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NAFTA Labor Side Agreement: Lessons for the Worker Rights and Fast-Track Debate

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NAFTA Labor Side Agreement: Lessons for the Worker Rights and Fast-Track Debate

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NAFTA Labor Side Agreement: Lessons for the Worker Rights and Fast-Track Debate

Updated October 12, 2001

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NAFTA Labor Side Agreement: Lessons for the Worker Rights and Fast-Track Debate

Summary

The North American Free Trade Agreement (NAFTA), between the United States, Mexico, and Canada was the first trade agreement ever linked to worker rights provisions in a major way. Its companion "side agreement," the North American Agreement on Labor Cooperation (NAALC, which rhymes with "talc") went into effect with NAFTA on January 1, 1994. The NAALC agreement is "broad" in that NAFTA signatories agree to enforce their own labor laws and standards while promoting 11 worker rights principles over the long run. However, under NAALC, sanctions as an enforcement tool are applicable to only three of the 11 labor principles (pertaining to minimum wages, child labor, and occupational safety and health), and are not applicable to three basic rights: the right to organize, bargain collectively, and strike.

NAALC and NAFTA were negotiated by the Administration and approved by Congress under presidential "fast-track" authority — without amendment and with limited debate. This authority which expired in 1994 was included in the *Omnibus Trade and Competitiveness Act (OCTA) of 1988*. It encouraged the birth of a document such as NAALC when it listed as a principal negotiating objective in trade agreements "to promote respect for worker rights." The 104th Congress considered but failed to pass renewed fast-track authority. In the 105th Congress, H.R. 2621 and S. 1269, both reported out of committee, would have renewed presidential fast-track authority but limited the potential to include worker rights provisions in trade agreements negotiated under fast-track procedures. They would have permitted only worker rights provisions aimed at preventing foreign governments from lowering or "derogating from" their existing domestic labor standards (e.g., child labor standards), in order to attract investment or inhibit international trade.

The U.S.-Jordan free trade agreement (P.L. 107-43, September 28, 2001) incorporated provisions from both the NAALC and the House and Senate-reported fast-track bills from the 105th Congress. In addition, for the first time, it included labor provisions in the body of the agreement and made them subject to the same dispute resolution procedures as other provisions in the trade agreement. Letters exchanged by the U.S. and Jordanian governments, however, vowed to resolve differences under the agreement without resorting to sanctions. H.R. 3005, the *Bipartisan Trade Promotion Authority Act of 2001*, was introduced October 3, 2001 (Thomas et al), and reported by the House Ways and Means Committee on October 9, to extend presidential fast-track or trade promotion authority to July 1, 2005. Provisions of H.R. 3005 both compare and contrast to those in OCTA.

Trade liberalization ultimately results in gains to all economies; however, there are winners and losers (both industries and workers) along the way. Worker rights provisions *could* mitigate the effects of trade liberalization on both winners and losers by increasing labor costs in developing countries. However, NAALC as a worker rights promotion vehicle with a developing country has mitigated the effects of trade expansion from NAFTA very little so far, because most compliance is voluntary.

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NAFTA Labor Side Agreement: Lessons for the Worker Rights and Fast-Track Debate

The North American Free Trade Agreement (NAFTA) — between the United States, Mexico and Canada, went into effect January 1, 1994. With it was the first labor side agreement ever attached to a trade agreement. This marked the first time that worker rights considerations were ever linked to a trade agreement in more than just a passing manner. The 43-page document was called the North American Agreement on Labor Cooperation (NAALC).¹

NAALC and NAFTA were negotiated under fast-track authority which Congress had given to the President under the *Omnibus Trade and Competitiveness Act of 1988* (P.L. 100-418). This authority also contained streamlined procedures for congressional consideration of a negotiated trade agreement, prohibited amendments, and limited debate. The negotiation of NAALC was supported by specific language in the 1988 Trade Act: Section 1101 identified as a *principal negotiating objective* in trade agreements "*to promote respect for worker rights.*"

Presidential fast-track authority to negotiate trade agreements expired in 1994. The 105th Congress reported two bills to extend this authority, which also would have limited somewhat the authority of the President to include worker rights (and environmental) provisions in future trade agreements. This CRS Report includes an analysis of worker rights provisions in the Administration's fast-track proposals reported on October 8 and October 23, 1997.²

The Worker Rights and Fast-Track Controversy

The worker-rights and fast-track controversy reflects the concerns of two sets of constituents. One set could include some corporations (especially multinational corporations). They could argue that fast-track reauthorization which mandates the promotion of respect for worker rights provisions through trade agreements might

¹ In everyday usage, specialists generally refer to this agreement by its acronym NAALC, which rhymes with "talc." The United States had passed trade laws before, which unilaterally imposed labor standards on trading partners, but it had never before entered into a mutual trade agreement which had a major labor component attached.

