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Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements

David A. Gantz*

I. INTRODUCTION

Free trade agreements (“FTAs”) such as the North American Free Trade Agreement (“NAFTA”)¹ and the more than a dozen subsequent accords negotiated by the United States primarily in the 1990s and the first decade of the 21st Century, with Israel (the first, in 1985), Canada, Mexico (through NAFTA), Jordan, Singapore, Chile, the CAFTA-DR nations (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua), Australia, Morocco, Bahrain, Oman, Peru, Colombia, Panama and South Korea,² are not commonly thought of as human rights

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1. North American Free Trade Agreement, Dec. 17, 1992, U.S. – Mexico – Canada, [hereinafter “NAFTA”], 32 I.L.M. 289 (1993), *also available at* <http://www.nafta-sec-alena.org/en/view.aspx?conID=590> (full text and annexes) (last visited Dec. 21, 2010).

2. United States-Israel: Free Trade Area Agreement, U.S.-Isr., Apr. 22, 1985, 24 I.L.M. 653, *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp; United States-Canada: Free Trade Agreement, U.S.-Can., Dec. 22, 1987-Jan. 2, 1988, 27 I.L.M. 281 [hereinafter CFTA] (suspended when NAFTA entered into force); Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63 (2002), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf; United States-Singapore Free Trade Agreement, U.S.-Sing., May 6, 2003, 42 I.L.M. 1026 (2003) [hereinafter Singapore FTA], *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf; U.S.-Chile (2003), United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026 (2003) [hereinafter Chile FTA], *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file535_3989.pdf; The United States-Central America-Dominican Republic Free Trade Agreement, U.S.-CAFTA-DR, Aug. 5, 2004, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter CAFTA-DR]; United States-Australia Free Trade Agreement, U.S.-Austl., May 18, 2004, 43 I.L.M. 1248 (2004) [hereinafter AFTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html; United States-Morocco Free Trade Agreement, U.S.-Morocco (June 15, 2004), 44 I.L.M. 544 (2005) [hereinafter U.S.-Morocco FTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text-Section_Index.html; United State-Bahrain Free

agreements. However, these accords frequently contain provisions that reflect principles embodied in international human rights accords. Not only do the FTAs incorporate provisions protecting internationally recognized labor rights and undertakings designed to lead to a cleaner environment, but they also contain obligations relating to international human rights such as affording respect for the rule of law, transparency in government and the like. This article reviews the labor and environmental provisions of key U.S. FTAs from NAFTA to the United States – Peru Trade Promotion Agreement (“Peru TPA”). Particular attention is given to the evolution of those provisions and to their focus on citizen submissions and dispute settlement. In the latter case, the article discusses possible/available trade sanctions.

The inclusion of labor and environmental provisions in regional trade agreements (“RTAs”) is not common practice other than by the United States; most such arrangements, except for the European Union and its most recent FTAs, do not address these issues.³ I have not discussed FTAs concluded by countries other than the United States, largely because most do not contain significant provisions related to enforcement of labor rights and environmental provisions. It is only the recent Canadian FTAs that contain provisions similar to those in the Bush era FTAs (such as CAFTA-DR) with third party dispute settlement mechanism and sanctions (including monetary penalties) limited to the labor

Trade Agreement, U.S.-Bahr., Sep. 14, 2004, 44 I.L.M. 544 (2005), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html; United States-Oman Free Trade Agreement, U.S.-Oman, Jan. 19, 2006, http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html; United States-Peru Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html [hereinafter Peru TPA or PTPA]; United States-Colombia Trade Promotion Agreement, U.S.-Colom., Nov. 22, 2006, http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html [hereinafter Colombia FTA] (not in force as of Sep. 15, 2011); United States-Panama Trade Promotion Agreement, U.S.-Pan., June 28, 2007, http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Section_Index.html [hereinafter Panama TPA] (not in force as of Sep. 15, 2011); Free Trade Agreement between the United States and the Republic of Korea, U.S.-S. Korea, June 30, 2007, http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html [hereinafter KORUS] (not in force as of Sep. 15, 2011).

3. In a 2008 non-random study of approximately fifty regional trade agreements, only a few such agreements, i.e. the EU, Canada—Costa Rica and the EU—Cariforum Economic Partnership Agreement, included labor and/or environmental provisions. DAVID A. GANTZ, *REGIONAL TRADE AGREEMENTS: LAW POLICY AND PRACTICE* (Carolina Academic Press, 2009) 68-69 (Table 4-1) (hereinafter “Gantz, RTAs”)

provisions.⁴

Still, the European Union—Cariforum Economic Partnership Agreement reiterates the Parties' commitment to sustainable development. It calls for "high levels of environmental and public health protection" and improving environmental laws and policies, as well as for "reaffirming their commitment to the respect for human rights, democratic principles and the rule of law"⁵ However, while monitoring is incorporated, there is no mechanism for addressing citizen complaints, nor any enforcement mechanism. In the labor rights area, there is a general commitment in the EU—Cariforum EPA to the International Labour Organization's ("ILO") core labor standards and a commitment not to use labor rights issues for protectionist purposes.⁶

In Part II, I discuss labor rights and environmental protection as human rights and note other aspects of U.S. FTAs that may be considered as supporting fundamental human rights, even though they are often couched in different terms from those found in the Universal Declaration of Human Rights and in the United Nations Covenants on Civil and Political Rights and Economic and Social Rights. Whether or not one believes that all or some of the labor and environmental provisions reflect human rights principles, these provisions differ substantially from traditional human rights accords. The FTA provisions are both narrower in scope and far more extensive in terms of implementation and enforcement.

In Part III, I review the incorporation of labor rights and environmental protection provisions in selected U.S. FTAs from NAFTA through the US—Jordan FTA, CAFTA-DR and the Peru TPA. Each selected U.S. FTA represents a particular approach to dealing with labor and the environment. There is some variation

4. See, e.g., Free Trade Agreement between Canada and the Republic of Peru, May 29, 2008, chs. 16 (labor), 17 (environment), available at http://www.sice.oas.org/Trade/CAN_PER/CAN_PER_e/CAN_PER_index_e.asp; Agreement on Labour Cooperation between Canada and the Republic of Peru, available at http://www.sice.oas.org/Trade/CAN_PER/CAN_PER_e/Labour_CPFTA_e.asp (last visited Dec. 23, 2010) (Arts. 12-20, provide for consultation, panel review and monetary fines); Agreement on Environment between Canada and the Republic of Peru, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Canada-Peru_Environment-en.pdf (last visited Dec. 23, 2010) (under art. 12 dispute resolution is limited to consultations).

5. CARIFORUM - EC Economic Partnership Agreement (EPA), Oct. 2008, Preamble, arts. 183-85, available at http://www.sice.oas.org/Trade/CAR_EU_EPA_e/careu_in_e.ASP (last visited Dec. 23, 2010).

6. *Id.*, arts. 191-93.

even among contemporary FTAs that are not specifically addressed (including most of those listed in note 2, *supra*), as in the inclusion of labor or environmental councils, but for the most part the differences are minor.

In Part IV, I analyze the significance of changes in treatment of labor and environmental issues. Part IV also discusses opportunities and challenges for improving the functioning of labor and environmental provisions in existing FTAs, and incorporating labor rights and environmental provisions in future U.S. FTAs. Finally, in Part V I offer a few additional recommendations and conclusions.

II. LABOR, ENVIRONMENTAL AND OTHER TRADE AGREEMENT OBLIGATIONS AS HUMAN RIGHTS

As one prominent trade scholar has suggested, the broader, albeit hidden, linkages of trade and human rights should not be ignored, particularly not the significance of the so-called “rule of law” issues.⁷ How do broader non-labor and non-environmental provisions of FTAs reinforce and support the labor and environmental objectives of those agreements? In the FTAs, in addition to (the over-arching) government-to-government dispute settlement and broader obligations to provide administrative or judicial review of administrative decisions so as to assure administrative due process, there are almost always also specific transparency requirements.⁸ U.S. FTAs are also replete with provisions assuring non-discrimination against foreign persons by requiring the Parties and their administrative and legal institutions to extend national treatment for traders in goods, investors or service providers, among others. NAFTA itself has multiple such obligations relating to trade in goods, government procurement, investment and services,⁹ all of which may directly benefit private individuals.

Others have argued that the basic exceptions to free trade

7. Stephen J. Powell, *Regional Economic Arrangements and the Rule of Law in the Americas: the Human Rights Face of Free Trade Agreements*, 17 FLA. J. INT'L L. 59, 62 (2005) [hereinafter “Powell”]. See also STEPHEN J. POWELL, JUST TRADE (NYU Press, 2009) (addressing the trade-human rights linkages in detail).

8. See, e.g., NAFTA, art. 509 (providing for advance administrative rulings on customs issues); art. 510 (providing judicial review and appeal of customs determinations); ch. 18 (publication, notification and administration of laws, including review and appeal of decisions); NAAEC and NAALC administrative provisions, discussed *infra*.

9. NAFTA, *supra* note 1, art. 301 (trade in goods); art. 1002 (government procurement); art. 1102 (investment); art. 1202 (services); art. 1405 (financial services); art. 1703 (intellectual property).

obligations under Article XX of the General Agreement on Tariffs and Trade ("GATT"), especially those related to public morals, protection of human, animal and plant life and health and prison labor,¹⁰ demonstrate the existence of a relationship between international trade and human rights,¹¹ although meeting the requirements of Article XX's "chapeau" has proven difficult in practice.¹² (This is significant in part because the GATT Article XX exceptions are incorporated by reference into virtually all U.S. FTAs.¹³) Also, as Salmon Bal observes, Article XX exceptions apply to "allow measures considered harmful to market access when a sufficient social or economic justification exists."¹⁴ Nevertheless, in the Ministerial Declaration beginning the Doha Development Round there is no mention of labor rights in the tentative agenda, even though trade and environment is incorporated, albeit to a very limited degree.¹⁵

Making a compelling case for labor rights as human rights is more straight-forward, simply because many of the key labor rights principles are specifically mentioned in international human rights and other closely related conventions. For example, the Universal Declaration on Human Rights ("UDHR") expressly recognizes the right to work; free choice of employment; just and favorable conditions of work; protection against unemployment; non-discrimination and the right to equal pay for equal work; and the right to form and join trade unions.¹⁶ Even though the many

10. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, arts. XX(a), XX(b), XX(e).

11. Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 Minn. J. Global Trade 62, 63 (2001).

12. The Article XX exceptions can be invoked only if they are not applied in a non-discriminatory manner and not as "a disguised restriction on international trade." See, e.g., Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/AB/R), circulated Mar. 12, 2001, adopted Apr. 5, 2001, paras. 155-175.

13. See, e.g., NAFTA, art. 2101(1); CAFTA-DR, art. 21.1.1.

14. Bal, *supra* note 11, at 67-69. Bal suggests the reinterpretation of Article XX so that the "balance is in favor of non-trade issues. *Id.*, at 108. This treatment would require giving human rights, including labor and environmental rights, much broader treatment under Article XX than is currently provided by GATT/WTO jurisprudence, a highly unlikely development giving the extreme reluctance of most WTO Members to discuss labor issues at all in the WTO context.

15. Ministerial Declaration, Nov. 20, 2001, WT/MIN(01)/DEC/1, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited Feb. 2, 2011), para. 31 (trade and the environment). See also, e.g., Tarek F. Maassarani, *WTO-GATT, Economic Growth and the Human Rights Trade-Off*, SPG ENVIRONS ENVTL. L & POL'Y J. 269 (2005) (attacking "neo-liberalism instrumentalism, or the proposition that free trade can advance human rights").

16. U.N.G.A. Res. 217 (III 1948, Dec. 10, 1948), art. 23 [hereinafter "UDHR"].

UDHR provisions are more honored in the breach than in the observance, they are generally recognized as the obligations of states under customary international law. The rights to freedom of association and to join trade unions are also reiterated in the U.N. International Covenant on Civil and Political Rights.¹⁷ The U.N. International Covenant on Economic, Social and Cultural Rights provides most of the same “rights” albeit in somewhat different phraseology: non-discrimination in wages, safe and healthy working conditions, the right to form trade unions, and the right to strike, among others.¹⁸

The ILO, founded in 1919, considers as its mission and objective “promoting social justice and internationally recognized human and labour rights, pursuing its founding mission that labour peace is essential to prosperity.”¹⁹ The ILO’s internationally recognized human and labor rights include a declaration of the “core” labor rights of freedom of association and the right to collective bargaining; elimination of forced labor; abolition of child labor; and elimination of employment discrimination.²⁰ These are considered fundamental rights and must be respected by all members.²¹ It is, thus, no surprise that they have been incorporated in one form or another in all of the Bush era FTAs, as discussed in detail in Part III.

The correlation between human rights and environmental rights is more diffused and continues to develop, although the connection between environmental justice and human rights is evident.²² The issue is complicated because, unlike labor rights, environmental rights are not generally seen as running directly to individuals, with international environmental agreements other than most of the U.S. FTAs providing “little direct recourse to individual victims of environmental harm.”²³ Multilateral envi-

17. Dec. 16, 1966, 999 U.N.T.S. 171, art. 22.1; ratified by the United States Jun. 8, 1992[hereinafter “UNCCPR”].

18. Dec. 16, 1966, 993 U.N.T.S. 3. The United States is not a party. But more than 160 nations have ratified the Covenant [hereinafter “UNCESCR”].

19. ILO, About the ILO, Mission and objectives, *available at* <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang-en/index.htm> (last visited Dec. 23, 2010).

20. See ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, Jun. 18, 1998 as amended Jun. 15, 2010, *available at* <http://www.ilo.org/declaration/textdeclaration/lang-en/index.htm> (last visited Dec. 23, 2010).

21. *Id.*, para. 2.

22. See, e.g., Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 Stan. Env'tl. L. J. 71, 80-86. (2005).

23. Caroline Dommen, *How Human Rights Norms Can Contribute to*

ronmental agreements (“MEAs”) focus primarily on “constraining environmentally deleterious behavior, rather than preventing injuries to people.”²⁴ Nevertheless, as one scholar has noted, there is a “synergy” between human rights and environmental rights,²⁵ and a “substantial and synergistic confluence” between human rights law and environmental law has developed over the past twenty years.²⁶ The overlap is reflected in the 1992 Rio Declaration, which provides in its first principle that “[h]uman beings are at the centre of concerns for sustainable development. *They are entitled to a healthy and productive life in harmony with nature.*”²⁷ Logically, the human rights to life²⁸ and health,²⁹ even if considered secondary human rights by some, are also reasonably characterized as human rights, as they subsume the right to clean water, breathable air and adequate sanitation. One can posit that for many of the approximately three billion human beings living on less than two dollars a day, there is much less concern with basic human rights such as freedom of religion, freedom of the press and the right to participate in governance than with the elusive “rights” to clean water, clean air, and sanitation, rights which would significantly decrease the likelihood that one’s child dies of dysentery or intestinal parasites.³⁰

Environmental Protection: Some Practical Possibilities Within the United Nations System, in LINKING HUMAN RIGHTS AND THE ENVIRONMENT 105 (Romina Picolotti & Jorge Daniel Taillant, eds., 2003).

24. Osofsky, *supra* note 22, at 78.

25. Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: a Case Study in the Need for Enforceable International Environmental Human Rights*, 26 Stan. Env’tl. L.J. 3, 19 (2007).

26. George Pring & Catherine Pring, *Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment*, 11 OR. REV. INT’L L. 301, 305 (2009).

27. U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, Jun. 14, 1992, 31 L.M. 874 (1992), *also available at* <http://www.unep.org/Documents/Multilingual/Default.asp?documentid=78&articleid=1163> (last visited Dec. 22, 2010), Principle 1 (emphasis supplied).

28. UDHR, art. 3; UNCCPR, art. 6.1; this article has been interpreted by some to support those who believe that life begins at the moment of conception, although that conclusion does not appear to be required by the language of the article.

29. UNCESCR, *supra* note 17, art. 11 (“continuous improvement of living conditions”); art. 12.1 (“enjoyment of the highest attainable standard of physical and mental health”).

30. See Paul Stoller, *Social Upheaval and the Structure of Poverty in Africa*, Feb. 2, 2011, available at http://www.huffingtonpost.com/paul-stoller/social-upheaval-and-the-s_b_817481.html (last visited Feb. 28, 2011) (describing life in Africa at under \$2 per day, without running water, indoor plumbing or any source of clean drinking water, leading to gastrointestinal diseases, parasites and skin infections for your children and other threats to life itself, such as food shortages and malnutrition).

The fact that the connection between human rights and the environment is still evolving is reflected in the Aarhus Convention, in which the Parties recognize in the Preamble “that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself”³¹ The Convention itself is focused on developing environmental justice (rights, *inter alia*, to information, participation in environmental decision-making, and the right to access to courts to challenge the failure of states to comply).³² While the Convention, now in force,³³ is open to accession only by the members of the U.N. Economic Commission for Europe, many of the procedural requirements of the Convention are reflected in different form in the North American Agreement on Environmental Cooperation (under NAFTA) and in the subsequent Bush era FTAs.³⁴

Still, the dichotomy between “hard” human rights law that encompasses labor rights and the “soft” law that connects human rights to environmental rights and protection is not the most important consideration when one is dealing with FTAs. It is not necessary to build soft law into customary international law, or discuss the scope of general principles (because existing agreements are extremely general). Rather, in this analysis, we focus on provisions of bilateral, trilateral (NAFTA) or regional (CAFTA-DR) trade agreements that incorporate detailed rights and obligations, are legally binding on the Parties and are subject to mandatory, if imperfect, implementation procedures and dispute settlement mechanisms.

