

---

---

LABOR PROVISIONS IN TRADE AGREEMENTS:  
FROM THE NAALC TO NOW

FRANK H. BIESZCZAT\*

INTRODUCTION

The North American Agreement on Labor Cooperation (NAALC) was included as a side agreement to the North American Free Trade Agreement (NAFTA), and entered into force on January 1, 1994 by the governments of Canada, Mexico, and the United States.<sup>1</sup> This note begins with a brief description of the background of the NAALC and then explores the process by which a private party can bring a complaint against one of the party governments for failing to comply with the agreement. Next is a short introduction to current American goals in free trade agreements, as expressed in the Trade Act of 2002. Following that is a discussion of some of the successes and shortcomings of the NAALC as found in the agreement itself, and from its application over the last thirteen years. The next section is a survey of some of the trade agreements entered into by the United States since the NAALC. The final two sections examine how to improve the NAALC itself, and includes proposed guidelines that can be used in future trade agreements entered into by the United States. These proposals attempt to tie together the lessons learned from the NAALC and other trade agreements with the underlying goals of American trade policy regarding labor conditions in order to create more efficient and effective trade agreements in the future.

\* Frank Bieszczat is currently a third year law student at Chicago-Kent College of Law. Prior to law school he received a degree in English and Political Science from the University of Illinois at Urbana-Champaign.

1. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., art. 51, Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC].

## I. THE NAALC

The NAALC was proposed by the United States as an addition to NAFTA in response to domestic concerns that U.S. companies would relocate to Mexico in order to take advantage of lower labor standards.<sup>2</sup> In the 1992 presidential election campaign, Bill Clinton included support of NAFTA in his economic platform.<sup>3</sup> Clinton maintained he would support NAFTA only if it included agreements designed to safeguard worker rights and the environment.<sup>4</sup> The Mexican government was generally opposed to the addition of new labor and environmental agreements to NAFTA.<sup>5</sup> Further negotiations resulted in a compromised document which was viewed by American labor activists as a watered-down version of what they were trying to achieve.<sup>6</sup>

The agreement's objectives are to improve working conditions and living standards, encourage cooperation, and promote compliance with and effective enforcement of each state's labor laws for the mutual benefit of all parties to the treaty.<sup>7</sup> Specifically, the agreement was designed to promote the following labor principles:<sup>8</sup>

- 1) freedom of association and protection of the right to organize;
- 2) the right to bargain collectively;
- 3) the right to strike;
- 4) prohibition of forced labor;
- 5) labor protections for children and young persons;
- 6) minimum employment standards;
- 7) elimination of employment discrimination;
- 8) equal pay for women and men;
- 9) prevention of occupational injuries and illnesses;
- 10) compensation in cases of occupational injuries and illnesses; and
- 11) protection of migrant workers.<sup>9</sup>

2. John H. Knox, *The 2005 Activity of the NAFTA Tribunals*, 100 AM. J. INT'L L. 429, 440 (2006) [hereinafter Knox, 2005].

3. Jenna L. Acuff, Comment, *The Race to the Bottom: The United States' Influence on Mexican Labor Law Enforcement*, 5 SAN DIEGO INT'L L.J. 387, 414 (2004).

4. Mark J. Russo, *NAALC: A Tex-Mex Requiem for Labor Protection*, 34 U. MIAMI INTER-AM. L. REV. 51, 57-58 (2002).

5. Acuff, *supra* note 3, at 414.

6. *Id.* at 415.

7. NAALC, *supra* note 1, art. 1.

8. *Id.* art. 1(b).

9. *Id.* annex 1.

While there is some vague language requiring the states to enact labor laws and regulations which “provide for high labor standards,”<sup>10</sup> the agreement’s primary focus is ensuring enforcement by the states of their own labor laws.<sup>11</sup> One provision specifically states that “[n]othing in this Agreement shall be construed to empower a Party’s authorities to undertake labor law enforcement activities in the territory of another Party.”<sup>12</sup> Included in the agreement are guarantees that the system will be open to private parties.<sup>13</sup> Specifically, private parties must have access to administrative, quasi-judicial, judicial, or labor tribunals in order to vindicate their rights arising under labor laws.<sup>14</sup> Labor laws are defined as including occupational health and safety, employment standards, industrial relations and migrant workers, and collective agreements.<sup>15</sup> Numerous procedural protections are also required of the party states.<sup>16</sup>

In order to execute the NAALC, each party is required to create a National Administrative Office (NAO).<sup>17</sup> Each state must also designate a Secretary, which is responsible for the administration and management of the NAO.<sup>18</sup>

A private party can begin the NAALC process by submitting a complaint to the NAO of one of the two states not implicated in the submission.<sup>19</sup> For example, in order to submit a petition regarding American enforcement of labor standards, the petition must be submitted to the NAO of either Mexico or Canada. Upon receipt of the submission, the NAO can then request consultations with the NAO of the state whose labor laws are the subject of the submission.<sup>20</sup> The third NAO is entitled to participate in the consultations if it so wishes.<sup>21</sup> At this point, the NAO of the state that is the subject of the submission must provide publicly-available data and information to the other parties in order to assist the consulting NAOs.<sup>22</sup>

10. *Id.* art. 2.

11. *Id.* art. 3.

12. *Id.* art. 42.

13. *Id.* art. 4(1).

14. *Id.*

15. *Id.* art. 4(2).