² This report deals with the issue of worker rights provisions in fast-track legislation. It does not track fast-track legislation. For the most current information about pending legislation, please consult the Legislative Information System (LIS) at [<http://www.congress.gov>].

hamper their ability to tap the natural *comparative advantage*³ of low-wage, labor-abundant countries in producing labor-intensive goods, and thereby compete successfully in the international marketplace. Into this group could also fall consumers looking for lower-priced goods and services. Both groups could want fast-track provisions which somehow *limit* the negotiation of labor provisions connected with trade agreements.

On the other side are some representatives of organized labor, who argue that by promoting worker rights the United States serves "humanitarian" objectives. They also argue that worker rights provisions linked to trade agreements could offer U.S. workers at least some shelter against competition based on lower wages and lack of worker rights in developing countries. These proponents tend to want fast-track to include broad authority to negotiate strong labor provisions in trade agreements.

Some economists tend to see the worker rights and trade arguments described above as a debate over protectionism vs. free trade. That is, imposing worker rights destroys the basis for trade in these countries and generally dampens income growth and economic development. They point out that as nations develop economically and production rises, they tend to adopt worker rights protections as workers shift their focus and their demands from merely wages and holding a job to broader concerns over the quality of their work environment.

Others counter that worker rights adoption in developing countries is hampered because workers around the globe are converging into a common labor pool. As a result, workers in any one developing country may not approach full employment and thereby have some bargaining power against multinational corporations until some time in the distant future. This is because production operations can be easily relocated to a country with lower wages and lower standards. Therefore, worker rights advocates argue, developing countries need to have labor standards provided for them; trade agreements are good vehicles for promoting these standards.

The worker rights debate so far has been based largely on theoretical arguments. Because NAALC is the first labor side agreement, it is both an experiment and a prototype. It provides an early opportunity to see the benefits and drawbacks of linking worker rights provisions to trade agreements, and to evaluate the specific *way* in which they are linked.

The purpose of this report, therefore, is to examine seven years of experience under NAALC for insights into the worker rights-and-trade agreement issue which could be applicable to the current debate on worker rights provisions in trade agreements. This report is divided into three parts. The first part sets out to briefly describe the worker protection structure that NAALC has created. The second part evaluates NAALC's characteristics and results as *input* into the debate on whether and how to authorize a continued link between worker rights and trade. The third part puts NAALC findings into the fast-track and current worker-rights debate and

³ A country has a comparative advantage, relative to a trading partner, in those goods which it produces relatively more efficiently than its partner does. Thus, these are the goods it is likely to export.

examines practical questions the two main groups of constituents are asking: Who are the winners and losers from trade liberalization both in general and with Mexico? How do worker rights requirements in general change that equation? What have been the effects of NAALC as a vehicle for worker rights provisions? Does NAALC improve the efficiency and welfare gains to the U.S. economy, or does it diminish them? What have been NAALC's benefits to workers so far?

The Structure that NAALC Created

As a first effort to link worker rights and trade agreements, NAALC is essentially a non-invasive way of promoting worker rights.⁴ It is non-invasive in that it does not require any country to adopt any new worker rights laws or conform to any international standards — only to enforce what it already has on the books. NAALC is at the same time, both "broad" and relatively "weak." The breadth of NAALC is in the number of labor principles it includes, that each country agrees to promote. NAALC includes more than just the five worker rights principles incorporated into U.S. trade laws, or the six worker rights principles identified as core labor standards by the International Labour Organization (ILO). It includes all of the above plus two other rights (workers' compensation and migrant worker protection). These principles are listed in figure 1.⁵