For example, as discussed in detail in Part III, virtually all of the U.S. FTAs, beginning with NAFTA, call for providing citizens of the Parties with opportunities for access to some kind of mechanism for addressing violations of the labor and environmental (and many other) obligations agreed to by the Parties. Those rights/causes of action are often so constrained (or limited to national government action) as to be non-functional, and thus, in many instances, are reasonably considered inadequate and

31. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Jun. 25, 1998, *available at* <http://www.unece.org/env/pp/documents/cep43e.pdf> (last visited Dec. 28, 2010).

32. *Id.*, arts. 5-9; see Pring & Pring, *supra* note 26, at 306-08 (discussing the Convention).

33. As of Oct. 30, 2001; see UNECE, Introducing the Aarhus Convention, *available at* <http://www.unece.org/env/pp/> (last visited Dec. 28, 2010).

34. See discussion in Part III, *infra*.

largely ineffective. But they exist nevertheless and in many respects go beyond what is available elsewhere, particularly with regard to environmental rights, which, unlike labor rights, do not provide injured individuals access to a variety of specialized tribunals. In particular, the Inter-American Commission on Human Rights, which celebrated its 50th anniversary in 2009, promotes structural reforms in human rights laws and their implementation throughout the Western Hemisphere and has evaluated thousands of individual petitions, more than 10,000 in the years 2002-2008 alone, typically providing individual review (“processing”) of over one hundred per year.³⁵

In addition, both the NAFTA “side” agreements and the labor and environmental provisions of subsequent agreements, such as CAFTA-DR and the Peru PTA, incorporate formal and informal institutions and procedures for furthering labor and environmental goals (including better laws and regulations) through cooperative activities, dissemination of information to the public and mutual efforts to improve national labor and environmental laws and regulations. Although to succeed such mechanisms depend, *inter alia*, on staffing and funding levels, they offer at least the possibility of significant change and improvement. Binding international agreements alone cannot assure that an FTA Party will observe the provisions of the agreement related to rule of law (or others for that matter), but the text may afford one Party leverage over another Party and the option of formal consultations and dispute settlement that would not be present otherwise, even without having to use the government-to-government dispute settlement provisions.

In the final analysis, compliance is in the hands of the national governments.³⁶ Moreover, one may hope that governments that are prepared to comply in good faith with the obligations they have entered into with regard to the trade and commercial aspects of an FTA would be prepared to do the same with the labor and environmental provisions. Those provisions embody, particularly in the Bipartisan Trade Deal (“BTD”) form, many of the same administrative transparency and procedural due process requirements as are applied to trade and commercial transactions under the agreements. If—and this is an enormous

35. IACHR, Annual Report 2009, Introduction, Chapter III B (c), (e) (statistics), available at <http://www.cidh.oas.org/annualrep/2009eng/Chap.I.eng.htm> (last visited Mar. 7, 2011).

36. Powell, *supra* note 7, at 70-71.

“if”—the United States complies with the labor and environmental FTA provisions, and provides adequate funding and technical support to its developing country partners, the other Parties may ultimately regard compliance with environmental and labor obligations as important as compliance with trade obligations under the agreements.

At the same time, if none of the Parties is prepared to make the mechanisms work as intended, as with the financially starved and politically beleaguered Commission and Secretariat under NAAEC, there is little chance that the provisions will contribute significantly to improving respect for labor rights and environmental quality in the affected Parties. So far, the provisions of U.S. FTAs relating to trade and to environment afford opportunities for major improvements in the observance of labor rights and environmental protection in the nations that are parties to the agreements, although, such opportunities have yet to be fully realized.

III. LABOR AND ENVIRONMENTAL RIGHTS UNDER US FTAS

The evolution of labor and environmental rights in U.S. free trade agreements is a process that has taken place in a non-linear manner over a sixteen year-period from the NAFTA negotiations beginning in 1991³⁷ to the modifications in the text of the Peru TPA in mid-2007. In this section, I discuss this evolution with particular focus on the texts. Throughout, the process reflects a relatively constant tension between opposing points of view, between those favoring the inclusion of strong labor rights and environmental provisions in FTAs and those believing, with equal fervor, that incorporation of such protections in trade agreements is misplaced.

The inclusion of labor and environmental provisions in U.S. FTAs was not a foregone conclusion; it was mostly an afterthought in relation to NAFTA, as explained below. None are found in the pre-NAFTA agreements with Israel and. However, in the United States, the relationship between trade and labor was well-established prior to NAFTA through non-reciprocal programs such as the Generalized System of Preferences (“GSP”),³⁸ the Caribbean

37. The first U.S. FTA, negotiated with Israel in 1985, was a relatively short document and contained no labor or environmental provisions. *See* Gantz, RTAs, *supra* note 3, at 208-18.

38. *See, e.g.* U.S. legislation authorizing the GSP program, 19 U.S.C. §§ 2461 et seq. (expired Dec. 31, 2010).

Basin Initiative (“CBI”),³⁹ and more recently with the Andean Trade Preference and Drug Eradication Act (“ATPDEA”)⁴⁰ and the African Growth and Opportunity Act (“AGO”).⁴¹ These unilateral programs, which are based on legislation rather than international agreements, lack permanency because, by their terms, they may expire, as happened most recently with GSP on December 31, 2010 and ATPDEA in mid-February 2011.

The United States has traditionally offered such programs to “beneficiary developing countries” only under terms of conditionality. To be eligible for GSP,

A GSP beneficiary must have taken or is taking steps to afford internationally recognized worker rights, including 1) the right of association, 2) the right to organize and bargain collectively, 3) freedom from compulsory labor, 4) a minimum age for the employment of children, and 5) acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health⁴²

The World Bank and other international financial institutions have in recent years made financial assistance similarly conditional on observation of ILO core labor standards and on principles of sustainable development.⁴³ Thus, there appears to be an increasing appreciation of what seems obvious in retrospect: if steps are taken to increase trade through RTAs or other mechanisms, there will be significant impacts on workers and on the environment, particularly in nations where RTA membership is designed to and succeeds in generating investment, jobs and exports.

39. 19 U.S.C. §§ 2701-2707.

40. 19 U.S.C. §§ 3201 et seq. (2009).

41. 19 U.S.C. §§ 3701-3739 (2006).

42. USTR, U.S. Generalized System of Preferences Guidebook (Jan. 2010), at 20 (citing 19 USC §2462(b)(2), *available at* http://www.ustr.gov/webfm_send/1597 (last visited Feb. 21, 2011)). “A GSP beneficiary must implement any commitments it makes to eliminate the worst forms of child labor.” *Ibid.*

43. See Tonia Novitz, *Core Labour Standards Conditionalities: A Means by Which to achieve Sustainable Development*, in *INTERNATIONAL ECONOMIC LAW, GLOBALIZATION AND DEVELOPING COUNTRIES* (Julio Faundez & Celine Tan, eds., Edward Elgar Publishers, 2010) 234, 242 (commenting on the practice of labor rights conditionality by various countries and the international financial institutions).

A. *NAFTA, the Environment and Labor*⁴⁴

The environment and labor provisions of NAFTA, including but not limited to the two “side” agreements, are unique in several respects. At the time NAFTA was negotiated by the George H.W. Bush Administration in 1991-1992 and modified by the Clinton Administration in 1993, these negotiations were among the first efforts to address environment and labor issues in an FTA, first in the body of NAFTA itself, and later with the separate North American Agreement on Labor Cooperation (“NAALC”),⁴⁵ the North American Agreement on Environmental Cooperation (“NAAEC”),⁴⁶ the Agreement creating the North American Development Bank (“NADBank”) and the Border Environment Cooperation Commission (“BECC”).⁴⁷ These first efforts represent an approach which, although changed by the United States in favor of incorporation of the labor and environmental provisions in the body of the FTA rather than in separate agreements, continues to affect RTAs concluded by the United States.

Even though NAFTA itself contained initially only limited environmental provisions, it accomplished what the WTO Agreements did not achieve; it established an order of precedence in relation to the three major MEAs, and two regional agreements.⁴⁸

44. This discussion of NAFTA provisions on the environment and labor is adapted from Gantz, RTAs, *supra* note 3, at 146-151.

45. North American Agreement on Labor Cooperation (“NAALC”), Sep. 14, 1993, *available at* <http://www.naalc.org/english/agreement.shtml> (last visited Jan. 10, 2011) [hereinafter “NAALC”].

46. North American Agreement on Environmental Cooperation (“NAAEC”), Sep. 14, 1993, *available at* <http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567> (last visited Jan. 10, 2010).

47. Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 1993, 32 I.L.M. 1545 (1994), *also available at* http://www.nadbank.org/pdfs/Charter_2004_Eng.pdf (last visited Jul. 24, 2007).

48. Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, amended Jun. 22, 1979, *available at* <http://www.cites.org/eng/disc/text.shtml> (last visited May 13, 2008); Montreal Protocol on Substances that Deplete the Ozone Layer, Sep. 16, 1987, amended Jun. 29, 1990, *available at* <http://www.unep.org/OZONE/pdfs/Montreal-Protocol2000.pdf> (last visited May 13, 2008); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, *available at* <http://www.basel.int/text/con-e-rev.doc> (last visited May 13, 2008); Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, La Paz, Aug. 14, 1983, *available at* http://untreaty.un.org/unts/60001_120000/12/10/00022468.pdf (last visited May 13, 2008); Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, Ottawa,

Specifically, in the event that NAFTA provisions conflict with three major MEAs, or two regional agreements, the provisions of the MEAs prevail to the extent they are inconsistent with NAFTA.⁴⁹

The side agreements were considered necessary when President Clinton succeeded President Bush in January 1993 after the NAFTA had been negotiated and signed, but before it had been submitted to Congress for approval. As a presidential candidate in October 1993, then Governor Clinton boldly endorsed NAFTA, but only on condition that NAFTA's environmental and labor provisions be strengthened.⁵⁰ Although those issues had been addressed earlier in an environmental impact assessment, candidate and then President Clinton's decision was driven in part by concerns of members of Congress and other elected officials on the U.S. side of the Mexican border that without attention to potential labor and environmental problems as part of the package working and living conditions on both sides of the border would deteriorate.⁵¹

Given the timing, and the reluctance of all Parties to reopen discussions of an already concluded agreement, the most practical solution was to negotiate one or more parallel agreements to address NAFTA's perceived environmental and labor shortcomings. Thus, the decision to treat labor and environmental issues in separate agreements was driven by sequence and timing, and not, as far as I have been able to determine, by any decision to relegate such issues to an inferior status.

1. Environment-Related Provisions within NAFTA Itself

In addition to NAFTA's preambular language and the hierarchy giving MEAs priority over inconsistent NAFTA provisions,

Oct. 28, 1986, available at <http://sedac.ciesin.org/entri/texts/bi-lateral/2.2X-CanXUS-Tby.Haz.html> (last visited May 13, 2008).

49. NAFTA, art. 104, annex 104.1. The provision also specifies that "where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement." It applies only to MEAs in force for all three NAFTA Parties; since the United States has not ratified the Basel Convention that convention is effectively excluded from the list.

50. Gerald F. Seib, *Clinton Backs the North American Trade Pact, But Candidates' Stances on the Issue Aren't Clear*, WALL ST. J., Oct. 5, 2002, at A14.

51. See, e.g., *The NAFTA: Report on Environmental Issues* ES-1 (Nov. 1993) ("the Promotion of trade and investment throughout the continent under the NAFTA has potential effects on the physical environment and on environmental policies and programs."

NAFTA's chapters on sanitary measures and standards, unlike their World Trade Organization counterparts, make explicit reference to "environmental conditions" and "the environment" as relevant factors in risk assessment and legal justification of standards, even where they affect international trade.⁵² Possibly for the first time in an RTA, NAFTA contains provisions to protect human, animal and plant health and safety and facilitates the use of standards, including those designed for environmental purposes, although subject to certain constraints.⁵³ The NAFTA investment provisions preserve the parties' right to apply environmental measures to firms operating within their territories, and bar the relaxing of domestic safety, health or environmental (or labor) standards as a means of attracting foreign investment.⁵⁴ The NAFTA dispute settlement mechanism is, in theory, mandatory where environmental disputes under NAFTA's provisions are concerned, so that parallel World Trade Organization remedies are not available.⁵⁵ Also, the General Exceptions in NAFTA, as noted earlier, make specific reference to permitting "environmental measures necessary to protect human, animal or plant life or health," "conservation of exhaustible natural resources" and barring imports made with prison labor.⁵⁶

2. North American Agreement on Environmental Cooperation

The NAAEC's objectives include protection and improvement of the environment; promoting sustainable development; increasing Party cooperation for conserving, protecting and enhancing the environment; supporting NAFTA's environmental goals; avoiding trade distortions or new trade barriers; strengthening cooperation to develop and improve environmental rules and regulations; enhancing compliance with environmental laws and regu-

52. NAFTA, arts. 715(1)(f), 903-907.

53. *Id.*, ch. 7, part B; ch. 9.

54. *Id.*, art. 1114.

55. *Id.*, art. 2005. *But see United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, DS381, consultations requested Oct. 24, 2008 (where the United States has insisted, unsuccessfully, that the action should have been brought under NAFTA rather than under the WTO's Dispute Settlement Understanding).

56. *Id.*, art. 2101(1), incorporating GATT, art. XX(b), (g) and (e); see Raymond B. Ludwiszewski & Peter E. Seeley, "Green" Language in the NAFTA: Reconciling Free Trade and Environmental Protection, in *THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT* (Judith H. Bello et al, eds. (ABA, 1994), at 375-385.

lations; promoting transparency and public participation in the development of environmental laws and regulations; promoting economically efficient environmental measures; and promoting pollution prevention policies and practices.⁵⁷ In the first instance, this is to be accomplished by each Party's obligation to enforce its environmental laws and regulations, provide private citizen access to legal remedies, and assure procedural due process for administrative and judicial proceedings.⁵⁸

The NAAEC is also designed to provide a mechanism for requiring the NAFTA parties to enforce their own internal environmental laws and regulations. Each Party, while maintaining the right to establish its "own levels of environmental protection," is to "ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations."⁵⁹ The latter commitment is not realistically enforceable, because NAAEC sets no substantive environmental standards other than to call upon each Party to "ensure that its laws and regulations provide for high levels of environmental protection."⁶⁰ Thus, nothing prevents a Party from weakening its environmental laws, and then enforcing them at the weakened level.

NAAEC creates a Commission for Environmental Cooperation ("CEC") consisting of a Council and a semi-autonomous Secretariat.⁶¹ Located in Montreal, Canada, the CEC is authorized to consider citizen complaints from private parties asserting failure to enforce environmental laws, with investigatory powers and authority to seek expert advice and issue reports.⁶² The Secretariat has the authority to develop a "factual record" when the submission so warrants.⁶³ Where the investigation demonstrates a NAFTA Party's "persistent pattern of failure . . . to effectively enforce its environmental laws," a process of binding consultation and dispute resolution through an arbitral process is made available.⁶⁴ This arbitral process, like the parallel process in the NAALC and the mechanisms in all subsequent U.S. FTAs, is open

57. NAAEC, *supra* note 46, art. 1

58. *Id.*, arts. 5-7.

59. *Id.*, art. 3.

60. *Id.*, art. 3.

61. *Id.*, arts. 8-9.

62. *Id.*, arts. 14-15.

63. *Id.*, art. 15.

64. *Id.*, art. 36.

only to the government parties.⁶⁵ For the United States and Mexico, an adverse arbitral decision with which the Party does not comply could result in trade sanctions. For Canada, in lieu of trade benefit suspension, a fine may be assessed and enforced in the (U.S.) federal court.⁶⁶ The process is clearly designed to encourage voluntary compliance; suspension of trade benefits is the last resort, occurring only after a complex and lengthy procedure that can be initiated only with the agreement of two of the three national representatives on the Commission.

While there have been more than sixty petitions filed with the CEC, no series of matters has been taken to arbitration or subjected to sanctions.⁶⁷ This reflects the requirement that two of the three governments must support the action and that only governments, not private parties, may initiate arbitration, as well as lack of enthusiasm on the part of all Parties for responding to citizen complaints. The principal value of the CEC/Secretariat mechanism is likely to expose a NAFTA government's failure to enforce its environmental laws in those cases in which the governments (acting through the CEC) permit the Secretariat to develop a factual record of the matter, rather than to compel compliance, which the Secretariat has absolutely no power to do. The Secretariat also has the authority to undertake reports on matters within the scope of its annual program, again with limitations that may be imposed by the CEC.⁶⁸

The majority of cases brought and resolved before the CEC were closed without the development of a factual record, usually on the grounds that the issues are already being dealt with by the national authorities or that the procedural requirements of the NAAEC have not been met. For example, in *Transgenic Maize in Chihuahua*, the Secretariat determined that the alleged violations of Mexican environmental law pertaining to risk assessment of growing transgenic maize were "indeed subject to a pending proceeding in Mexico," and as a result terminated the case.⁶⁹ Another matter, *Jetty Construction in Cancun*, was dismissed because the

65. See *id.*, art. 24 (providing that a panel may be convened by the Council "on the written request of any consulting Party . . .").

66. *Id.*, annex 36A.

67. See CEC, Citizen Submissions on Enforcement Matters, available at <http://www.cec.org/Page.asp?PageID=751&SiteNodeID=250> (last visited Feb. 2, 2011) (listing and discussing each of the enforcement matters under NAAEC); NAAEC, arts. 24-36.

68. *Id.*, art. 13.