16. *Id.* art. 5.

17. *Id.* art. 15(1).

18. *Id.* art. 15(2).

19. *Id.* art. 16(3).

20. *Id.* art. 21(1).

21. *Id.* art. 21(3).

22. *Id.* art. 21(2).

Any of the NAOs can also request ministerial consultations with the NAO of another state in order to deal with any unresolved matters.<sup>23</sup> Again, if the third state feels that it has a substantial interest in the matter, it can participate in the ministerial consultations as well.<sup>24</sup>

If the matter is still not resolved, any of the parties can request the establishment of an Evaluation Committee of Experts (ECE).<sup>25</sup> The ECE is comprised of three members who are independent experts in labor matters or other matters central to the dispute.<sup>26</sup> An ECE may not be convened if the matter is not trade-related or is not covered by mutually recognized labor laws.<sup>27</sup> First, the ECE presents a draft report that contains: “(a) a comparative assessment of the matter under consideration; (b) its conclusions; (c) and where appropriate, practical recommendations that may assist the Parties in respect of the matter.”<sup>28</sup> Following the draft report, each of the parties can submit written views of the report to the ECE, which will be taken into consideration by the ECE in the preparation of its final report.<sup>29</sup>

The ECE’s final evaluation report is presented to the Council,<sup>30</sup> which is comprised of labor ministers of the parties, and meets at least once a year.<sup>31</sup> At this point, the parties provide written responses to the recommendations made in the report to the Secretariat.<sup>32</sup> The Secretariat is appointed by the Council,<sup>33</sup> and performs its duties under the direction of the Council.<sup>34</sup> If the ECE’s report concerns the enforcement of a state’s occupational safety and health, child labor, or minimum wage standards, then either of the other two parties can request consultations with the investigated party regarding whether there has been a persistent pattern of failing to enforce the standards.<sup>35</sup>

If the consultations fail to resolve the dispute, the matter then proceeds to the Council, which may pursue one of three options.<sup>36</sup> First, the Council can call on advisers and create working groups or expert groups.<sup>37</sup> Second,

23. *Id.* art. 22(1).

24. *Id.* art. 22(2).

25. *Id.* art. 23(1).

26. *Id.* art. 24(1).

27. *Id.* art. 23(3).

28. *Id.* art. 25(1).

29. *Id.* art. 25(2).

30. *Id.* art. 26(1).

31. *Id.* art. 9(1), (3)(a).

32. *Id.* art. 26(3).

33. *Id.* art. 12(1).

34. *Id.* art. 10(1)(b).

35. *Id.* art. 27(1).

36. *Id.* art. 28(4).

37. *Id.* art. 28(4)(a).

the Council may “have recourse to good offices, conciliation, mediation or such other dispute resolution procedures.”<sup>38</sup> Third, the Council may make recommendations privately, or publicly with a two-thirds vote, so as to assist the parties to reach a “mutually satisfactory resolution.”<sup>39</sup>

If the matter still has not been resolved, the Council shall, upon the request of any of the consulting parties and by a two-thirds vote, convene an arbitral panel.<sup>40</sup> The arbitral panel consists of five members.<sup>41</sup> The disputing parties are required to agree on the chair of the panel, and if that is impossible, the disputing party shall select as chair a person who is not a citizen of the disputing party’s state.<sup>42</sup> After the chair is selected, each of the two disputing parties choose two panelists who are citizens of the other disputing party.<sup>43</sup> The panel is authorized to seek information and advice from any person or body it deems appropriate, so long as the disputing parties agree to it.<sup>44</sup> Within 180 days of the formation of the panel, it is to present an initial report to the disputing parties containing findings of fact, its determination as to whether there has been a persistent pattern of failure to enforce, and recommendations regarding the resolution of the dispute.<sup>45</sup> Any of the disputing parties can submit written comments to the panel in response to the initial report;<sup>46</sup> thereafter, the panel submits and publishes its final report.<sup>47</sup>

If the panel finds a persistent pattern of non-enforcement, then the disputing parties may agree on a mutually satisfactory action plan that should normally conform with the determinations and recommendations of the panel.<sup>48</sup> If the parties cannot agree on an action plan, any party may request that the panel reconvene so the party can propose an action plan.<sup>49</sup> The reconvened panel can then approve a plan submitted by the complained-against party or establish a plan consistent with the complained-against party’s laws.<sup>50</sup> The panel can also impose a monetary enforcement assessment where warranted.<sup>51</sup>

38. *Id.* art. 28(4)(b).

39. *Id.* art. 28(4)(c).

40. *Id.* art. 29(1).

41. *Id.* art. 32(1)(a).

42. *Id.* art. 32(1)(b).

43. *Id.* art. 32(1)(c).

44. *Id.* art. 35.

45. *Id.* art. 36(2).

46. *Id.* art. 36(4).

47. *Id.* art. 37.

48. *Id.* art. 38.

49. *Id.* art. 39(1).

50. *Id.* art. 39(4)(a).

51. *Id.* art. 39(4)(b).

