreements with separate dispute resolution procedures. The common element in all the trade agreements with labor provisions, however, is that they require parties to enforce their own labor laws, with no requirement that those laws be consistent with internationally agreed core labor standards.[13]

The first trade pact to address labor issues, NAFTA, which was negotiated by Canada, Mexico, and the United States in the early 1990s, was an unsuccessful attempt by the Clinton administration to assuage the fears of workers and unions about the consequences of an economic integration deal with a low-wage country. The Canada-Chile and Canada-Costa Rica FTAs signed later in the decade followed this precedent by placing labor issues in side deals with their own institutional structures and dispute settlement mechanisms that do not include trade sanctions.

The North American Agreement on Labor Cooperation (NAALC) and the arrangement under the Canada-Chile FTA establish a mechanism for ministerial consultations to deal with accusations that one of the parties has not adequately enforced its labor laws. If neither consultations nor an expert evaluation resolves the problem, the parties can appoint an arbitral panel to review cases involving a subset of technical labor regulations on minimum wages, health and safety, and child labor, and the panel may impose a monetary fine (Elliott 2001).[14] Allegations of forced labor and discrimination are subject to evaluation by a panel of independent experts but are not eligible for monetary penalties. Complaints involving violations of union rights go no further than ministerial consultations. Under the NAALC, US practices, particularly with respect to the treatment of migrant agricultural workers, have been challenged as have Mexican labor practices.

Unlike these two agreements, the labor agreement attached to the Canada–Costa Rica FTA provides for ministerial consultations on labor issues but does not authorize fines in the case of disagreements over adequate enforcement. Under all these agreements, however, disputes are referred

13. Although unfortunate because it potentially discourages improvements in local law, this approach is unlikely to change as long as the United States has itself ratified so few ILO core conventions.

14. In the case of a bilateral dispute between the United States and Mexico, bilateral tariff concessions can be withdrawn to the extent necessary to collect the value of the fine. But this provision is not regarded as authorizing trade *sanctions*. In disputes involving Canada, including under the Chile agreement, enforcement of the fine resides with the local judiciary.

for consultation or more dispute settlement only if there is a "persistent pattern" of failures to enforce relevant labor laws and if the violations are in trade-related sectors.

The US-Jordan FTA, which was completed in late 2000 by the Clinton administration, established a new precedent by including a section on labor in the main text that is subject to the same dispute settlement procedures and remedies as the rest of the agreement. The protectionist risk here arises not from the language on labor standards but from the vague language on dispute settlement procedures. If consultations, a dispute settlement panel, and the Joint Committee created to implement the agreement do not resolve a dispute, the complaining party is authorized "to take *any* appropriate and commensurate measure" (emphasis added)—broad discretion that could be abused.

But the US-Jordan FTA labor standards text is so weak that it is difficult to see any dispute getting that far. In section 6, the agreement requires only that the parties "*strive* to ensure" (emphasis added) that domestic laws are consistent with "internationally recognized labor rights," and that they do not "waive or otherwise derogate from . . . such laws as an encouragement for trade." The only "shall" in this section refers to the obligation of the parties to "not fail to effectively enforce its laws" on a sustained basis in a way that affects trade. However, other paragraphs preserve the discretion of governments to adopt, modify, and enforce labor laws and regulations so that a party will be in compliance with its labor obligations under the agreement if

> a course of action or inaction [in enforcing labor laws] reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources. [Section 4(b) of Article 6 of the agreement]

Despite this language, Republicans and the business community blasted the US-Jordan FTA as setting an unacceptably dangerous precedent. In the fall of 2001, the Bush administration argued in favor of the agreement on the grounds that it was important to support an ally in the war on terrorism and in the Middle East peace process. The Republican-controlled House of Representatives, however, approved the agreement only after US Trade Representative Robert Zoellick arranged for an exchange of letters with his Jordanian counterpart indicating that they did not anticipate using the dispute settlement provisions.