69. CEC ID: SEM-09-001 (Mexico) (filed Jan. 28, 2009); see CEC decides not to recommend the development of a factual record on Transgenic Maize in Chihuahua

complainant's submission did not conform to procedural requirements.⁷⁰ Nevertheless, there have been approximately sixteen cases, or about 25% of the total, in which a factual record has been developed, often without the responding Party's full cooperation, and released to the public.⁷¹

While the factual records have provided the public with important information on the actions and omissions of the NAFTA governments, it is difficult to determine the extent to which such records have altered the behavior of the Parties. There are, however, a few success stories with the citizen submission process. For example, some observers believe that a citizen submission relating to the construction of a cruise ship pier at Cozumel, alleging Mexican government failure to enforce Mexican environmental law in the approval process, ultimately led to needed reforms in Mexican environmental law.⁷²

The CEC process for responding to citizen submissions is subject to both procedural and substantive flaws. Jay Tuchtton has suggested that in addition to the potential for significant delays, the process is deficient because the complaining Party has little opportunity to participate in the review process once a submission has been made, and has no access to the response of the NAFTA Party being challenged.⁷³ With regard to substance, even if the submitter of the complaint is successful in meeting the procedural requirements of the NAAEC causing the Council and Secretariat to create a factual record that is made public, there is still no

submission, available at http://www.cec.org/Page.asp?PageID=122&ContentID=3155&SiteNodeID=532&AA_SiteLanguageID=1 (last visited Jan. 10, 2011).

70. CEC ID: SEM-08-003(Mexico) (filed Nov. 17, 2008), available at http://www.cec.org/Page.asp?PageID=2001&ContentID=2410&SiteNodeID=545&BL_ExpandID= (last visited Jan. 10, 2011).

71. See *Cozumel*, CEC ID: SEM-96-001(Mexico) (filed Jan. 17, 1996), available at http://www.cec.org/Page.asp?PageID=2001&ContentID=2346&SiteNodeID=550&BL_ExpandID= (last visited Jan. 10, 2011) (explaining that the factual record after approval of the CEC was released in October 1997); CEC, Factual Records, available at <http://www.cec.org/Page.asp?PageID=924&SiteNodeID=543> (last visited Jan. 10, 2011) (listing the cases in which factual records were developed).

72. Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 Sr. LOUIS PUB. L. REV. 201, 226 (2008) [hereinafter "Wold, NAAEC"]., citing Gustavo Alanis Ortega, *Public Participation within NAFTA's Environmental Agreement: The Mexican Experience in Linking Trade, Environment and Social Cohesion*, in NAFTA EXPERIENCES, GLOBAL CHALLENGES 183, 184-185 (John J. Kirton & Virginia W. MacLaren, eds., 2002).

73. Jay Tuchtton, *The Citizen Petition Process Under NAFTA's Environmental Side Agreement: It's Easy to Use but Does it Work?*, 26 ENVTL. L. REP. 10018, ____ (1996).

guarantee that the Party will change its practices.⁷⁴

However, there are also more fundamental problems with the manner in which the NAAEC process has been implemented by the NAFTA Parties. As Chris Wold has noted,

The rigorous and professional manner in which the Secretariat has reviewed submissions has been instrumental in ensuring the integrity of the process. Nonetheless, actions and decisions of the Council have eroded public confidence in the process, leading the former director of the CEC's unit on Submissions on Enforcement Matters to declare that the submissions process—frequently referred to as the “teeth” of the NAAEC—suffers from “tooth Decay.”⁷⁵

In particular, “[t]he Council has sought to whittle away at the independence of the Secretariat by determining the scope of proposed factual records, a role designated to the Secretariat.”⁷⁶ With regard to one submission, where the submitters requested the Secretariat to prepare a factual record regarding the failure of the United States to enforce the Migratory Bird Treaty Act against logging interests, and where the Secretariat agreed that preparation of the factual record was warranted based on the evidence provided, the CEC nevertheless sharply limited the scope of the factual record to two examples, effectively barring review of any of the many other examples submitted by the applicants.⁷⁷

The restrictive approach of the CEC, in which it regularly undermines the citizen submission process, has continued into the Obama Administration. The environmental coalition Ecojustice recently withdrew a complaint against Canada. The complaint, filed in 2006, alleged that Canada had failed to protect some 197 species at risk under Canadian law.⁷⁸ In January 2011, the CEC decided to investigate this complaint, but limited the investigation to only 11 species and otherwise narrowed the issues. An Ecojus-

74. *Ibid.* See also DAVID HUNTER, JAMES SALZMAN & DURWOOD ZALKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1275-87 (4th ed., Foundation Press, 2010) (discussing the operation of the NAAEC).

75. Wold, NAAEC, *supra* note 72, at 228.

76. *Id.*

77. *Id.*, at 228-229; see CEC Secretariat, Article 15(1) Notification to Council that Development of a Factual Record is Warranted, A14/SEM/99-002/11/ADV (Dec. 15, 2000), available at <http://www.cec.org/files/pdf/sem/ACFA30.pdf> (last visited Jan. 28, 2011).

78. Ecojustice, *Species-at-risk defenders walk away from NAFTA review process*, Jan. 17, 2011, available at <http://www.ecojjustice.ca/media-centre/press-releases/species-at-risk-defenders-walk-away-from-nafta-review-process> (last visited Jan. 17, 2011).

tice representative protested that the CEC action “tells you that the citizen submissions process, touted by NAFTA promoters as the way to ensure the environment isn’t trampled by free trade, is a sham.”⁷⁹ In sort, the citizen complaint process is still being treated “as an adversarial, rather than a cooperative, process.”⁸⁰

The CEC and Secretariat, with officials who are well qualified to engage in technical analysis and research, have had significant accomplishments through cooperative work programs and data collection, as authorized by NAAEC.⁸¹ The governments have used the CEC, albeit cautiously, to collaborate on various environmental issues, such as trade flows of used electronics for proper disposal, encouraging “green” buildings and “greening” the region’s transportation corridors.⁸² For example, the CEC has issued a number of important reports and “North American Regional Action Plans,” particularly with regard to toxic chemicals.⁸³

The CEC and Secretariat also produced “North American Environment Outlook to 2030,” a report that “summarizes recent research concerning the major forces and underlying trends that are likely to shape the [North American] environment of North America in 2030.”⁸⁴ The CEC maintains a North American Environmental Atlas, which furnishes on-line information on environmental issues on a continent-wide basis.⁸⁵ This is only one feature of an excellent website that is well maintained despite CEC’s chronic shortage of funds.

The original 1994 budget of \$9 million annually has never been increased. It must continue to cover all CEC’s activities including the processing of citizen complaints, compilation of factual records and production of reports, even though it has never been increased,⁸⁶ In real terms, \$9 million today is worth far less

79. *Ibid.*

80. Wold, Evaluating NAAEC, *supra* note 72, at 232.

81. See NAAEC, arts. 10 (council functions), 13 (secretariat reports).

82. Joint Statement, Meeting of the NAFTA Free Trade Commission, Jan. 10, 2011 (Mexico City), at 2, available at http://www.economia.gob.mx/swb/work/models/economia/Resource/1350/1/images/Joint_Statement_Final_1_Ene_2011.pdf (last visited Jan. 11, 2011).

83. Wold, NAAEC, at 226-227.

84. CEC, Jul. 2010, at 11, available at http://www.cec.org/Storage/64/9458_Outlook2030_en.pdf (last visited Jan. 11, 2011).

85. Available at http://www.cec.org/Page.asp?PageID=924&SiteNodeID=495&AA_SiteLanguageID=1 (last visited Jan. 29, 2011).

86. Wold, NAAEC, *supra* note 72, at 227; See CEC, Operational Plan of the Commission for environmental Cooperation (2010), at 5 (showing the Parties’ aggregate contributions at US\$9 million), available at http://www.cec.org/Storage/85/8126_Operational_Plan_2010_en.pdf (last visited Feb. 22, 2011).

and supports far fewer activities than it did in 1994. More adequate funding would undoubtedly increase the ability of the CEC to fulfill its analysis and research functions, as well as functions related to responding to citizen submissions.

More generally, the NAAEC has also been criticized for failing to provide any minimum standard of environmental protection in the Parties' laws and regulations and for near impossibility of reaching a minimum level of enforcement of environmental violations. With regard to the former, it was probably impossible to consider specific standards without risking a "lowest common denominator" effect (a compromise among the Parties that would provide less environmental protection for some Parties than that afforded under then-effective domestic laws). With regard to the latter, it remains to be seen whether subsequent U.S. FTAs, which at least on paper provide for enforcement of persistent patterns of environmental violations under the general dispute settlement provisions of the FTA, but do not have CEC equivalents, will be more effective in encouraging enforcement of national environmental laws than the NAAEC.

In Canada, NAAEC applies only to the federal government. NAAEC will not apply to the provinces' environmental laws and regulatory actions unless and until provinces representing more than 55% of the Canadian population have separately accepted an inter-governmental agreement concluded in 1995. Despite the passage of nearly seventeen years and the location of the CEC in Montreal, only Alberta, Quebec and Manitoba have signed on.⁸⁷

3. NADBank and BECC

In November 1993, without the participation of Canada, the United States and Mexico established a pair of little known and under-appreciated institutions, the North American Development Bank ("NADBank") and the Border Environment Cooperation Commission ("BECC"). These entities are intended to facilitate investment in environmental infrastructure in the border region.⁸⁸ The NADBank, with paid-in capital of \$450 million after the five initial years and total authorized capital of \$3 billion, was designed to furnish "seed" money for border environmental infra-

87. NAAEC Canadian Office, Canadian Implementation, *available at* http://www.naaec.gc.ca/eng/implementation/implementation_e.htm (last visited May 13, 2008).

88. The NADBank/BECC Agreement also incorporates a little-used technical assistance program, ch. II, art. I, § 1(b).

structure projects approved by the BECC.⁸⁹ The agreement contemplates a bifurcated system with a development bank to fund the projects and a separate (perhaps more “people-friendly”) entity, the BECC, to act as a liaison with state and local entities to develop and certify worthy projects. As of September 2010, the BECC had completed 101 environmental infrastructure projects with an aggregate value of \$1.68 billion, with NADBank financing amounting to \$563.2 million.⁹⁰ Another 61 projects were in various stages of construction, bidding or design, with a total cost of \$1.7 billion, of which NADBank financing amounts to \$653 million.⁹¹

Although the NADBank and BECC were initially criticized for moving too slowly in the process of certifying projects and providing funding, much of the problem was likely due to the inherent nature of the mechanism. Many local governments lack the expertise to develop projects that are technically sustainable. The NADBank (which is in fact a bank even though a development bank) finds some of the projects to be financially wanting.⁹² From the outset it was evident that financial viability would be a problem for designing projects, particularly in Mexico. In Mexico, there is only limited history of payment of user fees for the provision of water and sewage services and neither country was willing to contribute sufficient financial resources to allow the NADBank to provide full grants rather than a combination of grants and loans.⁹³

Under such circumstances, most viable projects have been funded through a combination of loans and government grants, so that the annual fees would cover not only the loan servicing, but operating costs as well. After a disappointing start in which the initial proposed operating regulations were criticized in Congress and elsewhere for being non-transparent, the BECC quickly corrected the problem. In practice, the BECC has shown a greater commitment to public participation and response to local needs

89. See 19 U.S.C. § 3473 (1993) (authorizing the expenditure of funds for the NADBank).

90. BECC, *Quarterly Status Report*, Sep. 30, 2010, at 10, available at <http://www.nadbank.org/publications.html#reports> (last visited Jan. 10, 2011).

91. *Id.*, at 12.

92. Moreno et al, *Free Trade and the Environment: The NAFTA, The NAAEC, and Implications for the Future*, 12 TULANE ENVTL. L.J. 405 (1999).

93. See David A. Gantz, *The North American Development Bank and the Border Environment Cooperation Commission: A New Approach to Pollution Abatement Along the United States-Mexican Border*, 27 LAW & POL'Y INT'L BUS. 1027, 1046-1056 (1996) (discussing the initial problems and prospects for the NADBank and BECC).

and desires than most other government agencies on either side of the border.⁹⁴ Unfortunately for those supporting such mechanisms, the NADBank and BECC have not been replicated in subsequent U.S. FTAs.

4. NAFTA and Labor

NAFTA itself incorporates little coverage of labor issues except for references in the Preamble to creating new employment opportunities, improving working conditions and enhancing and enforcing basic workers' rights. NAFTA also provides for temporary visitors for business purposes in Chapter 16, but does not further deal with immigration related matters. A key objective of NAFTA was job creation, reflecting Mexico's pressing need to create about one million new jobs a year, and the shared (but usually unstated) desire of both the United States and Mexico to reduce illegal immigration from Mexico to the United States. This objective is implicit, rather than explicit, in the Agreement, for obvious political reasons.

The NAALC⁹⁵ shares many similarities to NAAEC, but with some differences that make it on the whole a somewhat weaker mechanism. This differentiation likely resulted from the side agreement negotiations, when mainstream environmental organizations were prepared to support NAFTA if they were satisfied with NAALC, while major U.S. labor organizations indicated to the Clinton Administration that they would not support NAFTA under any circumstances.

In NAALC, each Party retains the right to set and apply its own labor standards. Each Party is also required to provide in its laws for unspecified "high labor standards"⁹⁶ and to enforce labor rights through specified procedures, including citizen access to authorities.⁹⁷ NAALC also enumerates International Labor Organization principles that the Parties are committed to encouraging, including freedom of association; protection of the right to organize; the right to collective bargaining and to strike; prohibition of forced labor; protection for child labor; minimum employment standards; elimination of discrimination in employment; equal pay for men and women; prevention of and compensation for occupational injuries and illnesses; and protection of migrant

94. *Id.*, at 1045-1046.

95. NAALC, *supra* note 45.

96. *Id.*, art. 2.

97. *Id.*, art. 42.

workers.⁹⁸

NAALC provided initially for a Commission for Labor Cooperation ("CLC"), again consisting of a Council of Ministers and a Secretariat.⁹⁹ The head of the CLC is an executive director chosen for a three-year term; the position rotates among the three Parties,¹⁰⁰ with a staff made up of individuals from all three countries.¹⁰¹ In addition to the trilateral CLC mechanism, each NAFTA Party has established its own National Administrative Office ("NAO") (now the Office of Trade and Labor Affairs), which monitors labor rights issues in North America. The NAO/OTLA principal functions include "receiving complaints about non-enforcement of labor laws" by a NAFTA government.¹⁰² The NAO may seek consultations with another NAO on matters relating to the Agreement.¹⁰³ Any Party may request ministerial level consultations, and, if necessary, request the convening of an Evaluation Committee of Experts ("ECE"). The ECE is directed, after study and analysis, which may include public hearings, to produce a report for consideration by the ministers.¹⁰⁴

The formal dispute settlement mechanism, which is solely available to the governments like that of the NAAEC, may be utilized only where there is a "persistent pattern of failure . . . to effectively enforce enumerated labor standards." More significantly, standards enforceable by arbitration are limited to occupational safety and health, child labor or minimum wage technical labor standards.¹⁰⁵ In other words, a denial of the right to organize a union would not be subject to arbitration. The first step of the dispute settlement mechanism involves inter-governmental consultations. Further, fact-finding and/or mediation by the CLC may follow. If issues are not resolved at this point, a Party may request arbitration, a step requiring a two-thirds vote of the CLC for approval.¹⁰⁶ If an arbitral decision is rendered but the offending Party fails to comply, only then may trade benefits afforded to the violating Party be suspended.¹⁰⁷ There have been no arbitra-

98. *Id.*, annex 1.

99. *Id.*, arts. 8-14.

100. *Id.*, art. 12(1).

101. CLC, Secretariat, *available at* <http://www.naalc.org/english/secretariat.shtml> (last visited Dec. 21, 2010).

102. NAALC, arts. 15-16, esp. 16.3.

103. *Id.*, art. 21.

104. *Id.*, arts. 22-23, 25-26.

105. *Id.*, art. 27.1.

106. *Id.*, arts. 28-29.

107. *Id.*, art. 41.

tions under these provisions.

A total of 38 public communications had been recorded through 2008.¹⁰⁸ The process for submission of citizen complaints to the NAOs was frequently used in the early years of NAFTA but has tapered off in recent years; there have been only two filings since 2005.¹⁰⁹ Several of the complaints filed with the various NAOs for investigation have been the subject of ministerial consultations. These submissions included filings with the Mexican and U.S. NAOs concerning protection of migrant workers, freedom of association, protection of the right to organize and to collective bargaining, minimum employment standards, and prevention of occupational injuries and illnesses along with compensation for the same.¹¹⁰

In one example, in August 2007, a report was issued in response to a complaint filed in 2005 by a group of Mexican labor organizations charging that Mexico was failing to “enforce its labor laws in connection with freedom of association and protection of the right to organize, the right to bargain collectively, and the right to strike,” and that the government had failed to “conduct required on-site inspections to detect and remedy labor law violations concerning forced labor, child labor, minimum employment standards, employment discrimination, and occupational safety and health.”¹¹¹ The OTLA recommended consultation with the Mexican NAO on questions relating to enforcement of Mexican labor laws by Mexican authorities, including *inter alia*, compliance with procedural requirements, unwarranted delays, coordination between federal and state authorities, transparency, inspections of workplaces and discriminatory practices, as identified in the report.¹¹²

Here and elsewhere, the NAALC has had some success in shedding light on labor violations in each of the NAFTA nations through publicity and “soft” political pressure. A number of the early cases, including those against Sony (relating to working con-

108. CLC, NAALC Communications and Results, 1994-2008, *available at* <http://www.naalc.org/userfiles/file/NAALC-Public-Communications-and-Results-1994-2008.pdf> (last visited Feb. 2, 2011).

109. *Id.*, at 1.

110. CLC, Annual Report 2002, at 6-9, *available at* http://www.naalc.org/english/pdf/AR02_eng_web.pdf (last visited Jul. 27, 2007).