⁴ NAALC is not included in the 3,755-page two-volume set of congressional documents which contain NAFTA and its implementing legislation. (U.S. Congress. House of Representatives. North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements. House Document 103-159, November 4, 1993.) The NAALC was submitted to Congress in a separate House document (H.Doc. 103-60, November 9, 1993.) A copy of it can be found, however, in Bureau of National Affairs, Daily Labor Report, September 15, 1993, p. D-1—D-12. The Agreement can also be found on the Internet:

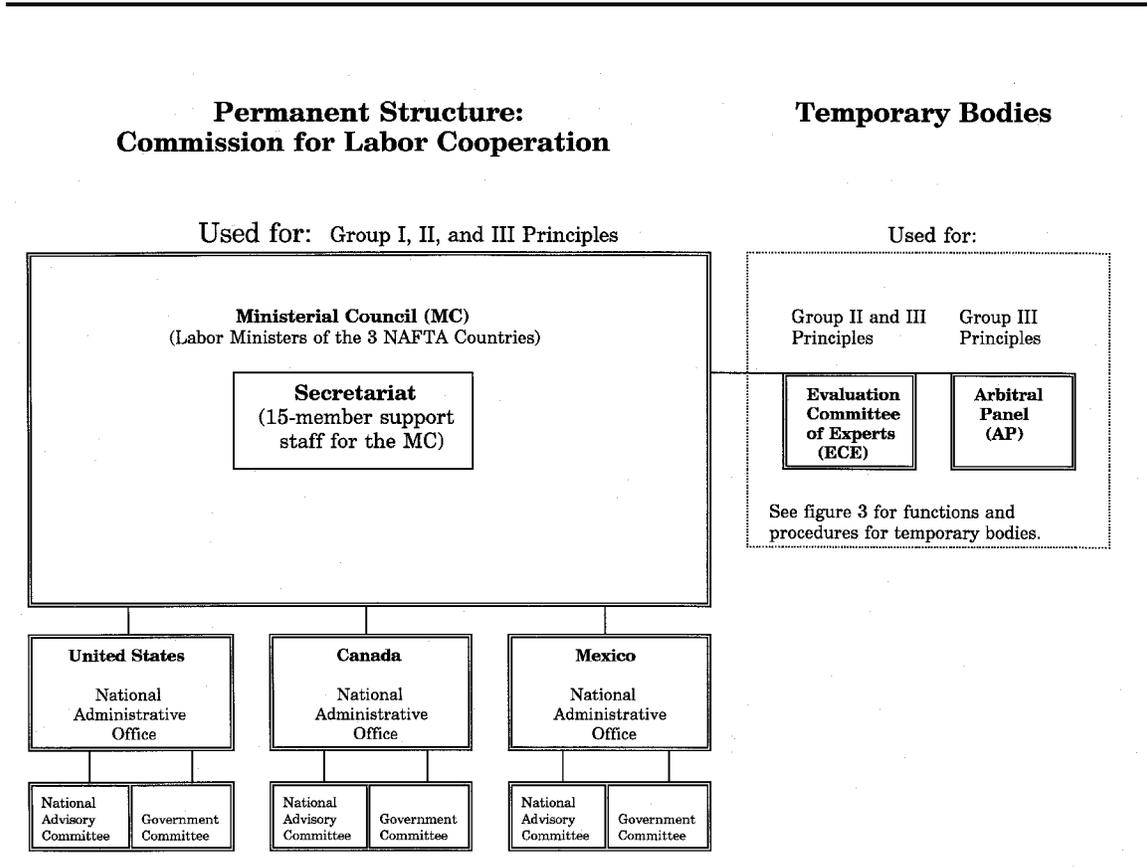
[<http://www.naalc.org/english/infocentre/NAALC.htm>].