During the congressional debate over trade promotion authority, which allows the president to negotiate trade agreements that Congress cannot amend once embodied in legislation, Senate Finance Committee Chair Max Baucus (D-MT) insisted that all future trade agreements must meet the "Jordan standard" of having enforceable labor standards in the main text. After passage of the Trade Act of 2002, Baucus and other Democrats claimed that this is the correct interpretation of the labor provisions. But

Senator Charles Grassley (R-IA), the chair of the Finance Committee in the 108th Congress, adamantly disagreed.

Either way, it is clear that US trade negotiators cannot ignore labor issues in future negotiations. In the section of the Trade Act providing trade promotion authority, references to workers' rights and labor standards appear as an "overall" and a "principal" trade negotiating objective, as well as a "certain priority" that the president should promote to address and maintain US competitiveness. The key section, 2102(b)(11), essentially copies the language from the US-Jordan FTA in defining principal US negotiating objectives with respect to labor (and the environment), emphasizing the legitimacy of discretion in setting and enforcing one's own laws.

In a Trade Act amendment that muddies the enforceability question, however, Senator Phil Gramm (R-TX), a leading opponent of linking standards and trade, convinced his House colleagues to insert additional language barring retaliation "based on the exercise of these rights [to discretion in enforcement] or the right to establish domestic labor standards." But this provision appears contradicted by the next negotiation objective, on dispute settlement and enforcement, which requires US negotiators to "seek provisions" that treat all "principal negotiating objectives equally with respect to" the availability of "equivalent dispute settlement procedures and remedies."

In its first attempt to interpret this potentially conflicting language, the Office of the US Trade Representative developed a compromise for the bilateral FTA negotiations with Chile and Singapore that combines elements of NAALC and the US-Jordan FTA.[15] Like the Jordan agreement, labor obligations are in the main text of the agreements, making violations subject to the same dispute settlement procedures as commercial disputes; and there is no distinction among applicable labor standards, as in NAALC.

The Chile and Singapore FTAs follow the practice of basing labor obligations on the effective enforcement of each country's own laws in trade-related sectors. In a bizarre twist, they "recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws" but then go on to explicitly exclude such derogations from dispute settlement.[16]

Like NAALC and in a departure from the Jordan FTA, these agreements limit enforcement measures in labor disputes to monetary fines,

15. This is based on the text of the Singapore FTA and a summary of the Chile FTA, both available on the Office of the US Trade Representative Web site at www.ustr.gov.

16. One explanation is that this provision was constructed this way to meet the Gramm language giving governments the "right to establish domestic labor standards." It is bizarre, however, because such derogations create exactly the sort of distortions that trade agreements typically address.

with the possibility of suspending tariff concessions if necessary to *collect* the fine (explicitly not a trade sanction). Unlike NAFTA, the fines would accrue annually if problems remain unresolved. In commercial disputes, the country in violation of the agreement could choose to pay a fine, but traditional trade retaliation would also remain an option. The Office of the US Trade Representative argues that while not "mirror images," the mechanisms for enforcement of labor and commercial disputes would be equally effective and therefore would meet the congressional standard of equivalence.

The outstanding question is whether any of these approaches affect labor standards on the ground. As of 2002, a number of studies and consultations had occurred under NAALC, but no complaint had gotten as far as an experts' committee, much less imposition of fines (Hufbauer et al. 2002). The process has directed attention to labor problems on both sides of the border. But independent unions still must battle to be recognized in the maquila sector in Mexico, and US firms can still use the threat to relocate to Mexico in bargaining with unions with virtual impunity (Bronfenbrenner 2000). The agreements reached thus far that include labor standards are with relatively small trading partners with little negotiating leverage and relatively good labor standards, and they may not provide precedents for trade agreements with larger countries.