A party may also ask the panel to reconvene in a situation where the parties agreed to a mutually satisfactory action plan, but there is a dispute as to whether the complained-against party is fully implementing that plan.<sup>52</sup> If the reconvened panel decides that the complained-against party is not fully implementing the agreed-upon action plan, the panel shall impose a monetary enforcement assessment.<sup>53</sup> Any actions taken by the reconvened panel are final.<sup>54</sup> A complaining party still has the option at any time to request that the panel reconvene in order to determine whether the complained-against party is fully implementing the action plan.<sup>55</sup> If a party fails to pay a monetary enforcement assessment, that party may have its NAFTA benefits suspended in order to collect what is necessary to pay the assessment.<sup>56</sup>

## II. AMERICAN LABOR GOALS IN FREE TRADE AGREEMENTS

In the Trade Act of 2002, Congress explicitly outlined the current trade negotiating objectives of the United States.<sup>57</sup> Included in these objectives are:

to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO . . . and an understanding of the relationship between trade and worker rights;<sup>58</sup> . . .

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;<sup>59</sup> [and]

. . . .

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.<sup>60</sup>

The statute goes on to list the “core labor standards” of the ILO that are to be promoted:

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) accept-

52. *Id.* art. 39(1)(b).

53. *Id.* art. 39(5)(b).

54. *Id.* art. 39(6).

55. *Id.* art. 40.

56. *Id.* art. 41(1)(b).

57. 19 U.S.C. § 3802 (Supp. II 2002).

58. *Id.* § 3802(a)(6).

59. *Id.* § 3802(a)(7).

60. *Id.* § 3802(a)(9).

able conditions of work with respect to minimum wages, hours of work, and occupational safety and health.<sup>61</sup>

NAFTA and the NAALC were negotiated and passed prior to the passage of the Trade Act of 2002. The goals and objectives found in the statute can be used as a template by which to judge the NAALC, since that statute embodies the current free trade goals of the United States. If the NAALC is in fact successfully promoting the goals favored by Congress and the President, then it would stand to reason that similar agreements will have been included in or alongside subsequent trade agreements. In fact, since the Trade Act of 2002, every major trade agreement negotiated by the United States has included a labor provision in the main text.<sup>62</sup>

### III. SHORTCOMINGS AND SUCCESSES OF THE NAALC

While some analysis of the NAALC has been positive, the majority opinion among commentators is that the agreement has failed to live up to its goals.<sup>63</sup> The primary criticism has been its lack of enforceability. The enforceability shortcomings were almost immediately apparent as the first four petitions pursued under the agreement failed to achieve concrete results.<sup>64</sup>

#### A. Lack of "Hard" Enforcement Mechanisms

One of the main criticisms regarding enforceability has been the unavailability of sanctions for breaching a majority of the agreement's principles.<sup>65</sup> A state can only face sanctions for failing to enforce occupational safety and health, child labor, or minimum wage standards.<sup>66</sup> The glaring

61. *Id.* § 3813(6).

62. Alisa DiCaprio, *Are Labor Provisions Protectionist? Evidence From Nine Labor-Augmented U.S. Trade Arrangements*, 26 COMP. LAB. L. & POL'Y J. 1 (2004).

63. See Jonathan Graubart, "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, 106–14 (2005); John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. L.A. INT'L & COMP. L. REV. 359, 377 (2004) [hereinafter Knox, *Separated at Birth*]; Knox, 2005, *supra* note 2, at 440–42; Edward Mazey, *Grieving Through the NAALC and the Social Charter: A Comparative Analysis of Their Procedural Effectiveness*, 10 MICH. STATE UNIV. DETROIT COLL. L. J. INT'L L. 239, 239 (2001); Marisa Anne Pagnattaro, *The "Helping Hand" in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. INT'L L. 845, 876–80 (2004); Acuff, *supra* note 3, at 414–29; Chantell Taylor, Note, *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Workers' Rights*, 28 DENV. J. INT'L L. & POL'Y 401, 415–19 (2000).

64. Graubart, *supra* note 63, at 110.

65. Pagnattaro, *supra* note 63, at 877.

66. *Id.*

omission is the failure to provide sanctions for violations of the right to organize and bargain collectively.

Substituting for the “hard” enforcement mechanisms are varying degrees of “soft” mechanisms, which may further dilute the effectiveness of the agreement. Thus far, no petition has been able to reach the procedural stage of an ECE report.<sup>67</sup> The NAO report may actually serve as an obstacle for the petitioner, because it could lessen the political pressure placed on the government. Undoubtedly some of the supporters of the petition will interpret the NAO report as a victory and significantly reduce or end support for pursuing any further measures.

The most common remedy for violations thus far has been ministerial consultation.<sup>68</sup> These consultations tend to achieve little, and have typically concluded with training sessions or the creation of a committee.<sup>69</sup> This result leads to petitioner frustration, as even a successful petition accomplishes nothing more than what is perceived as a public relations move by the party governments. Given the resources necessary to achieve this toothless result, petitioners are disincentivized from utilizing the NAALC petition process again in the future.<sup>70</sup> In addition to the substantial resources necessary to petition within the process effectively, private citizens have to deal with the consequences of what will most likely be a negative reaction by their employers, further discouraging the submission of petitions in the first place.<sup>71</sup>

### B. *Over-Reliance on Governmental Action*

Another problem is the agreement’s failure to provide roles for non-governmental actors in the enforcement process.<sup>72</sup> Non-governmental actors (NGOs) do not file complaints directly, but rather through a given government’s NAO.<sup>73</sup> Perhaps a better solution is found in the environmental side agreement, where the procedure is administered by an independent body rather than the states themselves.<sup>74</sup> It has been suggested that independent reports are more likely to be effective than governmental re-

67. Knox, *Separated at Birth*, *supra* note 63, at 381.

68. Knox, *2005*, *supra* note 2, at 441.

69. *Id.*

70. *Id.*

71. *Id.*

72. Knox, *Separated at Birth*, *supra* note 63, at 359.

73. *Id.* at 374.