111. Public Report of Review of Office of Trade and Labor Affairs, Submission. 2005-03, U.S. Dept. of Labor, Aug. 31, 2007, at 3, *available at* http://new.naalc.org/UserFiles/File/Hidalgo_Report-FINAL_08-31-2007.pdf (last visited Jan. 11, 2011).

112. *Id.*, at 5.

ditions in Mexico,) GE-Honeywell (relating to obstacles to workers seeking representation by independent labor unions in Mexico,) and Wal-Mart (relating to the closure of plants to avoid unionization in Quebec), all resulted in substantial publicity and some improvement in the conditions in focus of the complaints.¹¹³ In these instances, informal consultations among NAOs have likely been as valuable as more formal mechanisms.

Yet, as one observer has noted,

[t]he scope and autonomy of the Secretariat . . . has always been quite constrained, although it did some useful work in its first few years. However, for all practical purposes it now appears to have disappeared entirely as an independent entity, having been absorbed into the U.S. NAO.¹¹⁴

Given the built-in limitations, it is not surprising that arbitration has never occurred under the NAALC. Historically, it appears that none of the three NAFTA Parties has made effective utilization of NAALC a high priority, with the typical focus placed on organizing conferences and seminars and producing research publications instead of addressing citizen complaints.¹¹⁵

The NAALC, like the NAAEC, is not fully operational in Canada. Although adopted by the federal government in 1995, only Alberta, Manitoba, Quebec and Prince Edward Island have approved the intergovernmental agreement to date.¹¹⁶

*B. United States—Jordan Free Trade Agreement*¹¹⁷

The FTA with Jordan was the only FTA negotiated by the Clinton Administration, and is the only U.S. FTA concluded without the benefit of “fast-track”/Trade Promotion Authority (“TPA”).¹¹⁸ In significant respects, the Jordan FTA is more similar

113. See Jonathan Graubert, “Politicizing” a New Breed of “Legalized” Transnational Political Opportunity Structures: Labor Activists Uses of NAFTA’s Citizen Petition Mechanism, 26 BERKELEY J. EMP. & LAB. L. 97, 115-20 (2005).

114. Ruth Buchanan & Rusby Chaparro, *International Institutions and Transnational Advocacy: The Case of the North American Agreement on Labor Cooperation*, 13 UCLA J. INT’L L. & FOREIGN AFF. 129, 157 (2008).

115. See, CLC, Bi-Annual Report, 2008-2009, at 6, available at [http://new.naalc.org/userfiles/file/INFORME-ING%20051110\(1\).pdf](http://new.naalc.org/userfiles/file/INFORME-ING%20051110(1).pdf) (last visited Jan. 11, 2011).

116. See Folsom et al, at 625-626; Ian Robinson, *The NAFTA Labour Accord in Canada: Experience, Prospects and Alternatives*, 10 CONN. J. INT’L L. 475, 477-482 (1995).

117. This section is adapted in part from Gantz, RTAs, *supra* note 3, at 221, 227-29.

118. There may be others in the future. For example, although the United States—Korea FTA was concluded under TPA, issues arise as to whether the modifications agreed to in December 2010 in the form of an exchange of letters and agreed minutes

in form and substance to the United States—Israel FTA, negotiated almost fifteen years earlier, than to NAFTA. The Jordan FTA consists of a preamble, nineteen *articles*, three annexes and a variety of joint statements, memoranda of understanding and various side letters. Still, by comparison with NAFTA and subsequent U.S. FTAs, such as those with Chile, Singapore, and CAFTA-DR, each of which contains twenty or more *chapters*, the Jordan FTA is a compact bare-bones package, presumably reflecting the preference of the Clinton Administration for a somewhat less detailed and comprehensive FTA than NAFTA.

The political complexities surrounding the negotiation and U.S. implementation of the Jordan FTA were perhaps greater than with any other U.S. FTA. Although there is no direct legal relationship, the existence and timing of the Jordan FTA were linked to the Middle East peace negotiations taking place simultaneously, a major foreign policy initiative of the Clinton Administration, and to Jordan's support of the Oslo accords and peace with Israel.¹¹⁹ The approval of the FTA by the U.S. Congress¹²⁰ occurred after more than a year of bickering over labor and environmental provisions, just a few weeks after the September 11, 2001 attack on the World Trade Center in New York. This was anything but coincidence. (The Jordanian National Assembly approved the agreement by acclamation in May 2001.¹²¹) As reported at the time, the agreement was "intended to show U.S. appreciation of Jordan's efforts in supporting the Mideast peace process and in combating international terrorism . . . The rush to pass the Jordan trade pact illustrates how the Sept. 11 attacks have recalibrated the politics of normally divisive issues such as trade."¹²²

Still, despite, or perhaps because of, the political overtones, the Jordan FTA broke new ground.

will come within the strictures of TPA See Amy Tsui, *USTR Issues Final Texts on Korea Pacts, Setting Stage for Legislative Consideration*, 28 INT'L TRADE REP. (BNA) 272 (Feb. 17, 2010).

119. See Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan (Israel-Jordan), Oct. 6, 1994, available at <http://usembassy-israel.org.il/publish/peace/ijpeace.htm> (last visited Feb. 22, 2011).

120. United States-Jordan Free Trade Area Implementation Act, Pl. 107-43, 107th Cong., 1st sess., 115 Stat. 2431, 19 U.S.C. § 2112 Note (2001).

121. Royal Decree, Official Gazette No. 4486, at 1664 (Apr. 1, 2001).

122. Warren Vieth & Janet Hook, *Senate Passes Free-Trade Pact with Key Ally Jordan*, LOS ANGELES TIMES, Sep. 25, 2001, at A-8.

1. Environmental Protection Provisions

Article 5 represents the first instance in a U.S. FTA in which broad environmental protection provisions have been directly incorporated into the body of a trade agreement, making them subject to the general dispute resolution provisions. Many of the substantive obligations are a carry-over from either NAFTA itself or from the NAAEC, as discussed in Part III-A above. The recognition that it is “inappropriate to encourage trade by relaxing domestic environmental laws” and the obligation not to waive such laws for that purpose,¹²³ reflects similar language in NAFTA.¹²⁴ Also as in NAFTA, each Party retains the right to establish its own levels of environmental protection, development policies and priorities, while striving “to assure that its laws provide for high levels of environmental protection.”¹²⁵

As discussed earlier, under the NAAEC, dispute settlement could, in theory, be triggered when any Party requests consultations alleging “a persistent pattern of failure by the other Party to effectively enforce its environmental law.”¹²⁶ The language of the Jordan FTA is somewhat different, but similar in coverage: “A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.”¹²⁷ For each Party, the Jordan FTA also preserves discretion over “investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities.” This approach effectively permits a “reasonable exercise of such discretion.”¹²⁸

Making environmental disputes subject to the general dispute resolution mechanism (Article 17), rather than to the weaker NAAEC mechanism, was a significant development. Nevertheless, it has had its limitations, even before the Bush Administration effectively agreed not to use it. First, as with the NAAEC,¹²⁹ a single violation or series of violations is not sufficient to trigger

123. JFTA, art. 5.1.

124. NAFTA, art. 1114(2).

125. JFTA, art. 5.2; NAAEC, art. 3.

126. NAAEC, *supra* note 46, art. 22.1.

127. JFTA, art. 5.3(a).

128. *Id.*, art. 5.3(b).

129. See NAAEC, *supra* note 46, art. 24(1).

dispute settlement; there must be a “sustained or recurring course of action or inaction.” Second, the violations must affect trade between the Parties, although that concept is not defined in the Agreement and has not been tested by litigation. Investment is not discussed as there are no investment protection provisions in the Jordan FTA, even though a measure that affects trade likely affects investment as well. Investment is regulated in a separate, contemporary U.S. – Jordan Bilateral Investment Treaty, which does not contain any environmental provisions.¹³⁰

The Jordan FTA lacks any mechanism, whether bilateral or national, for the submission and acceptance of citizen submissions charging failure by either of the Parties to comply with their environmental law and regulations.

Even this relatively limited effort to provide enforceable environmental obligations provoked opposition in the Congress. In part, the opposition was concerned (with good reason based on the NAAEC experience) that the United States could well be the respondent rather than the moving Party in environmental disputes; others opposed the inclusion of such language in a trade agreement at all. These factors significantly contributed to the delay in U.S. approval of the Jordan FTA.¹³¹ The controversy also demonstrates the challenges for the United States in exporting its environmental (and labor) standards to countries that are not in an economic position to be able to afford them.¹³² Even so, the expanded level of environmental protection in the Jordan FTA may well be “an important step forward in the continuing harmonization of free trade and environmental protection policy.”¹³³

As with NAFTA, the United States completed an environmental review of the Jordan FTA.¹³⁴ The review focused on trans-

130. United States – Jordan Bilateral Investment Treaty, Jul. 2, 1997, *available at* http://www.jordanecb.org/pdf/Jordan_BIT.pdf (last visited Dec. 21, 2010).

131. See Andrea N. Anderson, *The United States Jordan Free Trade Agreement, United States Chile Free Trade Agreement and the United States Singapore Free Trade Agreement: Advancement of Environmental Preservation?*, 29 BROOK. J. INT'L L. 1221, 1227-1230 (2004) (providing an extensive discussion of Article 5 and the controversy surrounding the inclusion of environmental provisions in the JFTA).

132. See Emily Harwood, *The Jordan Free Trade Agreement: Free Trade and the Environment*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 509, 538 (2002).

133. *Id.*, at 540.

134. Final Environmental Review of the Agreement on the Establishment of a Free Trade Area Between the Government of the United States and the Government of the Hashemite Kingdom of Jordan (undated), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file64_5111.pdf (last visited Sep. 5, 2007). Jordan was also obligated to complete an environmental review for review by the Joint Committee. JFTA, art. 15.2(f).

boundary and global effects on trade in endangered species, migratory birds and protected areas, and concluded that it had no evidence to show an adverse effect on Jordan's record in these areas.¹³⁵ Jordan and the United States also concluded a separate initiative on technical environmental cooperation between the two countries.¹³⁶

2. Labor Provisions

The Labor rights obligations under the Jordan FTA are generally parallel to those relating to environmental obligations. The United States and Jordan:

reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its follow-up. The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in paragraph 6 are recognized and protected by domestic law.¹³⁷

The Paragraph 6 principles are the right of association; right to organize and bargain collectively; prohibition on forced labor; minimum employment age for children; and acceptable conditions of work regarding minimum wages, work hours and occupational safety and health. Even though the obligation is "strive" rather than "shall," this language goes beyond prior trade agreements, and undoubtedly reflects Clinton Administration efforts driven by their organized labor constituency to incorporate more specific labor provisions in FTAs. Nonetheless, the obligations remain considerably weaker than those dictated by the Bipartisan Trade Deal ten years later.

The labor provisions are also subject to normal dispute settlement under the Jordan FTA. However, the focus in Article 6 as shown above, in contrast to the NAALC, is on international labor standards rather than on national labor laws, and the Parties are to strive to ensure that their labor standards are "consistent with the internationally recognized labor rights" specified in Paragraph 6.¹³⁸ Most significantly, the labor provisions of the Jordan FTA are, unlike the NAALC obligations, enforceable in Party-to-Party

135. *Id.*, at 2.

136. Joshua Ruebner, *U.S.-Jordan Free Trade Agreement*, Cong. Research Service, May 1, 2001, at CRS-13.

137. JFTA, art. 6.1.

138. *Id.*, art. 6.3.

arbitration. There is no National Administrative Office or Commission under the agreement or other mechanism for investigating citizen complaints. The “Joint Committee” that has general jurisdiction under the agreement is empowered, *inter alia*, to consider “enhanced opportunities to improve labor standards,” if suggested by either Party.¹³⁹ As under the environmental provisions, the Parties agree that it is “inappropriate to encourage trade by relaxing domestic labor laws.”¹⁴⁰

The record of public disputes under the labor (or the environmental) provisions of the Jordan FTA since it became effective in 2002 is limited. In September 2006, the AFL-CIO and the National Textile Association filed a complaint with the U.S. Government and demanded that it institute dispute settlement proceedings under the Agreement.¹⁴¹ The complaint charged that Jordan violated its commitment to promote core labor standards by restricting union membership only to Jordanian nationals working in the “qualified industrial zones” created under the United States – Israel Free Trade Agreement in 1997.¹⁴² By this limitation, Jordan has allegedly excluded hundreds of thousands of foreign workers (such as those from Egypt, India and Sri Lanka) from freedom of association or union representation.¹⁴³ Other violations, including Jordan’s failure to enforce its own labor laws, were also alleged.

No formal dispute settlement proceedings appear to have been initiated, although it seems likely that the issue was raised at diplomatic levels not only by the United States, but also by the EU and other Jordanian trading partners. In any event, the Jordanian Government responded. In an official report issued several years later detailing the extensive changes in Jordanian labor laws, administration and enforcement, the Government of Jordan acknowledged “that improvements in labour administration were necessary in the apparel industry and across the country. As a result, the Government committed itself to a long-term

139. *Id.*, art. 6.5.

140. *Id.*, art. 6.2.

141. AFL-CIO and National Textile Association Complaint under the U.S.-Jordan FTA Labor Chapter: Executive Summary (Sep. 21, 2006), available at http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/Jordan_Executive_Summary.pdf (last visited Feb. 21, 2011).

142. Ministry of Labour, *Labour Administration Compliance in Jordan: A Multi-stakeholder Collaboration* (Feb. 2008, at 10-11, available at <http://www.jordanembassyus.org/new/LabourAdministrationandComplianceinJordanFinalLT.pdf> (last visited Feb. 21, 2011) [hereinafter “Labour Administrative Compliance”].

143. *AFL-CIO Complaint*, *supra* note 141.

comprehensive strategy to enhance labour administration and labour law compliance nationwide, and to becoming a model of labour compliance in the region.”¹⁴⁴ The collaborators included the Canadian International Development Association, USAID, the EU, the ILO and the World Bank’s International Finance Corporation.¹⁴⁵

C. 2002 Trade Promotion Authority and Agreements with Chile, Singapore and CAFTA-DR

Because of the unusual approach to negotiation and enactment of trade agreements in the United States through the so-called “Trade Promotion Authority” (“TPA”) (formerly “fast-track”) as described below, the Congress played a significant role in determining the content of the trade agreements negotiated by the Bush Administration, including but not limited to provisions relating to labor and the environment. As a practical matter, the Bush Administration could not complete the negotiations with Chile and Singapore that were initiated in the final days of the Clinton Administration or pursue other subsequent FTAs without TPA. The negotiation and enactment of TPA resulted in further evolution of the U.S. approach to such addressing labor and environmental concerns. TPA as interpreted by the Bush Administration is reflected in the FTAs with Singapore, Chile, CAFTA-DR, Morocco, Bahrain, Australia and the initial versions of the agreements with Peru, Panama, Colombia and South Korea. While there are some variations in the labor and environmental provisions of the first six such agreements, most are quite similar. The focus of this section will be on relevant provisions in the CAFTA-DR, in part because it is the only such agreement other than NAFTA with a fully functioning environmental secretariat and the ability to develop a factual record in response to citizen submissions.

While neither President Bush nor President Obama have possessed TPA since 2007, should the Obama Administration decide to move forward with any new trade negotiations to conclusion, either as part of the Doha Development Round of WTO trade

144. *Labour Administration Compliance*, *supra* note 142, at 4.

145. *Ibid.*

negotiations¹⁴⁶ or with the Trans-Pacific Partnership,¹⁴⁷ the President will necessarily have to seek such authority from Congress. Such legislation in many respects, probably including the labor and environmental provisions, will likely resemble the 2002 version, as modified by the provisions of the Bipartisan Trade Deal discussed below. (The three pending FTAs with South Korea, Panama and Colombia were concluded by the Bush Administration before the expiration of the TPA, so their consideration by Congress is subject to TPA constraints.)¹⁴⁸

1. General Considerations for Fast-Track and TPA

For practical reasons, most foreign governments are unwilling to complete substantive trade negotiations with the United States in the absence of “fast-track” provisions most recently incorporated under the President’s TPA. Under the version of TPA in force through June 30, 2007, once the agreement was formally submitted to Congress, Congress limited its authority to casting only a “yes” or “no” vote on a trade agreement; Congress could neither amend any provisions nor unduly delay consideration of the agreement and the implementing legislation once the President submitted it to Congress.¹⁴⁹ In the absence of TPA, Congress has had the ability to demand amendment of a trade (or any other) pending international agreement, so as to make the agreement more attractive to Congress and inevitably less attractive to the foreign governments,¹⁵⁰ or Congress may have simply delayed action indefinitely. Foreign governments want to avoid both of these negative effects.¹⁵¹

146. See WTO Ministerial Declaration, Nov. 14, 2001, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (setting out the initial agenda for the negotiations).

147. See White House, *Trans-Pacific Partnership: Progress Toward a Regional Agreement*, Nov. 13, 2010, available at <http://www.whitehouse.gov/the-press-office/2010/11/13/trans-pacific-partnership-progress-towards-a-regional-agreement> (last visited Jan. 329, 2011) (reporting on the November 2010 negotiating session).

148. For reasons explained in the text, *infra*, the applicability of the TPA provisions to the FTA with Colombia is uncertain. There is no significant doubt as to the other three.

149. 19 U.S.C. § 3805(b)(2) (Supp. 2002).

150. See Leslie Alan Glick, *World Trade After September 11, 2001: The U.S. Response*, 35 CORNELL INT’L L.J. 627, 637-38 (2002) (discussing Congress’ opposition, on constitutional and other grounds, to TPA because of limitations on congressional power).