The principal problem with many of these FTAs is that they have been largely concerned with finding politically acceptable trade-labor mechanisms that permit trade agreements to proceed, while doing little to ensure that labor standards improve. It is possible that experimentation with further regional agreements will produce useful and replicable compromises on trade and labor issues. These FTAs are also useful in setting a precedent for linking core labor standards with the further expansion of trade and investment.[17] But the link between trade and labor rights should not be limited to bilateral agreements. Multilateral agreements covering trade sanctions for improving standards are necessary, both to improve standards broadly and to limit possible protectionism associated with standards.

A Role for the WTO

Given the evidence that trade measures can contribute to improving labor standards, and that protectionist motivations have not captured the policymaking process when labor clauses are included in trade agreements, we believe that the WTO should include a provision allowing countries to retaliate against *trade-related* and egregious violations of the core labor standards.

17. See also Polanski (2002).

Our proposal differs from most social clause proposals in that it focuses on labor standards in the traded goods sector, for which the WTO and the world trading community are responsible, rather than seeking to move the general enforcement of labor standards from the ILO to the WTO or having the two organizations share broad enforcement power. In the nontraded goods, informal, and subsistence agricultural sectors, in which most people in poor countries work, the ILO should remain the primary organization charged with promoting and enforcing labor standards.

The starting point for WTO involvement in labor standards in the traded goods sector should be to adapt Article XX of the General Agreement on Tariffs and Trade (which was incorporated into the WTO). This article lists exceptional circumstances in which members can depart from their obligations under the agreement, including Article XX(e) permitting countries to ban imports of goods produced using prison labor. Article XX(h), which authorizes countries to impose otherwise prohibited trade measures if they are undertaken pursuant to an intergovernmental commodity agreement that "conforms to criteria" acceptable to member countries, might also be adapted to permit trade measures authorized by the ILO under its supervisory procedures.[18]

The WTO should build on Article XX(e) by adding a provision that allows countries to sanction the specific sector of a country that has violated core labor standards, if the ILO has determined that there is indeed a violation. As currently written, Article XX(e) allows members to take action only against imports implicated in the labor standards violation—not imports in unrelated sectors. This element should be retained to prevent any country from using labor standards problems in one sector of a trading partner to block LDC exports in unrelated, higher-value-added sectors with "good" jobs, such as electronics (Moran 2002).[19]

Similarly, to minimize the risks of protectionism, any revision of Article XX(e) should focus on egregious and narrowly defined violations of standards—based on ILO supervisory evidence, and subject to WTO review, just as actions under Article XX currently are. To define violations eligible for Article XX action, it would be natural to include, in addition to forced labor and the worst forms of child labor (which usually in-

18. Environmentalists have suggested broadening Article XX(h) to address potential conflicts between the WTO and multilateral environmental agreements that incorporate trade measures. This idea might also be adapted to avoid conflicts with the WTO if the ILO becomes more active in using trade sanctions under Article 33 of its own Constitution to enforce egregious labor standards violations (see the discussion of ILO enforcement in chapter 5).

19. We view this "targeted" sanctions feature as a major attraction of the Article XX approach. Staiger (2003), relying on a more traditional bargaining approach to WTO dispute settlement, minimizes this as an option because it might result in increased discrimination in trade. The alternative he proposes would, we believe, be unwieldy in practice and inappropriate in dealing with undemocratic regimes because it assumes labor standards reflect national preferences.

volve coercion), de jure national policies that discriminate on one of the prohibited grounds (i.e., gender, race, ethnicity, political opinion, religion, or social origin) that employers can exploit to promote exports. Such explicit, illegal discrimination appears to be rare, however, and the ILO approach emphasizes promotional measures, so we would not expect many disputes in this area.

It would be more difficult to identify actionable violations of freedom of association and bargaining rights. Guidelines should focus on the egregiousness of the violation and on its relation to trade. In addition to the examples of legal restrictions on unions in export processing zones, evidence that union organizers are de facto barred from entering such zones or are fired or arrested for trying to organize an exporting firm could be considered actionable.[20] In these and other cases, an additional useful criterion would be whether or not the country is cooperating with the ILO to remedy problems.