74. *Id.* at 375.

ports, and that governments will only authorize these reports if they are under the continuing pressure of some independent bodies.<sup>75</sup>

One reason why an independent body may be more effective than a government in enforcing the NAALC is a government's fear of subsequent retaliatory investigations directed at itself.<sup>76</sup> For example, the United States may be less willing to vigorously pursue a petition against Mexico if the United States is worried that Mexico may respond by pursuing a claim against the United States about failures to enforce American labor standards regarding migrant workers. "Allowing non-governmental actors to raise claims of noncompliance may avoid this governmental bottleneck, since they do not share the concerns that dissuade governments from acting."<sup>77</sup> The record indicates governments are not motivated to pursue claims against the other states, as no government has ever brought a claim against another in the history of the NAALC.<sup>78</sup>

Another effect of relying on governments rather than an independent body to enforce the NAALC is that it invites allegations of bad faith enforcement by the governments, and further discourages the use of the process. The purpose underlying all independent or impartial judicial organs is to divorce biases from the process. So long as governments continue to fill the enforcement role, they are not really binding themselves to anything more than the continued pursuit of their own objectives. If this is the case, then many will see the NAALC as nothing more than a sham agreement negotiated by the governments in order to appease local opposition groups. In the end, though, the opposition groups do not achieve the goals they were pursuing, and the NAALC almost loses its status as a treaty because it fails to bind the parties to take action.

### *C. Success Through Public Awareness and Political Pressure*

Despite the criticisms of all the shortcomings of the NAALC, it does seem to be of some value. The NAALC has been successful in creating opportunities for groups to publicize instances of labor rights violations, and this publicity has been translated into some substantive changes.<sup>79</sup> For example, the Mexican government launched an informational campaign in the maquiladora zone of Mexico to educate female workers on their legal

75. *Id.* at 376.

76. *Id.*

77. *Id.*

78. *Id.* at 377.

79. Graubart, *supra* note 63, at 119–20.

rights regarding pregnancy discrimination.<sup>80</sup> The Quebec government created a special council to address illegal plant closings designed to avoid unions.<sup>81</sup> In the State of Washington, the state government increased the amount of resources allocated to enforcing health and safety standards in regard to migrant workers, and one of the large apple growing companies relaxed its union certification procedure.<sup>82</sup> These results are not the hard sanctions or fines that many critics of the NAALC are looking for, but they demonstrate where the NAALC has been utilized to achieve the goals that are supposedly at the center of the agreement.

The problem with these successes is they indicate that in order to make the best use of the NAALC, you need to have a well-funded and highly organized group directing the procedure. The NAALC successes were the product of “a series of legally sophisticated and well-researched petitions . . . all of which involved extensive political mobilization and the participation of multiple actors.”<sup>83</sup> The organizations which operated as the driving forces included the AFL-CIO and the United Steel Workers,<sup>84</sup> organizations that enjoy extensive resources and organization. These groups are accessible because they welcome confrontation with governments rather than avoid them, but the truly powerless and voiceless may not be able to catch the eye of these organizations. Many of the people affected by the NAALC are no doubt unaware of this phenomenon and unable to generate the political support necessary to access it even if they are. If the NAALC were truly designed to allow private individuals the ability to bring complaints against governments, then there seem to be significant shortcomings. It is not private individuals that bring complaints, but rather large NGOs that pick and choose cases according to their own agendas.

An argument can be made to the contrary: a process that requires a filtering of claims prior to the complaint stage is preferable. If the system were made so accessible that any private individual could bring a claim, the number of claims could create significant inefficiencies and conflict with the original and ongoing intentions of the state parties. A high volume of claims could conceivably dilute the available pool of resources for each complaint. The complaints that have enjoyed some success within the NAALC have done so by utilizing large campaigns to capture public awareness.

80. *Id.* at 120.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

An additional limitation on the publicity strategy, whereby the goal is to force states into action by creating negative publicity, is uncertainty regarding its effectiveness for all complaints. For example, a violation by a Mexican company involving Mexican workers may not evoke the same emotional response in the American or Canadian public as would abuses by a company of one's own state. Much of the public might point to the lack of a domestic connection as a reason not to get involved. A lessened emotional response could prove to be fatal, since the strategy relies on strong and continued public pressure.

The level of success attained and prospectively available is hard to determine and arguable. One sign, though, that the successes have been somewhat substantial is the continued use of the procedure by petitioners.<sup>85</sup> This measure may not turn out to be very authoritative, since the number of annual submissions has been declining.<sup>86</sup> Especially telling may be the fact that while the quantity of submissions under the NAALC has been declining, the number of submissions under the other NAFTA tribunals has been increasing.<sup>87</sup> This seems to be more of a trend than an anomaly as half as many submissions were made in the years 1999–2005 than were made in the years 1993–1999.<sup>88</sup>

#### IV. TRADE AGREEMENTS SINCE THE NAALC

##### A. *U.S.-Jordan Free Trade Agreement*

The first trade agreement to include labor criteria directly in the main text is the U.S.-Jordan Free Trade Agreement (Jordan FTA).<sup>89</sup> The Jordan FTA was signed on October 24, 2000, and was the last trade agreement signed by the United States during the Clinton administration.<sup>90</sup> The agreement is similar to the NAALC in that it is based upon the countries enforcing their own labor laws.<sup>91</sup> The Jordan FTA also envisions the parties working together to find solutions through consultations.<sup>92</sup> If consultations prove to be unsuccessful, the matter is sent to the Joint Committee,<sup>93</sup>

85. Knox, *Separated at Birth*, *supra* note 63, at 379.

86. *Id.* at 380.