151. The Kennedy Round of GATT negotiations most clearly illustrated this problem, when Congress declined to vote on two of the major negotiated components (including a new Antidumping “Code”), prompting anger by the European Communities and a pledge that they would not negotiate again with the United

In return for the agreement by the House and Senate to limit debate and to conduct only an up-or-down vote without the possibility of amendments, the legislation imposed detailed substantive criteria on the President for conducting trade negotiations. In addition, TPA (along with certain provisions of the House and Senate rules) required the President to obtain permission, in a process that effectively permits a congressional veto, before he may negotiate each specific agreement.¹⁵² Also, consultations with Congress were required throughout the negotiating process.¹⁵³ Additionally, an environmental impact assessment was required, as were a series of trade advisory committee reports, including but not limited to labor and environmental issues.¹⁵⁴

With one exception, a president has never sent an FTA to Congress knowing that there was a strong likelihood that it would be disapproved.¹⁵⁵ However, Bush Administration officials became frustrated when the Democratic Congress in late 2007 and early 2008 effectively stalled the FTAs with Panama, Colombia and South Korea by implicitly or explicitly threatening disapproval. Accordingly, President Bush decided to send the Colombia FTA forward to Congress without having consulted on implementing legislation and despite uncertainties about whether there were

States without assurances that such a result would not recur. C. Fred Bergsten, *Trade Has Saved America from Recession*, FIN. TIMES, June 30, 2008, available at http://www.ft.com/cms/s/0/d87f2158-46a4-11dd-876a-0000779fd2ac.html?ncklick_check=1 (last visited Feb. 22, 2011).

152. 19 U.S.C. § 3803 (Supp. 2002).

153. 19 U.S.C. § 3805(a)(1)(A) (Supp. 2002). Also, the agreement had to be presented to Congress at least ninety days before either the President or his delegate may sign it. Congressional consideration would not begin until the President transmitted the final agreement to Congress. The completed agreement, when transmitted to Congress, was to be accompanied by a complete draft of the implementing legislation and a "Statement of Administrative Action" explaining what changes in U.S. laws were required, and demonstrating the agreement's consistency with the negotiating objectives stated in the TPA legislation. 19 U.S.C. § 3805(a)(1)(C) (Supp. 2002). TPA also provided for a study by the U.S. International Trade Commission ("USITC") of the economic impact of each FTA on the United States. With regard to labor and environmental language in trade agreements, TPA directed the President to create consultative mechanisms (advisory committees) to promote respect for core ILO labor standards and for protection of the environment and human health. Consultations with prospective FTA partners were also required, with the provision of technical assistance if needed, and various review and reporting requirements. 19 U.S.C. § 3802(c) (Supp. 2002).

154. 19 U.S.C. §§ 3802(c), 3804(e) (Supp. 2002).

155. Arguably, the decision to send CAFTA-DR to the Congress was almost as big a gamble; it ultimately passed the House of Representatives by only two votes. See Gantz, RTAs, *supra* note 3, at 162-163 (discussing the "near defeat" of CAFTA-DR due to strong Democratic Party opposition, primarily to the labor and environmental provisions).

sufficient votes for enactment.¹⁵⁶ The immediate, unprecedented, but predictable Congressional reaction was to change the rules of the House of Representatives, obviating the need to vote on the Colombia FTA within ninety legislative days and permitting the House to vote on the FTA at a time of its own choosing instead.¹⁵⁷

2. Negotiating Objectives of TPA

The "Trade Negotiation Objectives" in the Trade Act of 2002 were designed to guide U.S. trade policy and represented a compromise between Congress (reflecting NGO and labor union misgivings) and President Bush (probably reflecting the predominant views of the business community). They were applicable to trade agreements negotiated beginning August 6, 2002, and signed by March 31, 2007.¹⁵⁸ That group included the then-ongoing Chile, Singapore, and WTO negotiations, the since-abandoned Free Trade Agreement of the Americas negotiations,¹⁵⁹ and subsequent FTAs concluded within ninety days before June 30, 2007, the day TPA expired.¹⁶⁰ The latter group included FTAs with Australia, Bahrain, CAFTA-DR, Colombia, Morocco, Oman, Panama and South Korea. The focus in this discussion is on the labor and the environment requirements, among the most controversial provisions.¹⁶¹ Among the listed "Overall trade negotiating objectives" were the following:

* * *

"(5) to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources;

(6) to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO . . .

156. President George W. Bush, Remarks on the Colombia Free Trade Agreement (Apr. 7, 2008) (transcript available at http://www.washingtonpost.com/wp-dyn/content/article/2008/04/07/AR2008040700999_pf.html) (announcing his intention to send the FTA immediately to Congress so as to force a vote by the end of the session).

157. *House Approves Fast-Track Rules Change for U.S.-Colombia FTA*, INSIDE U.S. TRADE, Apr. 11, (2008). TPA "expressly recognizes the constitutional right of either House to change the rules" (so far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as any other rule of that House. 19 U.S.C. § 3805(c)(2) (Supp. 2002). That is what the House did.

158. 19 U.S.C. §§ 3802-3803 (Supp. 2002).

159. See Gantz, RTAs, *supra* note 3, at 263-72.

160. 19 U.S.C. §§ 3805, 3806 (Supp. 2002).

161. Others included investment protection.

and an understanding of the relationship between trade and worker rights

(7) to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade; [and]

* * *

(9) to promote universal ratification and full compliance with ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor.¹⁶²

In addition to these general negotiating objectives, which leave room for considerable negotiating discretion, specific negotiating authority was incorporated, *inter alia*, for labor and environmental objectives. This reflected the fact that the most controversial of all FTA-related discussions in the United States in recent years, as discussed with regard to the United States—Jordan FTA earlier, have been over whether U.S. trade agreements should include provisions relating to labor and the environment and, if so, what content should be incorporated in the agreements. Congressional and private opinions have varied widely, from opposing such provisions entirely to seeking assurances that any violations of trade or environmental standards are punished in the same manner as any other violations of the FTAs and that strict labor and environmental standards are included in the FTA texts.¹⁶³ Many Republicans who found the language dictated in TPA overly strong likely supported the compromise because of the perceived need of the Bush administration to have the necessary trade agreement negotiating authority.

The actual text favored the generally limited coverage of labor

162. 19 U.S.C. § 3802(a) (Supp. 2002).

163. See, e.g., MARY JANE BOLLE, CONG. RESEARCH SERV., JORDAN-U.S. FREE TRADE AGREEMENT: LABOR ISSUES, 2-4 (2001), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-2030:1>; Andrea N. Anderson, *The United States Jordan Free Trade Agreement, United States Chile Free Trade Agreement and the United States Singapore Free Trade Agreement: Advancement of Environmental Preservation?*, 29 BROOK. J. INT'L L. 1221, 1221-22 (2004); Emily Harwood, Note, *The Jordan Free Trade Agreement: Free Trade and the Environment*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 509, 509 (2002); Marley L. Weiss, *Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 689-701 (2003).

and the environment espoused by the Republicans over the broader coverage preferred by some Democrats:

"The principal negotiating objectives of the United States with respect to labor and the environment are—

(A) to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its environmental or labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party after entry into force of a trade agreement between those countries;

(B) to recognize that parties to a trade agreement retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor or environmental matters determined to have higher priorities, and to recognize that a country is effectively enforcing its laws if a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources, and no retaliation may be authorized based on the exercise of these rights or the right to establish domestic labor standards and levels of environmental protection;

(C) to strengthen the capacity of United States trading partners to promote respect for core labor standards . . . ;¹⁶⁴

(D) to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development;

(E) to reduce or eliminate government practices or policies that unduly threatens sustainable development;

(F) to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies, goods, and services; and

(G) to ensure that labor, environmental, health, or safety policies and practices of the parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against United States exports or serve as dis-

164. 106 "The term 'core labor standards' means— (A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." 19 U.S.C. §3813(6) (Supp. 2002).

guised barriers to trade.”¹⁶⁵

The limiting provisions in paragraphs A and B reflect similar language in the NAALC. TPA’s vague language allowed President Bush to incorporate language on labor issues in FTAs without any binding obligations to include them in national law and to enforce core labor standards. This approach was unsatisfactory to many members of Congress and other labor rights advocates, as the subsequent BTDA changes indicate.

The debate is reflected in the opposing positions of Democratic Senator Baucus and Republican Senator Grassley, both of whom acted as the Finance Committee Chairman in recent years. Baucus objected to the Chile FTA, because it did not meet the standard for labor rights provisions established in the Jordan FTA.¹⁶⁶ Grassley argued that “[s]ome members of Congress [i.e., Baucus] are even arguing that future agreements must follow the ‘Jordan Standard’”¹⁶⁷ Grassley had earlier contended that the TPA provisions were designed to preserve the flexibility of the Executive Branch to take into account the situations in individual FTA negotiating partners.

3. Environment and Labor in CAFTA-DR¹⁶⁸

While CAFTA-DR followed the completion of the FTAs with Singapore and Chile by several years, the general approach to labor and the environment reflected only relatively minor changes from the earlier agreements. In Chapter 16 (labor) of CAFTA-DR, the Parties must “strive to assure” that their laws are consistent with their commitments under ILO agreements and with “core” labor principles specified in Chapter 16.¹⁶⁹ This language has been criticized because it is not an absolute obligation, i.e., the provision does not say “shall assure . . .” as in the provisions of the Peru TPA¹⁷⁰ and other very recent U.S. FTAs. In addition, “[a] Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties”¹⁷¹ Furthermore, “[e]ach Party retains the right to exercise discretion with respect to investiga-

165. 19 U.S.C. § 3802(b)(11) (Supp. 2002).

166. 148 CONG. REC. 19,121-22 (2002) (statement of Sen. Baucus).

167. 148 CONG. REC. 17,588 (2002).

168. Adapted from Gantz, RTAs, at 194-96.

169. *Id.*, arts. 16.1 and 16.8.

170. See Part III(D), *infra*.

171. CAFTA-DR, art. 16.2(a).

tory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities."¹⁷²

Again, these consistent limitations reflect the fact that the provisions of the FTAs are reciprocal, and experience under the NAALC whereby U.S. as well as Mexican labor practices were periodically challenged. Moreover, for the United States, "labor laws" are effectively federal laws enforceable by the federal government,¹⁷³ excluding state labor laws, regulations and enforcement from the scope of CAFTA-DR.

CAFTA-DR requires creation of an office similar to the NAO:

"Each Party shall designate an office within its labor ministry that shall serve as a contact point with the other Parties, and with the public, for purposes of carrying out the work of the Council, including coordination of the Labor Cooperation and Capacity Building Mechanism. Each Party's contact point shall provide for the submission, receipt, and consideration of communications from persons of a Party on matters related to the provisions of this Chapter, and shall make such communications available to the other Parties and, as appropriate, to the public."¹⁷⁴

The Agreement provides for a variety of obligations and procedural guarantees relating to enforcement of national labor laws and mechanisms to increase public awareness.¹⁷⁵ Institutions designed for use as a basis for intergovernmental cooperation and capacity building are also incorporated.¹⁷⁶

Certain controversies regarding enforcement of labor laws are subject to the dispute settlement provisions of Chapter 20, which provides a process for consultation similar to Chapter 20 of NAFTA. If unsuccessful, the consultation may result in binding arbitration between any two or more Parties to CAFTA-DR. Again, only governments have access to the dispute settlement process. As indicated above, individual violations are not subject to dispute settlement.

Most significantly for those in Congress who had advocated treatment of labor rights violations in the same manner as viola-

172. *Id.*, art. 16.2(b).

173. CAFTA-DR, art. 16.8.

174. *Id.*, art. 16.4(3).

175. CAFTA-DR, art. 16.3.

176. *Id.*, arts. 16.4, 16.5.

tions of trade obligations, both jurisdiction and penalties are differentiated. First, because of the “persistent pattern” language jurisdiction over labor and environmental issues under Chapter 20 is narrower than with regard to trade related actions allegedly inconsistent with the Agreement. Second, individual violations by Parties under other CAFTA-DR chapters are generally subject to Chapter 20 review.¹⁷⁷ In practice, this may make less difference than the textual differences suggest, given the right of any Party to bring violations to arbitration under Chapter 20.

In lieu of trade sanctions, the most severe CAFTA-DR penalty for uncorrected labor and environmental violations is an “annual monetary assessment” to be determined by the arbitral panel. The panel is to take into account such factors as the trade effects of the non-enforcement; the pervasiveness and duration of the non-enforcement; the reasons for non-enforcement; the level of enforcement “that could be reasonably expected of the Party given its resource constraints,” etc.¹⁷⁸ Those assessments are not paid to other Parties, but rather into a fund established by the Commission to be used for appropriate labor or environmental initiatives in the territory of the Party complained against and consistent with its law.¹⁷⁹ In other words, should Guatemala be required to pay a monetary assessment in a panel proceeding with regard to labor or environmental law violations, the funds would effectively remain in Guatemala, reserved/constrained for appropriate labor or environmental initiatives. As discussed *infra*, this alternative penalty approach has been changed in the newer U.S. FTAs. The dispute settlement provisions of the FTAs with Columbia, Peru, Panama and Korea make no distinction between trade disputes and labor or environmental disputes in terms of the remedy for non-compliance with panel decisions.¹⁸⁰

“Labor laws” under CAFTA-DR relate to the core principles such as the right of association; right to organize and bargain collectively; prohibition on forced labor; minimum employment age and prohibition of the ILO’s worst forms of child labor; and acceptable rules on minimum wages, maximum hours and health and safety.¹⁸¹ These provisions are stronger than the labor obligations of NAFTA, at least procedurally, where it was virtually impossible

177. *Id.*, art. 20.2.

178. *Id.*, arts. 20.17.1 and 20.17.2.

179. *Id.*, art. 20.17.4.

180. See Gantz, RTAs, *supra* note 3, chs. 5 and 9 (Bipartisan Trade Deal, new FTAs).

181. CAFTA-DR, art. 16.8.

for a Party to be subjected to dispute settlement through binding arbitration.

Under the labor provisions of CAFTA-DR, the United States has committed substantial sums to strengthen the ministries of labor, modernize the labor justice system and fight discrimination, in the amount of \$20.3 million in fiscal year 2007 with similar amounts in earlier years.¹⁸² The first formal complaint under Chapter 16 was lodged by the United States against Guatemala in July 2010. The complaint, following a petition filed more than a year earlier by the AFL-CIO, charges that Guatemala has failed to enforce effectively Guatemalan laws protecting worker rights such as freedom of association, the right to collective bargaining and the right to work in acceptable conditions. In August 2011 the United States government, considering that Guatemala had failed to address systemic failures in the system, requested that an arbitration panel be convened to examine Guatemala's failure to effectively enforce its labor laws.¹⁸³

Chapter 17 (environment) parallels Chapter 16. It draws on the NAAEC, but with changes relating to enforcement. In Chapter 17, "[a] Party shall not fail to effectively enforce its environmental laws, through a *sustained or recurring course of action or inaction*, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement."¹⁸⁴ Thus, as with CAFTA-DR labor provisions and the NAAEC, an isolated act of non-enforcement is not subject to mandatory dispute settlement under CAFTA-DR Chapter 20. The same limitations on penalties—fines in place of trade sanctions—as in the labor provisions of CAFTA-DR are applicable to environmental violations. This is, nevertheless, a significant change compared to NAAEC (at least

182. U.S. Dept. of State, Media Note, *U.S. Commits Funding for Labor and Environmental Protection for Central America-Dominican Republic Free Trade Agreement Countries*, Jan. 30, 2008, at 2-3, available at <http://sanjose.usembassy.gov/CAFTADR%20labor%20fact%20sheet%20CLEAN.pdf> (last visited Jan. 29, 2011) [hereinafter "State, U.S. Funding"].

183. USTR, *USTR Kirk Announces Labor Rights Trade Enforcement Case Against Guatemala*, Press Release, Jul. 30, 2011, available at <http://www.ustr.gov/about-us/press-office/press-releases/2010/july/united-states-trade-representative-kirk-announces-lab>; see also Ellen Verryt, *Targeting Guatemala, US Launches First-Ever Labour Rights Dispute Under an FTA*, UNIONBOOK, Aug. 26, 2010, available at <http://www.unionbook.org/profiles/blogs/targeting-guatemala-us> (both last visited Feb. 28, 2011); Rossella Brevetti, *U.S. Seeks Arbitration Panel in Labor Case Brought under CAFTA-DR*, 28 INT'L TRADE REP. (BNA) 1322 (Aug. 11, 2001).

184. CAFTA-DR, art. 17.1; emphasis supplied. Rossella Brevetti, *U.S. Seeks Arbitration Panel in Labor Case Brought under CAFTA-DR*, 28 INT'L TRADE REP. (BNA) 1322 (Aug. 11, 2001).

on paper), since environmental disputes may be referred to binding dispute settlement in the normal manner. Enforcement is subject to national discretion similar to that in Chapter 16.¹⁸⁵ Procedurally, “[e]ach Party shall ensure that interested persons may request the Party’s competent authorities to investigate alleged violations of its environmental laws, and that each Party’s competent authorities shall give such requests due consideration in accordance with its law.”¹⁸⁶

NAFTA specifically incorporated a list of MEAs, which prevail over NAFTA to the extent of any NAFTA inconsistency with them.¹⁸⁷ Under CAFTA-DR, there is no such list. CAFTA-DR contains only a vague recognition by the Parties of the fact that “multilateral environmental agreements . . . play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements is critical to achieving the environmental obligations of these agreements” and a commitment to “seek means to enhance the mutual supportiveness” of MEAs and trade agreements.¹⁸⁸

In CAFTA-DR, as in NAFTA, the Parties “recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws.”¹⁸⁹

Unlike the Singapore, Chile, Korea and some other post-NAFTA FTAs, in CAFTA-DR, “[a]ny person of a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws. Such submissions shall be filed with a secretariat or other appropriate body (“secretariat”) that the Parties designate.”¹⁹⁰ These procedures do not apply to U.S. persons challenging the United States’ compliance with its own environmental laws; such complaints must be filed with the CEC pursuant to the provisions of the NAAEC, applied *mutatis mutandis*.¹⁹¹ However, a person other than a person of the United States may avail herself of the CAFTA-DR environmental Secretariat for such challenges.¹⁹² As with the NAAEC, the Secretariat under CAFTA-DR

185. *Id.*, art. 17.1(b).