⁵ The five basic worker rights included in U.S. trade laws are defined as internationally recognized worker rights by Sec. 502(a)(4) of the Trade Act of 1974, as amended. These are: (1) the right of association; (2) the right to organize and bargain collectively; (3) prohibition of forced or compulsory labor; (4) a minimum age for employment of children; and (5) acceptable conditions of worker rights with respect to minimum wages, hours of work, and occupational safety and health. Incorporation of the rights in trade laws is outlined in U.S. Library of Congress. Congressional Research Service. Worker Rights Provisions and Trade Policy: Should They Be Linked? by Mary Jane Bolle. CRS Report 96-661E, p. 10-11. The six core ILO labor standards are: (1) and (2) the right to organize and bargain collectively (with the implied right to strike – ILO standard nos. 87 and 98); (3) prohibition of forced labor (nos. 29 and 105); (4) minimum age for employment (no. 138); (5) equal pay for men and women (no. 100); and (6) freedom from employment discrimination (no. 111). Source: U.S. Library of Congress. Congressional Research Service. Trade Agreements and the International Labor Standards of the ILO, by Lois McHugh. June 30, 1994. CRS Report 94-535F, p. 4.

Figure 1. NAALC'S Labor Principles

GROUP AND PRINCIPLES	EXTENT OF ENFORCEABILITY
GROUP I	
<ol style="list-style-type: none"> 1. Freedom of association and protection of the right to organize; 2. The right to bargain collectively; and 3. The right to strike. 	<p>Enforceable by discussion of National Administrative Offices, Secretariat, and Ministerial Council</p>
GROUP II	
<ol style="list-style-type: none"> 1. Prohibition of forced labor; 2. Minimum employment standards pertaining to <i>overtime pay</i>; 3. Elimination of employment discrimination; 4. Equal pay for women and men; 5. Compensation in cases of occupational injuries and illnesses; and 6. Protection of migrant workers. 	<p>Enforceable by discussion as indicated for Group I plus evaluation by an Evaluation Committee of Experts.</p>
GROUP III	
<ol style="list-style-type: none"> 1. Labor protections for children and young persons; 2. Minimum employment standards pertaining to <i>minimum wages</i>; and 3. Prevention of occupational injuries and illnesses. 	<p>Enforceable by discussion as for Group I, evaluation as for Group II, and sanctions determined by an Arbitral Panel.</p>

Figure 2. Administrative Structure Set Up by NAALC



The "weakness" of NAALC is in the enforceability of those labor principles. All NAFTA partners agree to promote all 11 principles in the long run, as mentioned, and to comply with their own labor laws and standards which relate to these principles in the short run. However, only three of the 11 principles are enforceable by sanctions if a country does not self-enforce.

The enforceable principles are listed in group III in figure 1. (Those in group I are subject only to discussions among NAALC partners and those in group II may be addressed, in addition, by recommendations from an outside committee of experts.) The road to sanctions against a country that does not enforce its own labor laws is a long one. It can take more than two years when all procedures specified by NAALC (including waiting periods) are followed.

All procedures for handling a labor dispute (a complaint that another country is not enforcing its own labor laws or standards) start out the same, regardless of whether or no that complaint involves a principle for which sanctions are permitted.

Figure 3. Dispute Resolution Bodies Under NAALC

(To see how the ECE and AP fit into NAALC structure, see figure 2.)

<p>Evaluation Committee of Experts (ECE) (may consider Group II or III Principles)</p>	<p>Arbitral Panel (AP) (may ultimately impose sanctions for Group III Principles only)</p>
<p>An ECE:</p> <ul style="list-style-type: none"> ● consists of 3-members ● is appointed at the request of any Party <p>Functions — The ECE:</p> <ul style="list-style-type: none"> ● investigates <i>patterns of practice</i> in enforcing standards related to group II or III principles ● that are trade-related and covered by mutually-recognized labor laws <p>Powers and Procedures:</p> <p>The ECE shall:</p> <ul style="list-style-type: none"> ● analyze any <i>pattern of practice</i> in enforcement of its standards; and ● offer an assessment, conclusions, and recommendations. <p>Each party shall:</p> <ul style="list-style-type: none"> ● provide written responses. 	<p>An AP:</p> <ul style="list-style-type: none"> ● consists of 5-members ● is appointed by a 2/3 vote of the labor ministers <p>Functions — The AP:</p> <ul style="list-style-type: none"> ● investigates a <i>persistent pattern of failure to effectively enforce</i> standards related to group III ● that are trade related and ● covered by mutually-recognized labor laws <p>Powers and Procedures:</p> <p>The AP shall:</p> <ul style="list-style-type: none"> ● determine whether there has been a <i>persistent pattern of failure to effectively enforce</i> its standards; ● offer recommendations; and ● offer or approve an action plan; <p>and may:</p> <ul style="list-style-type: none"> ● impose a monetary enforcement assessment; and ● suspend NAFTA benefits to the amount of the monetary assessment.