87. Knox, *2005*, *supra* note 2, at 441.

88. *Id.*

89. DiCaprio, *supra* note 62, at 13.

90. Pagnattaro, *supra* note 63, at 878–80.

91. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan art. 6(4)(a) Oct. 24, 2002, 41 I.L.M. 63.

92. *Id.* art. 16.

93. *Id.* art. 17(1)(b).

and if necessary to an appointed panel.<sup>94</sup> The panel then generates a report including recommendations for the resolution of the dispute.<sup>95</sup> If the parties are unable to come to a resolution through the Joint Committee and the panel, the affected party then has the authorization to “take any appropriate and commensurate measure.”<sup>96</sup>

The procedure outlined in the Jordan FTA differs significantly from the NAALC in its brevity and breadth of options for a complaining party. Theoretically, one party would have the authority to impose sanctions upon the other for breaching its commitments. Sanctions are unlikely, however, as in 2001 the parties exchanged letters indicating it was unlikely that the U.S. would suspend benefits to Jordan.<sup>97</sup>

Unlike the NAALC, the labor provisions of the Jordan FTA are incorporated into the agreement itself, rather than relegated to side agreement status.<sup>98</sup> Here, the labor provisions are not watered down because they are tied to the enforcement mechanisms regarding the central issues of the agreement.<sup>99</sup> Therefore, labor standards should receive the same protections that apply to the central trade issues that are the primary subject of the agreement.

Despite the many distinctions, one similarity between the Jordan FTA and the NAALC is that both agreements were signed prior to the passage of the Trade Act of 2002.<sup>100</sup> This fact could be important when looking back to these agreements for the purpose of drafting new agreements in the post-Trade Act world. In the case of the Jordan FTA, this may not be as important because the Jordan FTA incorporates many of the same purposes and objectives that are found in the Trade Act. Specifically, both the Trade Act and the Jordan FTA rely heavily on the principles central to the creation and operation of the International Labor Organization (ILO).<sup>101</sup>

The ILO was created by the Treaty of Versailles in 1919 and was later adopted by the United Nations.<sup>102</sup> The overarching goal of the ILO is to promote the acceptance and enforcement of minimum labor standards globally through conventions, guidelines, and recommendations.<sup>103</sup> The

94. *Id.* art. 17(1)(c).

95. *Id.* art. 17(1)(d).

96. *Id.* art. 17(2)(b).

97. DiCaprio, *supra* note 62, at 14.

98. Pagnattaro, *supra* note 63, at 879.

99. *Id.*

100. *Id.* at 880.

101. *Id.* at 879.

102. *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2205 (2005).

103. *Id.*

current approach by the ILO focuses on eight “core” labor conventions that exist within four standards.<sup>104</sup> The four standards are “(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.”<sup>105</sup> Jordan has ratified seven of the eight core conventions, and according to the terms of the agreement, the United States could seek dispute resolution if Jordan failed to perform its obligations under the ILO.<sup>106</sup> Again, though, the “governmental bottleneck” problem re-emerges as a hindrance to vigorous enforcement.<sup>107</sup> Another problem is that the one core convention that Jordan has not ratified deals with freedom of association and the right to organize.<sup>108</sup> Therefore, one of the most important provisions is absent.

The Jordan FTA also includes one of the key safeguards found in the NAALC. There is an “anti-relaxation” clause included in the agreement which prohibits states from changing their own domestic laws regarding labor standards to decrease the amount of protections provided for private citizens.<sup>109</sup> Therefore, in order to comply with the agreements, a state cannot simply repeal existing labor laws to the detriment of labor standards.

In the end, though, no matter how well-written the agreement or treaty is, it will be ineffective if the parties do not have the political will to adequately enforce the provisions of the agreement. This seems to be the case with the Jordan FTA, as the U.S. in 2001 essentially promised that it would not suspend benefits to Jordan.<sup>110</sup> Therefore, the Jordan FTA can be seen as a model by which to craft an agreement that will more effectively bind the parties to the goal of improving labor conditions in concert with the benefits of free trade. Alternatively, it can be viewed as an even more clever exercise than the NAALC in placating anti-free trade, pro-labor standards groups while not imposing any real obligations on any of the parties.

104. *Id.* at 2206.

105. *Id.*

106. Pagnattaro, *supra* note 63, at 879.

107. Knox, *Separated at Birth*, *supra* note 63, at 376.

108. Pagnattaro, *supra* note 63, at 879.

109. *Id.* at 880.