186. *Id.*, art. 17.3(2).

187. NAFTA, art. 104, annex 104.1.

188. CAFTA-DR, art. 17.12.1.

189. CAFTA-DR art. 17.2.2; NAFTA, art. 1114(2).

190. *Id.*, art. 17.7(1).

191. *Id.*, art. 17.7(3).

192. *Ibid.*

is authorized to develop a factual record.¹⁹³ Under CAFTA-DR, there is no requirement for a two-thirds vote of the Council in order for the Secretariat to amass a factual record; it is sufficient for a single member of the Council to make the request.¹⁹⁴

Separate agreements among the CAFTA-DR Parties designate a new unit within the Secretariat for Central American Economic Integration ("SIECA") as the Secretariat for receiving citizen complaints against a Party, and set out procedures for dealing with such submissions.¹⁹⁵

Whether this unit can function effectively as a mechanism for evaluating as well as accepting citizen complaints about the Parties' alleged failures to comply with the requirements of Chapter 17 will likely depend on whether it is adequately funded and staffed; currently, the staff currently consists of only two persons.¹⁹⁶ However, early results are somewhat encouraging. The most prominent submission to date is a complaint by the Humane Society International against the Dominican Republic, charging the Dominican Republic with failure to enforce its environmental laws with regard to protection of endangered sea turtles.¹⁹⁷ As of early 2011, eleven matters had been referred to the Secretariat for Environmental Matters, four of them against Guatemala. All but one are listed as active and all charge failure to comply with various national environmental laws and regulations.¹⁹⁸ To date, there have been no U.S. citizen complaints relating to enforce-

193. *Id.*, art. 17.8; see NAAEC, art. 15.

194. CAFTA-DR, art. 17.8.2.

195. Understanding Regarding the Establishment of a Secretariat for Environmental Matters Under the Dominican Republic – Central America – United States Free Trade Agreement, Feb. 18, 2005, *available at* http://www.sice.oas.org/trade/cafta/caftadr_e/environment/environment_e.asp (last visited Dec. 21, 2010); Agreement Establishing a Secretariat for Environmental Matters under the Dominican Republic—Central America—United States Free Trade Agreement, July 27 and October 3, 2006, *available at* http://ustraderep.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file803_13194.pdf (last visited Dec. 21, 2010), art. 5.

196. See Secretariat for Environmental Matters, *available at* http://www.caftadr-environment.org/left_menu/secretariat.html (last visited Dec. 21, 2010).

197. CAFTA-DR Secretariat for Environmental Matters, Determination, in CAALA 07-001, Dec. 5, 2007, *available at* http://cabrera-verde.org/files/Determinacion_OriginalEng.pdf (last visited Dec. 21, 2010).

198. Secretariat for Environmental Matters, <http://www.saa-sem.org/> (last visited Dec. 21, 2010); Joint Communiqué from the Fifth Meeting of the Environmental Affairs Council of the Dominican Republic-Central America-United States Free Trade Agreement, Jan. 2011, *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2011/january/joint-communicu%C3%A9-fifth-meeting-environmental-affai> (last visited Jan. 29, 2011).

ment of U.S. environmental law brought under CAFTA-DR before the NAAEC Council on Environmental Cooperation.¹⁹⁹

The secretariat's first factual record, relating to the sea turtle submission and having been requested by the United States, was published in January 2011.²⁰⁰ The 80 page report compiles data on sea turtle populations in the Dominican Republic received from the submitters, the Government of the Dominican Republic and several independent sources. As is the practice with factual records, the report does not reach conclusions; it is limited to amassing information:

The purpose of the factual record is to provide factual information about the alleged failure to effectively enforce environmental law by any of the countries that are parties to the CAFTA-DR. In this regard, the documented information can be useful to parties as well as to the general public to serve as an objective and impartial version of the facts connected with the case.²⁰¹

There is reason to believe that this process, here as elsewhere, has and will have a positive impact, at least in some instances. The factual record in the sea turtles matter notes that

[I]n its comprehensive response, the Dominican Republic attached a copy of its *Plan of Action for the Implementation of Legal, Effective Protection and Conservation of Sea Turtles in the Dominican Republic 2008-2015*, which included a plan of activities and short-term priorities regarding the completion of inventories.²⁰²

One can reasonably infer that the Dominican Republic was motivated by the initiation of the proceeding in 2007 and moved forward with conservation measures that would not have taken place, or would not have occurred as quickly, save for the submission and decision to create a factual record.

As with the NAAEC, the scope of the environmental provisions goes beyond citizen submissions. CAFTA-DR and the other Latin American FTAs create an Environmental Affairs Council, composed of cabinet level officials and similar to the NAAEC's

199. Email exchange with Dane Ratliff, CEC director of submissions on enforcement matters, Feb. 22, 2011 (on file with author).

200. CAFTA-DR Environment Secretariat, Expediente de Hechos: CAALA 07-001, Tortugas Marinas RD, at 8, available at http://www.saa-sem.org/expedientes/expediente_de_hechos_caala_07_001.pdf (last visited Jan. 29, 2011).

201. *Id.*, at 71 [informal translation by author].

202. *Ibid* [informal translation by author].

CEC in many respects.²⁰³ The Council is to oversee “the implementation of and review progress under this Chapter and to consider the status of cooperation activities developed under the Dominican Republic – Central America – United States – Environmental Cooperation Agreement (“ECA”).²⁰⁴ An Environmental Cooperation Commission is charged under the ECA with developing cooperative work programs on environmental issues and fostering public participation.²⁰⁵ The ECA and work program under CAFTA-DR have been funded at significantly higher levels than the CEC’s \$9 million; the budget for fiscal year 2007, for example, was \$19.3 million, funded entirely by the United States.²⁰⁶ This included \$1.4 million in support for the environmental secretariat.²⁰⁷ These mechanisms allow for a variety of informal consultations at various levels, but it is unclear whether they are being used extensively by the United States or other Parties.

D. The Bipartisan Trade Deal (BTD) and the Peru TPA

The BTD was negotiated by U.S. Trade Representative Susan Schwab and the Congressional and Senate leadership for the principal purpose of obtaining the support of the Democratically controlled Congress and Senate for the four then-pending FTAs, particularly for the three with the Latin American nations of Peru, Colombia and Panama, although the results applied to the KORUS FTA as well.²⁰⁸ With control of Congress passing to the Democrats in January 2007, it had become evident that the pending FTAs would require modifications to gain approval by Congress.²⁰⁹

203. CAFTA-DR, *supra* note 2, art. 17.5.

204. *Id.*, art. 17.5.2; Agreement among the Governments of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and the United States of America on Environmental Cooperation, arts. IV, V, Feb. 8, 2005, *available at* http://www.sice.oas.org/trade/cafta/caftadr_e/environment/envcoop_e.asp (last visited Jan. 29, 2011).

205. CAFTA-DR, art. 17.9.

206. State, U.S. Funding, *supra* note 183, at 1.

207. State, U.S. Funding, *supra* note 183, Fact Sheet: CAFTA-DR Environmental Projects.

208. Gary G. Yerkey, *Veroneau ‘Confident’ Deal Can Be Struck With Congress On Labor Provisions of FTAs*, 24 INT’L TRADE REP. 373, 373 (2007).

209. *Id.* (discussing the efforts by U.S. Trade Representative Susan Schwab to reach agreement with Democrats on standards in trade agreements “which would pave the way for the FTAs with Columbia, Peru, and Panama to move forward in Congress . . .”).

4. The BTD and Peru TPA—Labor

The BTD, which informally modifies the TPA requirement even though it is not legislation, covers six areas: labor, environment, intellectual property, investment, government procurement and port security, but the most significant elements relate to labor and the environment, and are the only areas discussed herein. While the differences are not revolutionary several of them are notable. The BTD led directly to Congressional approval of the Peru TPA once the BTD language had been used to modify the earlier negotiated version. More than four years later, it is obvious that the BTD was not in itself sufficient to bring about Congressional approval of the other three pending FTAs, which had not been submitted to Congress as of March 2011.

As to incorporation of internationally-recognized principles into trade agreements, the BTD requirements and limitations are summarized by USTR as follows:

“[e]nforceable reciprocal obligation for the countries to adopt and maintain in their laws and practice the five basic internationally-recognized labor principles, as stated in the [1998] ILO Declaration on Fundamental Principles and Rights at Work.

Freedom of association;

The effective recognition of the right to collective bargaining;

The elimination of all forms of forced or compulsory labor;

The effective abolition of child labor and a prohibition on the worst forms of child labor; and

The elimination of discrimination in respect of employment and occupation.

These were subject to the usual conditions and a few new ones.²¹⁰ In particular, the obligatory incorporation by reference of ILO standards into national law is a notable change from the CAFTA-DR group of FTAs. CAFTA-DR lacks the enforceability of the ILO obligations and simply defines “labor laws” with reference to a similarly-worded list of “internationally recognized labor

210. USTR, Trade Facts, Bipartisan Trade Deal, May 2007, available at http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf (last visited Sep. 18, 2001) [hereinafter “BTD”], at 1. These included the requirement that the violation affect trade and investment between the parties; a limitation to the five basic principles plus acceptable work conditions; violations must reflect through a sustained or recurring course of action or inaction; and a limitation to current definitions of labor laws in the FTAs and to federal labor laws alone.

rights,”²¹¹ failing to incorporate core labor principles as obligations under the Agreement. This expansion in the Peru TPA is groundbreaking despite other limitations in previous FTAs incorporated in the BTDA (and the Peru TPA): 1) the requirements apply only to enforcement of federal labor laws,²¹² 2) the dispute settlement provisions may be invoked only by the Parties, and 3) panel decisions that are neither self-executing nor able to alter U.S. or other national law.²¹³

In the other major departure from earlier FTAs, the BTDA clarifies that “[l]abor obligations [are] subject to the same dispute settlement procedures and remedies as commercial obligations, probably the most important change advocated by labor rights advocates. Available remedies are fines and trade sanctions, based on the ‘amount of trade injury’.”²¹⁴

Presumably because the United States has not ratified many of the ILO Conventions,²¹⁵ the BTDA asserts that the United States, even without such ratification, complies with the ILO principles of freedom of association and collective bargaining, and the abolition of compulsory labor, child labor and employment discrimination through the Constitution and various laws of the United States.²¹⁶

The BTDA further specifies that FTA Parties may include in their government contracts requirements for suppliers to comply with core labor laws, including any applicable occupational health and safety requirements, in the country where either the good is produced or the services are performed. For example, a Peruvian supplier of goods to a government agency in the United States may be required to comply with core labor laws in Peru, and awards may presumably be challenged on the basis of a failure to

211. CAFTA-DR, *supra* note 2, art. 16.8.

212. A possibly significant exclusion given current (February 2011) disputes in Wisconsin and other states regarding the rights of public employees to engage in collective bargaining. See Brady Dennis & Peter Wallsten, *Obama Joins Wisconsin's Budget Battle, Opposing Republican Anti-Union Bill*, Wash. Post, Feb. 18, 2011 (electronic ed.), available at http://www.washingtonpost.com/wp-dyn/content/article/2011/02/17/AR2011021705494_pf.html (last visited Feb. 22, 2011) (discussing proposed legislation that would eliminate the collective-bargaining agreements affecting most public workers in Wisconsin, except for negotiating pay).

213. BTDA, *supra* note 211, at 1-2; Peru TPA, *supra* note 2, art. 17.3.

214. BTDA, *supra* note 211, at 1.

215. The United States has failed to ratify six of the eight core ILO conventions on freedom of association/collective bargaining; forced labor; employment discrimination; and elimination of child labor. See ILO, *Ratification of the Fundamental Human Rights Conventions by Country*, Jan. 2011, available at <http://www.ilo.org/ilolex/english/docs/declworld.htm> (last visited Jan. 11, 2011).

216. BTDA, *supra* note 211, at 2.

comply.²¹⁷

In the Peru TPA, as amended to reflect the BTD requirements, the relationship between international labor rights and local law is explicitly set out:

“1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration):

- (a) freedom of association;
- (b) the effective recognition of the right to collective bargaining;
- (c) the elimination of all forms of compulsory or forced labor;
- (d) the effective abolition of child labor and, for purposes of this Agreement, a prohibition on the worst forms of child labor; and
- (e) the elimination of discrimination in respect of employment and occupation.

2. Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations implementing paragraph 1 in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph.”²¹⁸

The BTB limitations are also expressed: “[t]o establish a violation of an obligation under Article 17.2.1 a Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation, or practice in a manner affecting trade or investment between the Parties.”²¹⁹ Whether a Party maintains a statute or regulation “in a manner affecting trade or investment” is subject to some interpretation, which the panelists will presumably supply if and when a labor dispute is referred to dispute settlement under the binding arbitration provisions of Chapter 21 of the Peru TPA.

In order for a Party to comply with these new provisions, it “shall” incorporate the ILO core principles into national law; a Party no longer satisfies the requirements by “striving” to incorporate.²²⁰ Thus, a failure to incorporate them into national law

217. *Id.*, at 4.

218. Peru TPA, *supra* note 2, art. 17.2.

219. *Id.* at art., 17.2 n.1.

220. Peru TPA, *supra* note 2, art. 17.2(1); see BTB, *supra* note 210, at 2.

becomes *ipso facto* a violation of the Agreement, and another Party may seek enforcement of the obligation under the dispute settlement provisions of the Agreement, assuming that it can show that violations constitute a “sustained course of action or inaction.” Thus, individual violations are not actionable, just as they are not actionable under NAALC or CAFTA-DR.

Relevant dispute settlement provisions in the Peru TPA provide that the failure of a Party to comply with a panel ruling or to reach an agreement on compensation may lead either to the suspension of trade benefits or to the imposition of a monetary fine in lieu of trade sanctions, whether or not the subject of the dispute is labor, the environment or something else.²²¹

It remains to be demonstrated whether the BTB language as incorporated into the FTAs will significantly affect the observance of labor rights under the FTAs, given that the language in earlier FTAs provides a Party such as the United States the tools for enforcement of national labor laws (as indicated in the Guatemala action under CAFTA-DR). However, it increases the opportunities for enforcement of core labor rights as incorporated into the Peru TPA.

5. BTB and Peru TPA—Environment

Under the BTB, the environmental provisions of future trade agreements were also to be modified, in a manner generally parallel to the labor provisions. Most significantly, a specific list of MEAs was to be incorporated into FTAs negotiated by the United States.²²² While such a list does not appear in the earlier Bush-era FTAs, the list approach represents an expansion of NAFTA rather than a totally new innovation. In the BTB, the incorporated MEAs include not only those listed in NAFTA, but also those related to endangered species, protection of the ozone layer, control of trans-boundary movement of hazardous waste, and certain bilateral agreements between Canada, the United States and Mexico.²²³ The BTB also includes, *inter alia*, the Ramsar Convention on Wetlands, the International Whaling Convention, and the

221. Peru TPA, *supra* note 2, arts. 21.15, 21.16.

222. “The list includes (with abbreviated titles) the Convention on International Trade in Endangered Species (CITES), Montreal Protocol on Ozone Depleting Substances, Convention on Marine Pollution, Inter-American Tropical Tuna Convention (IATTC), Ramsar Convention on Wetlands, International Whaling Convention (IWC), and Convention on Conservation of Antarctic Marine Living Resources (CCAMLR).” BTB, *supra* note 210, at 2.

223. NAFTA, *supra* note 1, art. 104.

Convention on Conservation of Antarctic Marine Living Resources.²²⁴ (The list does not include the Basel Convention on Hazardous Waste, presumably because it has never been ratified by the United States.)²²⁵

As in NAFTA, the BTM language provides that “[i]n the event of any inconsistency between a Party’s obligations under this Agreement and a covered [environmental] agreement, the Party shall seek to balance its obligations under both agreements, but this shall not preclude the Party from taking a particular measure to comply with its obligations under the covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade.”²²⁶ Also, the failure of an FTA Party to adhere to a listed MEA is a violation of the FTA that is subject to dispute settlement.²²⁷

The environmental non-derogation obligations, like the labor obligations, are also somewhat tightened by substituting “shall” enforce for “strive to” enforce environmental laws, again through fines and trade sanctions, as with trade violations.²²⁸ Further, as in the case of labor, government procurement contracts may include provisions that promote environmental protection.²²⁹

The Peru TPA environmental provisions generally track the BTM requirements; they incorporate the listed MEAs by reference and subject a sustained or recurring cause of action or inaction to the same government-to-government dispute settlement provisions applicable to other types of disputes.²³⁰ Here, as in earlier FTAs, conflicts between the Agreement and MEAs are resolved in favor of the MEA language, assuming the conflict cannot otherwise be resolved. But the Peru TPA uses somewhat different language:

[i]n the event of any inconsistency between a Party’s obligations under this Agreement and a covered agreement, the Party shall seek to balance its obligations under both

224. BTM, *supra* note 210, at 2.

225. The United States signed the Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal March 3, 1990, but has not completed the ratification process. Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, May 5, 1992, 1673 U.N.T.S. 57 available at <http://www.basel.int/ratification/convention.htm> (last visited Feb. 28, 2011).

226. See Peru TPA, *supra* note 2, art.18.13.4; NAFTA, *supra* note 1, art. 104(1)(d) [similar language].

227. *Id.*

228. BTM, *supra* note 210, at 2.

229. *Id.* at 4.