An ECE may evaluate and make recommendations when any country fails to enforce its own group II or III worker rights law.

An AP may investigate and ultimately impose sanctions when any country fails to enforce its own group III worker rights law. Maximum sanctions from any one submission are equal to suspension of NAFTA tariff reduction benefits for one year.

The procedure is that an observer may bring a complaint, called a "*submission*" to the *National Administrative Office* (NAO) in his or her *own* country.⁶ [See figure 2 showing the organizational structure established by NAALC — called the *Commission on Labor Cooperation* (Commission).] Each country has an NAO headed by a Secretary and located in its labor department. Each NAO has its own rules on who may file submissions.⁷ NAOs may consult with each other and hold hearings. If the issue cannot be resolved by "cooperative consultation" at the NAO level, it may be addressed by labor ministers involved in the dispute, and if there is still not resolution, by a meeting of labor ministers from NAFTA countries, who together form the *Ministerial Council* (MC). The Ministerial Council (i.e., the U.S. Secretary of Labor in Washington and counterparts in Ottawa and Mexico City) is supported by a 15-member staff called the *Secretariat* (which is located in Dallas).

If the issue is not resolved at the ministerial level and it relates to a group II or group III principle, the MC may refer it to an *Evaluation Committee of Experts* (ECE). The three-member ECE lies outside the Commission, and is created at the request of any NAFTA partner, on a case-by-case basis by the MC, from a roster of experts. The ECE may investigate patterns of alleged non-enforcement and make recommendations, after which the ministers consult again.⁸

If the matter is still not resolved and it relates to a group III principle (child labor minimum wage, or occupational safety and health), it may be referred to an *Arbitral Panel* (AP) which may investigate further. The five-member AP is also created by the MC from a roster on a case-by-case basis. The AP may, as an ultimate penalty against a country for failure to enforce its own standards, issue a monetary assessment. If this is not paid, sanctions may result.⁹ Maximum penalties would be suspension of NAFTA benefits to the amount of the monetary penalty (which may be no greater than NAFTA benefits from tariff reductions) for one year. Functions of the ECE and AP, and the scope of their powers, are summarized in figure 3.

⁶ For additional discussion of the administrative structure set up by NAALC, see Pérez-López, Jorge. *The Institutional Framework of the North American Agreement on Labor Cooperation*. U.S. Mexico Law Journal, Symposium 1995, p. 133-147.

⁷ Both the United States and Mexico will accept submissions from citizens or organizations within the United States as well as outside the country. However, the submissions must concern a matter arising in a country other than the country where the submission is being made.

⁸ An ECE may not be convened if a Party to the agreement obtains a ruling from an independent expert selected by the Ministerial Council that the matter is not trade-related or is not covered by mutually-recognized labor laws.

⁹ The AP does not issue the sanctions itself. Rather, it makes findings as to implementation or the lack of it, which brings into play the complaining Party's right under NAALC to suspend benefits against the other Party (article 41 of NAALC).

Major Characteristics and Results of NAALC¹⁰

NAALC's major characteristics relate to its groundbreaking existence, its nature as a promoter of worker rights, yet preserver of sovereignty, and its enforcement mechanism. All three characteristics are seen as controversial.

NAALC's Groundbreaking Existence

The very existence of a labor side agreement is groundbreaking in the history of trade agreements. At the same time, this existence can be viewed from four perspectives: It is an accomplishment to some; it falls short of the original plan to others; it is a signal of alarm to a third group; and is considered unnecessary by a fourth group.

As an accomplishment, NAALC promotes international engagement in labor rights and standards on an unprecedented scale.¹¹ It is a first acknowledgement that workers making goods for export are intimately connected with the products that are traded, and, some would say, pawns in the process.

Yet to others, NAALC falls short of the original plan. They argue that NAALC does not go nearly far enough in protecting workers: If workers were granted status equal to that of the goods they produce, the worker rights provisions would be *in* NAFTA and enforceable under it. The possibility would exist for the termination of NAFTA benefits or expulsion from NAFTA.¹² Instead, NAALC is "only" *attached* to NAFTA in a side agreement. Maximum disciplinary action is suspension of a portion of NAFTA benefits for one year.