110. DiCaprio, *supra* note 62, at 14.

### B. *Bilateral Trade Agreements After the Trade Act of 2002*

Following the Trade Act of 2002, the United States has entered into a number of trade agreements including free trade agreements with Singapore, Chile, Australia, Bahrain, and Morocco.<sup>111</sup> These agreements resemble the Jordan FTA much more than the NAALC. Like the Jordan FTA, all of these agreements are bilateral agreements between the U.S. and the partner state, and all of these agreements include labor provisions in the main text of the agreement.<sup>112</sup> Just like the NAALC and Jordan FTA, these labor provisions operate by guaranteeing compliance with a party's own labor laws.<sup>113</sup> Some of the same criticisms of prior labor provisions have been levied against these agreements as well, including the lack of an imposition of new heightened standards and the lack of any "hard enforcement mechanisms."<sup>114</sup>

### C. *CAFTA*

On May 28, 2004, the United States entered into the United States-Central America Free Trade Agreement (CAFTA) with Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.<sup>115</sup> The Dominican Republic signed the agreement later, on August 5, 2004.<sup>116</sup>

CAFTA includes a chapter addressing labor.<sup>117</sup> In it, all states reaffirm their obligations as members of the ILO, but only "strive" to ensure that such labor rights are protected by their laws.<sup>118</sup> CAFTA defines these labor rights as the rights to organize and bargain collectively, prohibitions against forced labor, protections against child labor, and minimum health and safety standards.<sup>119</sup> The use of the word "strive" has been criticized as merely setting a goal, rather than a requirement, that the countries abide by international labor standards.<sup>120</sup>

111. *Developments in the Law—Jobs and Borders*, *supra* note 102, at 2214.

112. DiCaprio, *supra* note 62, at 1.

113. *Id.* at 14–15.

114. *Developments in the Law—Jobs and Borders*, *supra* note 102, at 2214.

115. Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 *FORDHAM INT'L L.J.* 386, 386 (2006).

116. *Id.*

117. Free Trade Agreement, U.S.-Cent. Am.-Dom. Am., ch. 16, Aug. 5, 2004, available at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/asset\\_upload\\_file320\\_3936.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file320_3936.pdf) [hereinafter CAFTA-DR].

118. *Id.* art. 16.1(1).

119. *Id.* art. 16.8.

120. Pagnattaro, *supra* note 115, at 434.

Each state is charged with enforcing its own labor laws, and is given significant discretion in doing so.<sup>121</sup> A state is in compliance with the agreement whenever “a course of action or inaction reflects a reasonable exercise” of a state’s discretion in enforcing its own labor laws.<sup>122</sup> In fact, third parties are expressly forbidden from enforcing a state’s labor laws.<sup>123</sup> A state that fails to enforce its own labor laws does face the prospect of a possible monetary penalty, but the penalty is capped at \$15 million annually and requires a lengthy, cumbersome process essentially identical to that of the NAALC.<sup>124</sup>

The shortcomings of the labor provisions of CAFTA mirror those of the NAALC, and represent a step backward from previous agreements such as the Jordan FTA. CAFTA fails to deliver effective hard enforcement mechanisms by creating an unnecessarily lengthy procedure, which precedes a relatively insignificant fine. The reasonableness requirement applied to the states gives them significant discretion regarding labor law enforcement, and creates a safe haven for inadequate enforcement.

## V. HOW TO FIX THE NAALC

It is not yet so late in the game that the NAALC cannot be saved from the precipice of death and irrelevance. Modifications can be made to the text of the agreement, and changes can be made in the way the text is interpreted and executed. The political landscape is different now than it was at the time of enactment in each of the three member countries, and it is conceivable that this change in context may facilitate a change in the workings of the agreement.

### A. *Looking to the Rest of NAFTA for Answers*

It seems that the majority of the shortcomings of the NAALC could be solved by providing for an enforcement mechanism that works independently from the governments. It would make sense to model the NAALC on the other, more effective side agreement to NAFTA involving environmental standards. A short exploration of the environmental side agreement illustrates its superiority.

121. CAFTA-DR, *supra* note 117, art. 16.2.

122. *Id.* art. 16.2(1)(b).

123. *Id.* art. 16.2(3).

124. Bryan D. Gerbracht, Note, *Export Processing Zones and Free Trade Agreements: Lessons from the North American Agreement on Labor Cooperation*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 1029, 1051–52 (2007).

The North American Agreement on Environmental Cooperation (NAAEC) resembles the NAALC in many ways. Like the NAALC, the NAAEC was conceived of as a means by which to address American public resistance to NAFTA.<sup>125</sup> The concern was that U.S. companies would rush to Mexico in order to take advantage of low Mexican environmental standards.<sup>126</sup> Just as in the labor sector, the Mexican environmental standards on the books are comparable to their American counterparts.<sup>127</sup> The difference is that there are significantly lower rates of compliance with those standards in Mexico.<sup>128</sup> The NAAEC operates by requiring parties to enforce their own environmental laws, and does provide for a citizen submissions procedure through which an NGO can claim that a government is failing in its enforcement.<sup>129</sup>

The key difference found between the processes in the NAALC and the NAAEC is that in the environmental agreement citizen submissions are filed with the Commission for Environmental Cooperation (CEC), an independent international organization created by the NAAEC.<sup>130</sup> The CEC reviews the submission and then decides whether it is sufficient.<sup>131</sup> If it is, the CEC then requests a response from the government implicated in the submission.<sup>132</sup> It is this point at which the governments have input into the fate of the submission. If the Secretariat believes further investigation is warranted by the submission and the response, it goes to the representatives of the governments and this group then decides if the Secretariat should prepare a "factual record."<sup>133</sup>