230. Peru TPA, *supra* note 2, art. 18.3, ch. 21.

agreements, but this shall not preclude the Party from taking a particular measure to comply with its obligations under the covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade.²³¹

Other aspects have not changed from NAFTA and earlier FTAs. For example,

[r]ecognizing the sovereign right of each Party to establish its own levels of domestic environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall strive to ensure that those laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve its respective levels of environmental protection.²³²

As with other FTAs since 2002, the parties to the Peru TPA are required to provide opportunities for interested parties to request investigation by governmental authorities of alleged violations of national environmental laws and judicial, quasi-judicial or administrative remedies for the same.²³³ As in CAFTA-DR, provision is made for designation of a secretariat to be established under separate agreement for the purpose of receiving citizen submissions. (The NAAEC Secretariat serves that function for complaints against the United States brought by U.S. persons; otherwise the mechanism under the FTA will be applicable).²³⁴ Where the Peru PTA diverges from some of the earlier agreements is with respect to efforts aimed at identifying and addressing Peru's legal, institutional and capacity building needs.²³⁵

Prior to the BTDA, the United States and Peru had concluded an Environmental Cooperation Agreement.²³⁶ Pursuant to that agreement and to the Peru TPA, the United States and Peru established an Environmental Cooperation Commission and have agreed on a work program, which included the creation of a Secretariat within 18 months after the entry into force of the Peru TPA.²³⁷ Implementation of the work program and the environ-

231. *Id.*, art. 18.13(4).

232. Peru TPA, *supra* note 2, art. 18.1.

233. *Id.* art. 18.4(1), (2).

234. *Id.* art. 18.8.

235. Wold, NAAEC, *supra* note 72, at 246.

236. *Peru Environmental Cooperation Agreement*, (Jul. 26, 2006), <http://www.state.gov/g/oes/env/trade/peru/81638.htm>.

237. *United States – Peru Environmental Cooperation, 2009-2010 Work Program*,

mental obligations of the Peru TPA were still under discussion as of February 2010;²³⁸ it is unclear whether the Secretariat has been formed and funded.

6. BTM and Peru TPA—Logging of Tropical Hardwoods

In the BTM, USTR “agreed to work with the Government of Peru on comprehensive steps to address illegal logging, including of endangered mahogany, and to restrict imports of products that are harvested and traded in violation of CITES.”²³⁹ The result, unique among U.S. FTAs and far reaching with regard to the extent to which one FTA partner dictates the internal operations of another, is the incorporation of detailed obligations on the part of Peru to control illegal logging,²⁴⁰ an area where compliance (or lack of it) remains controversial. At the same time, the Annex responds to concerns that are arguably unique to Peru among U.S. FTA partners, and thus represents an effort to depart from the more usual “one size fits all” U.S. approach.

Under the “Annex on Forest Sector Governance:”

The Parties recognize that trade associated with illegal logging, and illegal trade in wildlife, including wildlife trafficking, undermine trade in products from legally harvested sources, reduce the economic value of natural resources, and weaken efforts to promote conservation and sustainable management of resources. Accordingly, each Party commits to combat trade associated with illegal logging and illegal trade in wildlife. The Parties recognize that good forest sector governance is critical to promoting the economic value and sustainable management of forest resources. Accordingly, each Party commits to take action under this Annex to enhance forest sector governance and promote legal trade in timber products.²⁴¹

The obligations under the annex include increasing forest service personnel; civil and criminal liability “at adequate deterrent levels” to deter violations; inventories; strategic planning; establishment of quotas for big-leaf mahogany harvesting (an endan-

10, <http://www.state.gov/documents/organization/133528.pdf> (last visited Jan. 11, 2011).

238. *Statement on First U.S.—Peru Environmental Affairs Meeting: Officials discuss compliance with provisions under bilateral Agreement*, (Feb. 18, 2010), <http://www.america.gov/st/texttrans-english/2010/February/20100219120031xjsnommis0.1936762.html>.

239. BTM, *supra* note 210, at 3.

240. Peru TPA, *supra* note 2, art. 18.3.4, annex 18.3.4.

241. *Id.* annex 18.3.4, para. 1.

gered species under CITES)²⁴²; improved management of forest concessions; capacity building measures by both Parties; various audit and verification measures; and a licensing system for lumber trade between the United States and Peru.²⁴³

Implementation by Peru, particularly of the Annex, has been difficult for internal political reasons. Peru passed roughly twenty new laws to implement the Peru TPA, but the new Forestry Law resulted in violent protests by indigenous groups, protests that resulted in more than thirty-five deaths. The Peruvian Congress responded by suspending the Forestry Law. Perhaps illustrating the law of unintended consequences, indigenous groups objected strenuously to the new laws because of their relationship to land tenure issues, and because of allegations that the new laws lifted earlier prohibitions on land ownership and facilitated investment in the jungle regions.²⁴⁴ The law was revised, this time in consultation with indigenous, environmental and business groups.²⁴⁵ The new legislation creates a new Forest and Wildlife Service to coordinate activities throughout the sector, with duties transferred to the Environment Ministry.²⁴⁶

In July 2011 the Peruvian Congress despite opposition from indigenous groups enacted the necessary legislation, which was to be signed into law before President Alan Garcia left office July 28.²⁴⁷ The USTR and some environmental groups believed this law to be essential to assuring compliance with the Peru TPA annex.²⁴⁸ Interestingly, during this period of delay and controversy the environmental groups were *not* calling upon USTR to

242. See Lucien O. Chauvin, *U.S. Moves Regional Environmental Hub to Peru, Plans Focus on Cross-Border Issues*, 33 INT'L ENV'T. REP. (BNA) 72 (Jan. 20, 2010) [hereinafter Chauvin I] (discussing the controversy over tropical hardwoods).

243. Peru TPA, *supra* note 2, annex 18.3.4, paras. 2-12.

244. Lucien O. Chauvin, *Indigenous Groups in Peru Clash with Police as Protests over Forest Laws Turn Violent*, 32 INT'L ENV'T. REP. (BNA) 507 (Jun. 10, 2009) [hereinafter Chauvin II].

245. Chauvin I, *supra* note 242; Lucien O. Chauvin, *Peruvian Congress Suspends Forestry Law That Sparked Protests by Indigenous Groups*, 32 INT'L ENV'T. REP. (BNA) 560 (Jun. 24, 2009) [hereinafter Chauvin III].

246. Lucien O. Chauvin, *Peru's Government Unveils Forestry Plan to Combat Climate Change via Conservation*, 33 INT'L ENV'T. REP. (BNA) 758 (Aug. 4, 2010) [hereinafter Chauvin IV].

247. Lucien O. Chauvin, *Peru's Congress Passes Forestry Legislation Needed to Comply with U.S. Trade Accord*, 28 INT'L TRADE REP. (BNA) 1147 (Jul. 7, 2011). See *Peru: New Forest Law Faces Resistance from Indigenous Communities*, FORDAQ, THE TIMBER NETWORK, (Dec. 10, 2010), http://www.fordaq.com/fordaq/news/logs_softwood_plywood_24997.html (last visited Dec. 23, 2010).

248. U.S. 'Monitoring Situation' After Peru Fails to Act on New Forestry Law, INSIDE U.S. TRADE, Dec. 24, 2010, at 5. .

initiate formal dispute settlement; they urge extended consultations and ask that USTR “signal[s] clearly to the Peruvians the importance of finishing the process around this forest law.”²⁴⁹ This approach in retrospect appears to have been a wise one, although it remains uncertain whether the enactment of the legislation will result in a prompt end to the controversy. The new president, Ollanta Humala, has promised to honor Peru’s obligations under the PTA with the United States, presumably including the forestry provisions, but has also indicated the he intends to focus on Latin American integration.²⁵⁰

IV. IMPROVING THE FTA PROVISIONS: PRESENT AND FUTURE

A. *Existing and Pending FTAs*

Despite the efforts by some labor and environmental rights groups to incorporate stronger and broader, supposedly enforceable, legal protections in U.S. FTAs, one can reasonably question whether the changes in the formal dispute settlement provisions are likely to be successful in improving observance of core labor rights and good environmental practices. The government-to-government dispute settlement mechanisms in FTAs are seldom used; cases are rare regardless of the subject matter of the dispute. Even in NAFTA, where more than a dozen requests for consultation have been lodged,²⁵¹ there have been only three arbitrations in the seventeen years during which NAFTA has been in force, with the last arbitral decision rendered ten years ago.²⁵² There have been no arbitrations of trade disputes involving the United States under any of the other U.S. FTAs,²⁵³ although a noted earlier the United States is seeking arbitration of labor non-compliance issues with regard to Guatemala. However, even with a lack of formal proceedings one can reasonably argue that the

249. *Id.* (quoting Andrea Johnson, director of forest campaigns at the Environmental Investigation Agency).

250. Lucien O. Chauvin, *New Peru President to Stress Latin America Integration, but Promises to Honor U.S. FTA*, 28 INT’L TRADE REP. (BNA) 1088 (Jun. 30, 2011).

251. Gantz, RTAs, *supra* note 3, at 143.

252. See *Status Report of Dispute Settlement, U.S. Section*, NAFTA SECRETARIAT, <http://www.nafta-sec-alena.org/en/StatusReportResults.aspx> (last visited Dec. 22, 2010) (showing only three arbitrations). The decision in the *Cross-Border Trucking* case was issued on Feb. 6, 2001.

253. A request for consultations under CAFTA-DR between the Central American nations and the Dominican Republic was rumored to be pending as of January 2011, but could not be confirmed.

existence of such provisions may encourage parties to the agreements to negotiate reasonable solutions.

Experience with CAFTA-DR in particular suggests that a comprehensive effort by the United States Government, with the good faith cooperation of the Parties to the FTA, to implement and, if necessary, expand the mechanisms in U.S. FTAs designed to require) an analysis of citizen petitions by an independent council and secretariat or fact-finding body, would be productive. Expanding the consultation and cooperation efforts facilitated by the existence of such mechanisms is also desirable. The same Environmental Affairs Council and Labor Affairs Council, or their equivalents under other agreements, along with a secretariat for the Environmental Affairs Council, should also be provided with the authority, funds and expertise to support cooperative activities aimed at improving compliance with the substantive labor and environmental provisions.

All of the U.S. FTAs already contain provisions that can reasonably serve as the basis for improved labor and environmental cooperation, technical assistance and training, acceptance and review of citizen complaints and enforcement, as the labor action brought by the United States against Guatemala confirms. If not in the original text, these provisions are expressed in the supplemental agreements such as the two NAFTA side agreements and the subsidiary agreements concluded with respect to CAFTA-DR. Thus, for example, the existence of the labor obligations in all of the FTAs provides a solid legal basis and procedural mechanism for U.S. government complaints.

The language in the latest group of FTAs with Peru, Colombia, Panama and South Korea actually increases U.S. influence, should it choose to use it, because it requires incorporation of core international labor standards into domestic legislation.²⁵⁴ A failure of a Party to adopt and maintain its statutes, regulations, and practices consistent with the rights "stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)*" makes it a violation of the FTAs.²⁵⁵ At present, the United States' credibility in enforcing high labor standards with FTA partners is for some observers limited by U.S. domestic practices, such as limits to the right to organize under some state laws.²⁵⁶

254. See, e.g., KORUS, *supra* note 2, art. 19.2.1.

255. See, e.g., Peru TPA, *supra* note 2, art. 17.2.1.

256. Almost half of the U.S. states have so-called "right to work" laws, which generally prohibit unions from requiring employees to join and pay union dues.

With regard to the environmental provisions, U.S. practices mirror the obstructionism that has characterized the NAFTA Parties' responses to efforts by the NAAEC Secretariat to establish factual record in some instances.

Thus, among other things, Barak Obama's campaign promise that if elected he would renegotiate NAFTA to incorporate the labor and environment provisions in the body of the agreement, making them, *inter alia*, subject to the Chapter 20 dispute settlement mechanism, was ill-advised and unlikely to result in improved observance of labor and environmental rights under NAFTA. The subsequent abandonment of NAFTA re-negotiation in the face of demands from Canada and Mexico to reopen other NAFTA provisions was perhaps as inevitable as it was welcomed by those who were skeptical from the outset.²⁵⁷

Further, the effectiveness of labor and environment provisions in the newest FTAs, like the weaker ones in earlier U.S. FTAs and the "side" agreements in NAFTA, depends mostly on the willingness of the U.S. president and Congress to commit sufficient funds, staff and technical assistance (minor compared to other expenditures on foreign aid), *and* the political will to implement citizen submission procedures, even when the United States is the respondent. In this respect, the NAALC Commission and NAAEC CEC and Secretariat deserve another look, since it has been poor implementation, rather than the structure, that is primarily responsible for their shortcomings. A quasi-independent NAAEC-style secretariat, with both a mandate and sufficient resources to investigate citizen complaints and supported by a political commitment by all Parties to cooperate through the Council or Commission in providing timely information responsive to citizen submissions, is still a reasonable model. While the process in CAFTA-DR is still evolving, the fact that there are presently eleven proceedings pending before the Environmental Council and one factual record was recently completed suggests that NGOs approach this mechanism as an important tool and

Advocates believe that such laws foster freedom of employment. Labor groups argue that allowing workers who benefit from unions to avoid contributing to union coffers undermine unions' ability to organize workers. See John Steven Niznik, Right to Work: Right to Work States and Laws, ABOUT.COM, http://jobsearchtech.about.com/od/laborlaws/a/right_to_work_2.htm (last visited Jan. 30, 2011).

257. See GANTZ, RTAs, *supra* note 3, at 88; Rossella Brevetti, *Kirk Says USTR to Review Colombia FTA, Reopening of NAFTA May not be Necessary*, 26 INT'L TRADE REP. (BNA) 534, Apr. 23, 2009, available at 2009 WL 1085995 asserting that the Administration's problems with NAFTA "can be addressed without having to reopen the agreement".)

that the CAFTA-DR governments are capable of taking their environmental obligations seriously.

Additionally, expanded financial and capacity building assistance is essential in meeting other obligations of the environmental provisions, such as analyzing the environmental effects of trade under specific agreements. This is evident with the Jordan FTA, as well as with CAFTA-DR and the Peru TPA (including considerable effort by the United States to work with Peru on logging issues). Fulfilling these needs could be enhanced through technical assistance and better cooperation among the parties to the respective FTA, along with political pressure where advisable. The same is of course true with regard to improvements in enforcement of national labor laws through strengthening of labor ministries and judicial systems.

As of September 2011, there seems to be a reasonable possibility that the United States—Korea FTA (“KORUS FTA”) will be approved by the Congress during 2011, largely because there is strong pressure from the business community to do so and because of the support from the United Auto Workers union, despite opposition by most other unions such as the AFL-CIO and the Teamsters.²⁵⁸ As of the beginning of 2011, the Obama Administration remained much less enthusiastic in committing itself to moving forward on the FTAs with Colombia and Panama.²⁵⁹ However, the Colombia and Panama FTAs, now with the strong support of President Obama, now seem likely to be approved after resolution of a stalemate over Trade Adjustment Assistance, although such a result is by no means certain.²⁶⁰ Insofar as I have been able to determine, there has been no credible suggestion of amending any of the three agreements with regard to the labor or environmental provisions, although some members of Congress have lodged various objections to the Colombian Government’s treatment of labor leaders.²⁶¹

258. Rossella Brevetti, *Teamsters President Announces Opposition to Revised Korea FTA*, 28 INT’L TRADE REP. (BNA) 321, Feb. 24, 2011, available at 2011 WL 639337.

259. Editorial, *See The U.S. has no Good Reason to Stall on Latin American Free-Trade Deals*, WASHINGTON POST, Dec. 20, 2010 (chiding the Administration for “drag[ging] its heels on Columbia and Panama free trade”).

260. *See Brady Confident on Pending Trade Deals, Cites “Tight Agreement” on Approval Process*, 28 INT’L TRADE REP. (BNA) 1476 (Sep. 15, 2011) (Reporting House Ways and Means Committee Chair Kevin Brady’s confidence that the House, Senate and White House have reached agreement on a process for moving forward with the three FTAs).

261. Gary G. Yerkey, *Democratic Leaders Reject Bush Call for Early Vote on Colombia Free Trade Pact*, INT’L TRADE DAILY, Jan. 30, 2008, at D1, available at 2008

B. New FTAs – The TPP and Beyond

When and if the United States concludes additional FTAs, such as the TPP,²⁶² political necessity will almost certainly require U.S. officials to include labor and environmental chapters. The language proposed by the United States will likely emulate the 2007 BTDA and the Peru TPA. Thus, the U.S. negotiating position—not yet fully determined²⁶³—is likely to focus on detailed substantive obligations (core labor rights and MEAs) as well as on enforceability using the general dispute settlement mechanism in the Agreement. These attributes appear to be the basis for the U.S. negotiating positions in the TPP negotiations, at least with regard to the environmental provisions.²⁶⁴

The complexities of negotiating labor and environmental provisions in the TPP context should not be underestimated. The current negotiations consist of nine potential Parties: the United States, Australia, New Zealand, Singapore, Peru, Chile, Brunei, Vietnam and Malaysia, with the possible addition of one or more others.²⁶⁵ The United States already has free trade agreements with four of them, Australia, Chile, Peru and Singapore, each with similar labor and environmental provisions. Moreover, four of the Parties participating in the TPP negotiations, Australia, New Zealand, the United States and Singapore, are developed countries

WL 224583. As of February 2011, it is not clear what steps the Colombian Government could take, if any, to satisfy critics in Congress.