Still others view NAALC with alarm. They argue that it is like a "foot in the door." It impinges on the freedom of multinational corporations to bring goods to the consumer at the lowest possible cost, and it deprives developing countries of the source of their comparative advantage.

¹⁰ Resources for this section include the following: Compa, Lance. Another Look at NAFTA. Dissent, Winter 1997, p. 45-50. The Failed Experiment: NAFTA at Three Years. Jointly published by the Economic Policy Institute, the Institute for Policy Studies, the International Labor Rights Fund, Public Citizen's Global Trade Watch, the Sierra Club, and the U.S. Business and Industrial Council Educational Foundation, June 26, 1997, 34 p.; Testimony of Lori M. Wallach, Public Citizens' Congress Watch, September 9, 1993 before the House Committee on Government Operations, Subcommittee on Employment, Housing and Aviation on the NAFTA Labor and Environmental "Side" Agreements, 15 p.; Levinson, Jerome. NAFTA's Labor Side Agreement: Lessons from the First Three Years, Published jointly by the Institute for Policy Studies and the International Labor Rights Fund. November 21, 1996, 28 p.; Milanovic, Nikola. An Examination of the North American Agreement on Labor Cooperation, for the International Labor Rights Fund. Discussion Draft, 42 p.; and Harvey, Pharis. Myth #4: NAFTA's Labor Agreement Has Teeth, in NAFTA's First Two Years: The Myths and the Realities, Sarah Anderson and John Cavanaugh, Institute for Policy Studies, and David Ranney, university of Illinois at Chicago, editors, March 26, 1996, p. 18-20.

¹¹ Compa, Lance. op. cit. p. 45-50.

¹² Wallach, Lori, op. cit., p. 3.

The last group argues that NAALC is unnecessary. They point out that the ILO, a large organization with more than 1,800 employees, has been working for more than 75 years to promote and monitor worker rights adoption around the world on a voluntary basis, and needs no assistance in this matter.

NAALC: Promoter of Worker Rights and Preserver of Sovereignty

Beyond the controversial fact that NAALC exists at all, it can be viewed as a vehicle that at the same time both promotes worker rights and preserves sovereignty. Herein lies another area of controversy.

NAALC promotes worker rights by creating a system of *mutual obligation* and *mutual responsibility*. All countries agree to promote and comply with their own laws relating to the 11 labor principles. Mutual accountability is enhanced by the fact that there are three parties to NAALC and therefore, there will likely be a majority opinion even if the most powerful tools available are "cooperative consultation" among the NAFTA partners and moral suasion.

Yet, when mutual accountability breaks down, as it is apt to do from time to time, NAALC's critics find fault with NAALC's enforcement mechanism. The fact that not all labor principles under NAALC are equally enforceable has been identified as NAALC's "fatal flaw"¹³ in that the three most basic of all labor rights — to organize, bargain collectively, and strike — are the least enforceable of the 11 labor standards. They are subject only to two different levels of "cooperative consultation" among the three NAFTA Partners—consultation among the NAOs and consultation among the labor ministers.¹⁴ All labor principles, some argue, should be subject to consultations, evaluations, and arbitrations.¹⁵

NAALC preserves sovereignty in several ways. First, it does not require "harmonization" — that the same body of standards apply in all three NAFTA countries. Under NAALC each country maintains its freedom to adopt its own labor laws and standards and enforce them as it sees fit. If a country does not support a labor principle by already having, or by adopting and then enforcing a national labor law or standard upholding that principle, no complaint may be brought against it for failure to offer such protections to its workers.

Second, NAALC preserves sovereignty by its enforcement mechanism. "Cooperative consultation" is the primary way of settling disputes. No country can be compelled to enforce its own labor laws and standards. When enforcement mechanisms of NAALC are taken to the limit, sanctions are restricted by their attachment to only a few standards and monetary penalties are restricted to a percentage of goods traded for the most recent year. While repeated submissions can

¹³ Levinson, Jerome. *op. cit.*, p. 3.

¹⁴ *The Failed Experiment. NAFTA at Three Years.*, *op. cit.*, p. 19.

¹⁵ Milanovic, Nikola. *An Examination of the North American Agreement on Labor Cooperation*, *op. cit.*, p. 38.

be brought against any country that exhibits patterns of non-enforcement, there is no international court system.