The factual record is essentially an investigation into whether there is evidence that supports the submission.<sup>134</sup> This is not the kind of hard enforcement mechanism many advocates may be looking for. On the other hand, this is a more effective form of soft enforcement than that found in the NAALC. The record indicates petitioners have enjoyed a far greater rate of success through the NAAEC than their counterparts have with the NAALC. As of 2005, 45% of submissions have achieved recommendations for factual records from the Secretariat.<sup>135</sup> Of those, 89% have survived

125. Knox, 2005, *supra* note 2, at 438.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 439.

governmental scrutiny and proceeded to the stage of a factual record.<sup>136</sup> These numbers may indicate why it is that the NAAEC process has been utilized by petitioners more than twice as often as that of the NAALC.<sup>137</sup>

The difference in results emanates, in a large part, from the independence of the Commission for Environmental Cooperation and the Secretariat.<sup>138</sup> The fact that only 45% of submissions have resulted in a recommendation by the Secretariat for factual records is an indication that the Secretariat is performing its function as an initial filter of submissions.<sup>139</sup> On the other hand, that number is high enough to indicate that the Secretariat is willing to confront the governments, and not merely bow to the political forces that make enforcement of the NAALC so difficult.

Despite the many ways in which the NAAEC process has been successful, there have been a number of shortcomings as well. For example, the Secretariat's ability to elicit consent by the governments to create factual records has been accompanied by serious reservations and limitations regarding the scope and content of the investigations.<sup>140</sup> Another problem involves the governments' ability to withhold consent for factual records for a significant period of time.<sup>141</sup> This holdup tactic can create an inefficient process similar to that of the NAALC. The inefficiencies of the NAAEC process would most likely be less harmful than those of the NAALC process, though, because of the independence of the Secretariat. Whereas the success of a complaint under the NAALC is reliant upon the continued support and active participation of one of the governments, an independent Secretariat is not subject to declining public support and concern as a motivation to abandon the complaint.

#### *B. Providing for an Independent Body Within the NAALC*

Many of the problems currently faced by the NAALC would be solved with the creation of some sort of independent body to review and pursue complaints against states. This measure would accomplish a number of goals.

First, it would create greater legitimacy for the system in the eyes of activists and the public in general. The declining use of the NAALC is an indication of this loss in faith in the process.

136. *Id.*

137. *Id.* at 441.

138. *Id.* at 439.

139. *Id.*

140. *Id.*

141. *Id.*

A second, related benefit is that it will significantly reduce reliance upon political will to achieve enforcement. The primary purpose of the NAALC's citizen petition system is to hold governments accountable in enforcing their own labor standards. The fact that these complaints exist in the first place is evidence that governments are not always willing to abide by these standards on their own. Complaints have been brought against all three party governments to NAFTA, indicating that none of the governments may have the requisite political will to enforce labor standards because of the fear that they might be the subject of scrutiny next time. It seems nearly impossible that the NAALC's goals will be achieved through a process that relies upon state action, because the benefits of pursuing a complaint against another state party almost never outweigh the costs, both political and financial, that accompany such a plan of action.

Governments will probably be hostile to any arrangement that divests them of a certain level of control. Nonetheless, this option may not be completely politically unfeasible since, after all, this is the arrangement that was agreed to in the NAAEC.<sup>142</sup> It may be wise for labor activists to divert attention and resources from pursuing NAALC petitions to applying pressure on the governments to provide for an independent body with more power and discretion within the NAALC itself.

#### VI. THE FUTURE OF LABOR PROVISIONS IN TRADE AGREEMENTS

Currently, the preferred avenue by which to address global labor standards is through trade agreements that include labor standards provisions. The labor provisions have been substantially similar across the board, and have not been molded with the intent of accommodating the different contexts that exist within different domestic labor spheres. As American policymakers contemplate the prospect of using future trade agreements to achieve improved labor standards globally, it is important to apply lessons from recent history to future circumstances. The end result could range from ending this practice altogether, to following an identical template, to radically changing the terms and content of future agreements. Bilateral trade agreements can be used to improve labor standards, but in order to be successful, there needs to be a shift in the prioritization of certain goals.

142. *Id.* at 438.

A. *Focus on Rights To Organize and Bargain Collectively*

If there is one labor standards principle which should be promoted above all others in future labor provisions, it is the right to organize and bargain collectively. The labor agreements that the U.S. has entered into have not done an effective job of highlighting this principle. This is especially apparent in the Jordan FTA, where all of the core conventions of the ILO are protected with the exception of freedom of association and the right to organize.<sup>143</sup>

One of the important contributions of the NAALC is that it allows for private citizen submissions in addition to submissions made by a government. This signals that one of the purposes behind the NAALC was to allow private individuals some level of control over their own working conditions. The fact that all of the labor provisions the United States has agreed to since the NAALC also contain some mechanism by which private individuals can bring claims against governments for labor standards violations implies that some private control is still desirable.<sup>144</sup> Private control is desirable because governments generally do not want to get caught up in the business of governing someone else's state, and governments are also generally resistant to foreign governments meddling in domestic affairs. It is also more costly for the government of a given state to represent workers from another state because there are more transaction costs. There are barriers in language, culture, and geography that need to be overcome. If these barriers are not overcome, then the workers are left with a relatively incompetent representative.