262. This is the only new trade agreement anyone in the Administration has embraced. *Peru Says Trans-Pacific Partnership Talks Top Priority, With More Countries Joining In*, INT'L TRADE DAILY, Oct. 18, 2010, at D9, available at 2010 WL 4038190 (discussing the status of the negotiations and the likely parties); Rossella Brevetti, *USTR Sees Steady Progress in TPP Round, Market Access Offers Next Month*, INT'L TRADE DAILY, Dec. 14, 2010, D5, available at 2010 WL 5067283 (reporting on market access discussions).

263. See INSIDE U.S. TRADE (ONLINE EDITION), Jan. 13, 2011, at 1, available at insidetrade.com (last visited Jan. 18, 2011) (noting that U.S. positions on these issues remained at the time to be tabled).

264. The draft of the environmental chapter tabled by the United States in September 2011 is said to closely resemble the BTDA and Peru TPA language; it includes *inter alia* seven multilateral environmental agreements for which the FTA signatories would be required to fulfill their obligations, but that list itself is subject to negotiation. *U.S. Tables Full Environmental Chapter, Reflects "May 10" Deal*, WORLD TRADE ONLINE, Sep. 16, 2011. However, labor proposals have not been tabled as of September 2011. *U.S. Holds Off on Tabling SOE, Labor Proposals at Latest TPP Round*, WORLD TRADE ONLINE, Sep. 16, 2011.

265. Japan has expressed interest but apparently put off any decision to join the negotiations until June, which may be too late, according to sources Chauvin, Peru, *supra* note 264 at 230 (discussing the current status of the talks and the likely participants).

with generally strong labor and environmental protections as well as functioning legal arrangements for enforcement. In the other nations, both the laws and enforcement mechanisms are weaker.

The extent to which an effort to harmonize those provisions will be undertaken, and the content of the harmonized provisions, remains to be determined, not only with labor and environment but also regard to intellectual property, investment and many other FTA provisions. At minimum, it seems likely that Australia, New Zealand and perhaps Singapore will have their own ideas as to how best to deal with labor and environmental issues in the TPP. Thus, the United States may have to prioritize its objectives with regard to labor and environment, without being able to dictate the full package to the other negotiators. The inclusion of such provisions in the form preferred by the United States may require concessions in other sectors. Should the U.S. wish to reopen the labor and environmental provisions of the earlier U.S. FTAs, it must expect that some of those nations will want to reopen unrelated provisions (such as Australian access to the U.S. sugar market), much as Mexico and Canada would have done had the Obama Administration insisted on reopening NAFTA.

These complexities among others make it virtually certain that the TPP negotiations will be not concluded even in principle by the Administration's stated target date, the end of 2011,²⁶⁶ and probably not during the U.S. presidential election year of 2012. One can hope that the TPP will not meet the fate of the Free Trade Agreement of the Americas, where negotiations died with a whimper some nine years after their initiation.²⁶⁷

V. CONCLUSIONS

Regardless of the extent to which one considers the labor rights and environmental provisions embodied in U.S. trade

266. The United States originally hoped to complete the negotiations by November 2011, when it will host the rotating annual meeting of the Asia Pacific Economic Cooperation (APEC) Forum. *See Kirk, Sanchez Raise Doubts about Reaching Final TPP Deal in November*, WORLD TRADE ONLINE, Feb. 14, 2011 (quoting U.S. Trade Rep. Ron Kirk as stating "If we could meet that goal [Nov. 2011] that would be exceptional"). However, that deadline has been abandoned; *see Michael Bologna, TPP Negotiators See Progress on Legal Texts; Groups Push Positions During Chicago Round*, 28 INT'L TRADE REP. (BNA) 1496 (Sep. 15, 2011) (reporting on the inclusive nature of the negotiations after the September 2011 meeting, where textile rules of origin among other aspects of the negotiations could not be concluded).

267. *See* Kevin C. Kennedy, *The FTAA Negotiations: A Melodrama in Five Acts*, 1 LOYOLA INT'L L. REV. 121 (2004) (discussing the FTAA negotiations and the reasons for their failure).

agreements to reflect established human rights or human rights in progress, there is little doubt that improving conditions for workers and the local environment are worth-while objectives which support basic international human rights and environmental protection conventions. International trade, after all, has never been entirely about the movement of goods and services; culture, morality, security and, indeed, human rights, have always been part of the equation, whether articulated or not. The U.S. FTAs, the rights and obligations they provide and the mechanisms for implementing them go well beyond what is commonly found in the ILO accords and MEAs. These FTA mechanisms, formal and informal, have provided various means (even if not effectively used) for improving labor/environmental situations in member nations, through encouragement, financial and technical assistance and diplomatic pressure, depending on the circumstances.

Governments will, after all, continue to do what they perceive to be in their national interests. If, for example, Jordan, Guatemala and Peru conclude that it is in the country's national interest to respond favorably to U.S. urging to improve labor rights enforcement (Jordan and Guatemala), or to regulate logging in sensitive areas (Peru), they will act accordingly. Those governments would probably have been less willing to act in the absence of labor and environment provisions in their respective FTAs.

In a more perfect world one could contemplate a broad ILO accord and a series of MEAs that would provide minimum labor and environmental standards, respectively, opportunities for citizen complaints, cooperation for capacity building and binding enforcement mechanisms for violations, with the prospect of sanctions for non-compliance. However, such agreements are likely many years or decades from fruition, even should strong support of the United States for either be forthcoming, an unlikely development in the foreseeable future.

In this perhaps unfortunate real world situation, existing and new U.S. FTAs *could* be improved vehicles for cooperation between the developed and developing Parties in improving labor and environmental protection practices to the benefit of both groups, even though funding and political constraints in the United States may limit what is possible at the present time. The medium and longer term goals seem most likely to be achieved if each agreement makes provision, either in the text or in supplemental agreements, for quasi-independent secretariats that have

adequate financial resources, provision of technical expertise, and freedom from undue interference by the Parties. Proper functioning also requires Parties' cooperation in the national labor office or environmental secretariat's investigations of citizen complaints and construction of factual records, as well as with the traditional legal and institutional mechanisms of cooperation and capacity building. In the final analysis, imperfect as U.S. FTA provisions may be, they are significantly better in support of labor rights and environmental protection internationally and regionally than the alternatives most other governments prefer—doing nothing.

Comment

C. Ryan Reetz*

I think one of the most interesting things about Professor Gantz' presentation, in addition to the breadth and depth with which he has amassed all the information on the various treaties and the means of addressing rights under them – what was especially significant to me as a litigation and arbitration person concerned with going to court or arbitration and getting a remedy, is the variety of possible means of effectuating these labor and environmental rights, even in the context of a trade agreement. For example, something we haven't yet seen but could eventually see is a very strong enforcement mechanism, similar to under NAFTA chapter 11, where an individual aggrieved party might be able to bring a proceeding. Of course, we do have state-to-state arbitration mechanisms under the existing treaties, although they are not as strong as they might be in other contexts. But there are also other available means of vindicating these rights, such as technical cooperation or the factual record development that was discussed.

Curiously, sometimes a strong enforcement mechanism may not be the most effective at promoting rights under these agreements. I think that is because ultimately governments are only willing to agree to and to do what is in their best interests at the time. They are not necessarily going to feel pressured to comply with an award or to give in to other forms of dispute resolution pressures when they know that they can subsequently renegotiate an agreement or try to work around sanctions. So that even a final resolution under a strong enforcement mechanism is not necessarily final in this context. And the idea that governments tend to only do what is in their best interest as they conceive it at the time, I see that in national court litigation all the time. Our courts in the U.S. only extend comity to foreign laws or judgments, only comply with treaties, when there is some sense that it is in the

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broad national interest to do so. We don't have, for example, the monist theory of international law where a treaty becomes part of our law simply because the U.S. is a party to it. The rash of investment treaty arbitrations I think also supports this point. Why are there so many investment treaty arbitrations? There are probably many answers to that. One possibility is that many parties (both governments and private parties) are making the decisions that they feel the need to make without necessarily first engaging in a formal legalistic analysis of their perceived rights and obligations under international legal norms. So these strong enforcement mechanisms may not work.

Even in agreements that do provide for a direct means of enforcing labor and environmental provisions, we see that very few disputes are actually taken to conclusion. That may be because of the persuasive power that is inherent in these provisions. But it is also true that challenging a foreign government in formal proceedings is a very expensive process. Whether you are doing that either as an individual or group, or through your government as a proxy, it takes a lot of time, energy, and commitment. This happens in investment arbitrations because the stakes are typically so large that it makes economic sense to do so. But when we are talking about defending individual rights or rights of groups of people who are not politically empowered, it is more difficult to sustain the economic burden of enforcing these rights, so that the formal enforcement mechanisms may not be the best approach.

Professor Gantz also referred to the fact that the scope of labor and environmental rights seems to expand and contract with time according to the circumstances. That is clearly what we are seeing here in the U.S. where the dominance of labor unions has declined quite a bit over the decades, and as recently as this week we have seen legislative proposals that arguably infringe on fundamental collective bargaining rights. This is not to suggest that there are not core values in these areas or core rights in these areas, but their parameters are really not clear at all. And the lack of a stable consensus over what they mean, means that formal dispute resolution mechanisms may not be the best way of achieving those ends.

We also need to take into account the purpose of labor and environmental provisions in trade promotion agreements. It is only in recent decades that we have what might be called a protectionist alliance of classical protectionist interests, who don't want

to face competition from foreign producers who aren't bound by high labor and environmental standards, and other groups who are interested in promoting labor and environmental values internationally for their own sake. The focus of these agreements is on trade, and many of the standards in the agreements say that a country's failure to enforce its laws only violates the agreement if that failure takes place in a manner that affects trade. So, the purpose and scope of the labor and environmental provisions suggests that they are not primarily designed to secure these rights, but rather to maintain an appropriate environment for promoting trade.

Finally, I think that it is probably fair to conclude that the real benefits of these agreements, in terms of labor and environmental rights, are likely to come from economic incentives. They are likely to be driven by economic factors. If governments feel that providing a higher level of protection is in their own economic best interest or there is some other economic incentive for this to happen — whether it is a greater flow of trade, or the threat of a factual record being developed that may cause problems, or these mechanisms of fines that are paid into a fund that is used to promote technical development goals — when those kinds of incentives exist, I think we are more likely to see actual action driven by those incentives. Thanks.

Comment

Guillermo Aguilar-Alvarez*

Thank you very much for the invitation. I'm very happy to be here. Let me take you inside the negotiation of the SAID agreements to the NAFTA between Mexico the U.S. and to a lesser extent, Canada. When we did an inventory of the environmental laws and especially the labor laws of the three countries, a very interesting finding emerged. Of the three countries, the country with the highest standards in the books was Mexico. The Mexican revolution in 1917, the fact that we inherited our private law perfectly codified from Europe but then had to go on ourselves and write our public laws after adopting the U.S. model of government, yielded a situation where Mexico has very strict laws of moderate application. As opposed to the U.S. system where the laws are moderate but they are very strictly applied.

This paradox has a very profound impact on the ability of the rule of law to develop in Mexico. So when you enter into a negotiation where the premise is you assume a conventional international obligation to apply your own law, you can see very clearly what asymmetry is. Very briefly, I think it is undisputed that there is a correlation between economic development and the ability of a state to protect certain rights. So, protection would look a little bit like this. . . As GDP grows, the level of protection increases. However, when you enter into a negotiation with a more developed country, let's say the U.S. right here, and Mexico is somewhere down here. The premise is you now have to enforce your own laws or face trade sanctions, fines, or whatever it is. Well, you have a gap, right? You now have to comply with this level of protection much earlier in history than the developed country had to in the past. If you on top of that add the poetry that we write into our laws, if there is to be a response to Martinez' earlier question. . . what is intrinsically common to Latin American countries, this might be the answer: That we have laws that are very strict, but

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moderately implied. So in our books, this might be the level of protection.

So, I get asked the question: are trade agreements the right kind of instrument to fix this problem? My answer is maybe but not if you don't take care of the substantive problem here and the timing issue here. I will stop my comment there, I just want to throw this wrench into the discussion and hopefully provoke some kind of discussion with the audience. On the issue of Chapter 20, case 6, I would say today that the dispute settlement chapter of NAFTA comprises three stages. The panel is normally the third stage, and cases only get there if they were not settled in the previous two stages. Before the first stage, NAFTA created about 30 working groups, technical working groups, in every topic that NAFTA deals with. Many of the disputes get resolved either at the working group level or at the political level in one of the first two stages. This is what I wanted to add. This was the elephant in the room. . .

Comment

Jan Paulsson*

I thought as the last substantive speaker before you today, that I would take a couple of steps back and say two things about the general importance of the things that we have been discussing today and at the very end I think I will be coming back to professor Gantz' paper.

First something quite lighthearted since it is the end of the day, and after that I will hit you with something really serious. NAFTA is a very historic thing. It is part of my history. I remember it first 20 years ago when my good friend Guillermo was snatched away from a very pleasant life in Paris by the president of Mexico who absolutely insisted that he go back and negotiate a NAFTA, which he then did. And so for a couple of years you could call him at any time of day, so I had the feeling that something very important was under foot. Fast forward 10 years I found myself sitting on the first arbitral tribunal deciding an investor state dispute under NAFTA on the merits.

This was the very first case known as the *Zenyan*. This felt rather exalted. I was sitting there with the former attorney general of the US to my left and the former president of the bar association of Mexico to my right, hearing this particular claim which actually become interestingly enough something that is cited from time to time, or rather often, for the proposition that an international tribunal will respect the *res judicata* of the national court, provided that the national court decision itself did not violate international law in some procedural way i.e. denial of justice. The case itself, however, had to do with garbage.

These were sanitation engineers but they all looked like they had come into the profession before it was felt necessary to use euphemisms to describe what they did. You might forgive an arbitrator for being somewhat concerned, one shouldn't be concerned about these things, if the decision would disappoint the claimants, the fact that any one of them could wring your neck in about ten

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seconds, should not come into play at all. Fast forward a little bit later, just a couple of years ago a movie came out called Borat.

Now I will tell you something about NAFTA that you have never heard before, I think. Borat involves a Kazak journalist coming to discover the United States. He is played by Sasha Baren-Cohen, a north Londoner who is absolutely unafraid of embarrassing himself. As anyone who saw the movie, one cringes from beginning to end. And he travels around the United States with his sidekick, who is his driver from Kazakhstan. And one of the most cringe inducing moments in that motion picture is when the two of them, for reasons which totally escape anybody, find themselves naked on a bed in a very small motel room and they begin to wrestle. And the camera gets very close up and one wishes one was not watching this movie. At one point I was observing the face of Borat's driver and I thought to myself, I know this man.

That was Mr. Devician, the sanitation engineer who had gone into a second career. . . . The more serious thing, taking a few steps back. The reason one is interested in international law is that all kinds of things come into one's attention sphere. What is the interest, policy wise, of our international community in the agreements that underlie trade law and investment law? Why is it that we want to give legal effect to these negotiations? They are all negotiations. There are trade agreements. There are agreements that give legal protection to investors. They are negotiated and they become implicated in the notion of the rule of law, which immediately raises a question of sovereignty, because when you commit to an undertaking you give up a piece of sovereignty. And now the international community is going to impose the consequences of having given up that little bit of sovereignty and we very quickly get into some very thorny questions.

Such as, if an investor has signed a very significant agreement and begun to invest very large amounts of money, let's say two or three years ago, on the faith of a contract signed with Colonel Kadafi, how is that investor feeling today? And what is the nature of the binding commitment vis a vis the state of Libya represented as it will be one year from now by Colonel Kadafi or perhaps not? Some simple questions occur to us. First of all, are we in favor of the promotion of international trade and international investment? We have to answer that question. Most of us will say yes. It's not obvious that we have to say yes. It was very fashionable in France in the 1970's to discuss something, which was called

La Politique de la Rupture? This was not something, which was propounded by responsible government officials, the politics of rupture. But it was very fashionable intellectually to say that each country should in its pride follow a policy of autarchy, do what it wanted to do at any moment and not rely on anybody else, including relying on the international standards of the rule of law.

So that we need to decide. The second thing we might think about in this context is if we are in favor of those who engage in trade and those who engage in investment, businesses and investors? Are we in favor of corporations or are we in favor of states? Actually I think we should decide that too in about one second, we should be in favor of states that represent the people. We are interested in the welfare of the members of our community. It is very silly to think we support an abstraction like a corporation; if they weren't useful as a way of mobilizing capital we would give up on them. So that is not the question then. The question really is why is it in the interest of states that represent the collectivity to respect the rule of law and to accept ultimately that these bits of sovereignty that are given out are going to be sanctioned by the external agent to the state of some form of international adjudication.

Now here I propose that the answer to that question is that we should only do that as the international community because the result of doing it is going to improve the terms of trade and the terms of investment for the state involved. Now no state is more successful at dealing with the rule of law in this sense than Switzerland because people will invest in Switzerland for the mere promise of getting their money back. In the wicked world in which we live some people are really happy to know that they will get zero percent return but they will get their capital back. Switzerland is so risk free in the minds of many that one will invest on that basis. What rate of return would you require to invest in Libya today? What rate of return would you require to invest in Belarus for example? I think you might want 20 percent every six months. And after six months you probably want to clear out in case your relations aren't so good. That's not good for the people of Belarus because that's the wrong type of investment they are getting under those circumstances. It's not long term, it's very expensive, and it has the moral hazard of involving quite a lot of potential corruption. So when we come around this circle, I think it seems that the interest of everything we are talking about today

ultimately has to come down to saying that instrumentally the rule of law has nothing to do with being nice or moral.

Instrumentally, it is a way of improving the terms of trade and improving the terms of investment long term for the state that receives them. And if that's not true, there is no interest in it whatsoever. Now back to the immediate section that we are discussing, the difficulty of the soft law component of this discussion is how do you analyze the advantages of the soft law when it is, Guillermo used the word "moderately enforced or moderately enforceable." That is the conundrum as I see it.