Some observers find fault with NAALC's preservation of sovereignty. In particular, they see as a major weakness the lack of harmonization. They argue that, as an alternative to harmonization of standards, entities that do businesses in two or more NAFTA countries should be held responsible for meeting certain standards in all operations. Such standards, they argue, could be embodied in a corporate code of conduct, modeled on the codes already recognized by the United States, Canada, and Mexico in two documents: the Organization for Economic Cooperation and Development (OECD) *Guidelines for Multinational Enterprises* and the ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*. Promoters of this position argue that adherence to the code could be reinforced by an annual labor information audit which includes specific inspection of such things as terms and conditions of employment, and wages.¹⁶

NAALC's Enforcement Mechanism

Beyond the controversy over promoting worker rights vs. preserving individual sovereignty, a third level of conflict exists over the details of the enforcement mechanism in NAALC. Penalties are one area of enforcement controversy; hearings procedures are another.

Penalties under NAALC are characterized as "low" by some, and as "high" by others who argue that NAALC should not include penalties. Those who want to raise penalties have offered suggestions about how to do so. One suggestion is to include a penalty for anyone offering to waive a NAALC principle to induce or retain an investment. Another suggestion is to establish an arbitral disputes panel to prevent the importation into any NAALC nation of goods produced with exploitative child labor, slave or forced labor, or by unhealthy processes. A third suggestion is to raise the penalty limits for any country not complying with its own labor laws.¹⁷

The hearings process is characterized by required steps and time limits. While some see these steps as a way to encourage compliance with NAALC, others see them as a burden, particularly on businesses that must prepare responses even when no possibility for sanctions is involved. (This pertains to submissions relating to the right to associate, organize, and bargain collectively.)

¹⁶ The Failed Experiment. op. cit., p. 20, and Milanovic, op. cit., p 39 and 42.

¹⁷ Milanovic, op. cit., p. 39. The maximum monetary penalty is a percentage (0.007%) of total goods traded between the Parties during the most recent year for which data are available (Annex 39.1 in NAALC). If there is an initial failure to pay a penalty, then the complaining Party (country) can suspend benefits in an amount no greater than needed to collect the assessment (NAALC Article 41.1). If a Party is not fully implementing an action plan, the complaining Party may annually suspend benefits in an amount sufficient to collect any previously imposed monetary penalty. (Article 41.2). If a country uses as its measure, a suspension of NAFTA tariff benefits, it can not raise the duty beyond either the Most Favored Nation (MFN) rate or the pre-NAFTA rate (whichever is lower). In any event, the country cannot collect more money than the assessment (Annex 41B).

Still others argue that the time allowed for each step (particularly when an ECE or AP is involved) is too long, thus slowing down the dispute resolution process and limiting the number of submissions cases that can be processed by the small staff of the various bodies established under NAALC's administrative structure. A final group suggests requiring that hearings be held at a convenient site for affected workers (i.e., within the same country as and a reasonable distance from the relevant plant).¹⁸

NAALC's Results

Between January 1, 1994 when NAALC first went into effect and September 6, 2000, 23 submissions were filed. These include 14 allegations against Mexico, two against Canada, and 7 against the United States. Most of the allegations against Mexico were for failure to uphold Mexican laws giving workers the right to organize and bargain collectively. Others concerned the illegal use of child labor, pregnancy-based gender discrimination, minimum employment standards, and occupational safety and health. The ones against the United States typically involve Mexican workers (such as migrant workers) and issues such as freedom of association, protection of migrant workers, various worker standards, and safety and health.

Two accomplishments in particular stand out above the others. Some might say "surprisingly."

First, in one case, NAALC has encouraged Mexico to begin enforcing its own labor law permitting workers the right to organize and bargain collectively. This came about primarily through "sunshine," prescribed under the NAALC dispute resolution process and against the predictions of many observers.¹⁹

A second major result from NAALC so far has been the creation of a labor communications superhighway connecting the three NAFTA partners. Before NAFTA went into effect, information comparing laws and labor market indicators among the three countries was not always readily available. However, in its first three years NAALC has fostered studies comparing the labor laws of the three countries, nurtured the development of a standardized system of labor market indicators, and been responsible for studies comparing productivity levels and wage rates. (Some of this work had been undertaken in the past, to a lesser extent, by the Bureau of Labor Statistics.)