The most effective way to ensure private control over the interests of the workers is through the formation of unions. A union which grows out of a group of employees, and is held directly accountable to them, faces significantly less transaction costs than a foreign government. Additionally, there is less need for foreign interference because the unions will be able to perform the oversight function that is outlined for governments in the NAALC and other agreements.

Another benefit of the strengthening of local unions is greater governmental flexibility in regard to labor standards. Agreements like the NAALC obligate governments to enforce the labor standards found in their own laws. In many countries, including Mexico, the laws protecting labor are excellent, but the problem appears in lack of enforcement.<sup>145</sup> The

143. Pagnattaro, *supra* note 63, at 879.

144. DiCaprio, *supra* note 62, at 1.

145. Acuff, *supra* note 3, at 388–89.

---

NAALC theoretically takes care of this problem by addressing the enforcement of the laws rather than the laws themselves. The problem is that many governments have no intention of complying with these standards because they may be artificially high. These standards may have been developed as a mere public relations ploy, and perhaps there was never any intent to follow them. In fact, the standards may be so high that they would significantly threaten the state's economic well-being and comparative advantages in cheap labor were they to be fully enforced. If unions were allowed to develop, employers and governments might be able to negotiate a middle ground with workers.

For example, assume that we can objectively assign some number to states' working conditions, with "level 1" indicating poor compliance with labor standards and poor working conditions, and "level 10" indicating perfect compliance and excellent working conditions. Assume further that a hypothetical state has excellent laws on the books regarding labor standards. Were these standards fully enforced, working conditions in the state would reach level 8. The government realizes that there would be practically no foreign investment in the state if labor standards were that high. The cost to produce would be so high that there would be no incentive for foreign corporations to enter the state and employ its citizens. Therefore, the government does not enforce these standards at all, and the actual working conditions in the state fall to level 2. The optimal scenario would be for working conditions to be at level 5. Level 5 is low enough that there will still be strong incentives for foreign companies to invest in the state. On the other hand, level 5 is good for the workers because it is a significant increase in working conditions, and as a result, the quality of life of a worker will improve as well.

The government is extremely reluctant to enforce any of the labor standards laws because it fears that giving any ground on the subject will motivate workers and foreign labor activists to push for full enforcement that will drive investors out of the state and cripple the national economy. The government would be willing to change its labor standards to a lesser standard and then enforce them at that standard because that would not threaten foreign investment. Unfortunately, the state is locked into a free trade agreement with the United States that does not allow the government to reduce its stated labor standards. Therefore the state will be unable to change its laws according to the treaty it signed with the United States, but it will not enforce its existing labor standards either, because that would hurt the national economy and the United States is not putting the government under any great pressure to enforce them anyway.

If the state had instead signed an agreement with the United States which focused primarily on protecting laws that allow for free organization and the right to bargain collectively, things might be different. First, workers would have better representation because their unions would have much stronger motivations to scrutinize government enforcement of labor standards than the United States government. Additionally, the state's government would not be locked into the existing labor standards laws, and would then be in a better position to negotiate. Through the information exchanges that occur during negotiations, both parties will become aware that heightened labor standards will actually hurt the workers' chances for employment, and also that labor conditions need to improve if the government does not want a strike on its hands. The parties will come to an agreement that a relaxation of labor standard laws to something that resembles level 4 or 5 is agreeable, so long as those standards are fully enforced.

The government is happy because it gets to take the unrealistically burdensome labor standards laws off the books and maintains its comparative advantage in luring foreign investment. The workers are happy because their working conditions have improved without costing them much in terms of the number of employment opportunities. The United States is happy because it has not had to get involved in the domestic labor relations of the state. Additionally, the improved labor standards pacify labor activists, and American companies are still happy because they can still invest in the state and make a profit. While this scenario is no doubt an idealized one, it illustrates the possible benefits that can result from protecting the rights to organize and bargain collectively if all of the parties involved act in a rational and reasonable manner while still pursuing their best interests.

#### *B. Bilateral vs. Multilateral Agreements*

It is important to note the differences that exist between bilateral and multilateral trade agreements. Bilateral trade agreements have the advantage of reducing negotiating and enforcement costs by limiting the number of parties involved. Multilateral agreements can reduce costs on a greater scale. By creating a free trade zone which encompasses a number of states, each of the states reaps the benefits of a diversified pool of comparative advantages. Additionally, multilateral treaties make things a little easier on the United States because they create consistent obligations. This benefit can also be achieved through consistent bilateral agreements. So long as the United States' obligations remain the same throughout, the United States does not worry about having to constantly make sure that its activities are in accordance with numerous standards.

---

---

The preferred strategy may be to broker a number of bilateral treaties that are essentially identical. In this context the focus on protecting the rights to organize and bargain collectively becomes even more important because that provides for the contextual flexibility lacking in a system of identical agreements across different countries and regions. The reason this strategy may be preferred is because the negotiation costs are much lower when negotiating an agreement between two parties. Therefore, each agreement will cost less in negotiation. Many of the countries that struggle with problems with labor conditions would benefit significantly by being party to a free trade agreement with the United States, and that potential economic gain would create an incentive for these countries to agree to the terms of the standard agreement.

It would also be a wise move to have the standard labor conditions in these agreements closely resemble international labor standards. Therefore, these countries would be more able to form agreements with other countries, and the goal of a unified global marketplace would become more attainable.