In addition to identifying the range of violations that would be actionable, there is the question of which agency should make the determination. One of the weaknesses of the current dispute settlement process for Article XX cases is that WTO panels with no expertise on environmental issues, for example, rule on the legitimacy of environmental claims. To avoid putting trade dispute settlement panelists in the position of having to investigate the legitimacy of claims on labor standards violations, the wealth of information produced by the ILO supervisory system should be used instead. Countries invoking Article XX(e) against a trade-related core labor standards violation should be required to present evidence from the ILO supervisory process, as described in the next chapter, before taking any action.

In cases involving forced labor (by adults or children) or discrimination where the targeted country has not ratified the relevant conventions, the country invoking Article XX should offer evidence from other independent sources, for example the UN Human Rights Commission or respected nongovernmental organizations such as Amnesty International or Human Rights Watch. In this case, the defendant country could appeal to the ILO to conduct an independent investigation, and if the claim of a violation is not upheld and the trade measure is not removed, the defendant country could then file a dispute with the WTO.

Experience with the WTO's Dispute Settlement Understanding and with trade-environment disputes suggests that multilateral trade rules provide safeguards that would prevent protectionists from exploiting the trade-labor link as a trade barrier (Elliott 2000a, 199–201). The Dispute

20. The big problem is what to do with respect to countries that either ban unions or enforce a trade union monopoly that is not independent and does not genuinely represent the interests of workers. These violations, though egregious, are almost always motivated by fear of political competition and not by competitiveness concerns, and a ban on *all* exports would be both costly and ineffective.

Settlement Understanding reduces the threat that protectionists could exploit an expanded Article XX in a number of ways. Restrictions on unilateral trade measures mean that trade threats cannot be used as a tool of "aggressive unilateralism," as they were on intellectual property, for example, to force countries to change their policies or to agree to negotiate new multilateral rules. The key is for the trading rules to limit government discretion and to require that trade measures related to social issues be subject to multilateral review and discipline.

The WTO settlement system has also demonstrated that it can protect small, poor countries from unjustified or arbitrary discrimination against their exports. Several LDCs have challenged US trade measures, including those based on environmental concerns, and have prevailed in the WTO, leading the United States to modify its policies. In one case, a panel ruling forced the United States to revise its clean air regulations on gasoline that discriminated against imports without a legitimate rationale. The appellate body ruling that allowed the United States to ban shrimp imports that threaten endangered sea turtles did not result in a proliferation of new trade bans for nominally environmental purposes.[21] Though not satisfactory to everyone, the WTO system in this and other cases has shown itself capable of distinguishing protectionist trade barriers from legitimate attempts to address environmental issues.[22]

Finally, the WTO could consider expanding the General Agreement on Trade in Services to cover the cross-border provision of "worker agency services." Workers' associations provide a variety of services that support markets. These associations alleviate market failures associated with collective action problems, workplace public goods, and imperfect information; and they discipline practices that border on coercion and create countervailing market power to the anticompetitive market power of firms.

Moreover, the services provided by workers' associations encompass not just bargaining over compensation but also workplace safety monitoring, grievance and dispute settlement, training and education, and management of other services, such as child care, pensions, and health insurance (Richardson 2000; Stiglitz 2000; Freeman and Medoff 1984). It would be consistent with the WTO's mission to encourage the liberalization of "trade" in such market-supportive services. The ILO could also provide advice on how to develop these rules and could assist in training workers' (and employers') organizations on how best to take advantage of them. Again, trade and labor working together can do more than either can do separately.

---

21. The United States has modified its application of the law that led to the shrimp-turtle dispute but is still struggling to find a solution that satisfies both the demands of its trading partners and the requirements of its domestic law.

22. Whether, and if so on what basis, the WTO should make such distinctions is a separate issue.