¹⁸ Milanovic, *op. cit.*, p. 38-42.

¹⁹ A local labor board denied registration to workers of Maxi-Switch (which produces keyboards for computers and computer games) and after the company allegedly fired some 400 workers for union activity. Hearings were scheduled. Then, to the surprise of many, two days before hearings were to begin, the local Mexican labor tribunal awarded the workers union registration when they reapplied. As a result, the submission was withdrawn, and victory was declared by Mexico's independent labor. Bureau of National Affairs. Daily Labor Report. NAFTA Complaint Adds to Recognition of Mexican Union, according to Experts. April 23, 1997, p. A-2; and Mexican Labor Group Calls for Action Following Victory in Maxi-Switch Campaign, April 28, 1997, p. A-4—A-5. Supporting NAALC's worker rights accomplishments, however, has been the changing political climate in Mexico.

An Administration report evaluating NAFTA after three years (as required by NAFTA) identified other related accomplishments under NAALC: The NAALC submission process resulted in permission for secret union ballots at two companies where union votes previously were not secret. In addition, between 1993 and 1996, Mexico's Secretariat of Labor and Social Welfare increased funding for enforcement of labor laws by almost 250 percent. Moreover, Mexico reported a 30% reduction in the number of workplace injuries and illnesses in the first three years after NAFTA was signed, suggesting greater enforcement of its worker rights standards relating to occupational safety and health.²⁰

Putting NAALC Findings into the Fast-Track Debate

Experience under NAALC is important in the fast track debate because it offers lessons from actual events. Two key insights to be gained from three years under NAALC that are applicable to the current debate are these:

First, experience under NAALC has shown that open-ended fast-track language endorsing worker rights as a principal negotiating objective does not *necessarily* result in a "strong" labor side agreement that incorporates many sanctions. The shape of the worker rights provisions depends little on the language in the original fast-track provision. Provisions in a labor side agreement depend on what the specific parties to the trade agreement involved. Thus, the argument could be made that the shape of worker rights provisions in a trade agreement appears to depend much more on what trading partners are willing to agree on, and very little on the scope of the original fast-track authority.

For example, when the United States and Canada negotiated NAALC with Mexico, the fact that sanctions on key worker rights provisions — the right to organize, bargain collectively, and strike — were omitted, resulted from the unique identity of the NAFTA partners, and from the resistance of Mexico, in particular, as a developing country. In general, *developing* countries have been resistant to the idea of linking worker rights provisions and trade agreements. This position was made clear at the World Trade Organization December 1996 Singapore Ministerial, when trade ministers from the more than 110 member countries met to discuss trade issues. At that meeting, developing countries blocked the formation of a group to even *study* the issue of linking worker rights to trade.

Second, a side agreement based primarily on cooperation rather than sanctions, can have some effect on promoting adherence to worker rights. This became evident when Mexico finally recognized a single union after repeated submissions alleged Mexico's failure to grant workers the right to organize (referred to above).

Other questions also remain about the effects of including worker rights provisions in trade agreements negotiated under fast-track language: Who are the winners and losers generally from trade liberalization? How do worker rights

²⁰ Office of the U.S. Trade Representative. Study on the Operation and Effects of the North American Free Trade Agreement. July 1997, p. vi.

provisions in trade agreements change this equation? Who are the winners and losers under NAALC?

It should be emphasized that the terms "winners" and "losers" group various entities into artificial categories. In reality "winners" and "losers" fall along a continuum which includes all combinations between two extremes. The discussion below concentrates on salient winners and losers without trying to calculate exactly where they might fall along the spectrum, and without identifying those in the large middle section.

Who Are the Winners and Losers from Trade Liberalization?

In general, winners from liberalized trade include the overall economies of all countries to the trade agreement. This is because trade liberalization improves economic efficiency. Each country exports those goods and services it produces most efficiently and imports those which it produces least efficiently. The result is lower costs for consumers, but sectoral production shifts along the way may leave in their wake a mix of "winners" and "losers."

Trade agreements between *developed* and *developing* countries, tend to result in three groups of *winners* for the *developed* country (see figure 4, part I):²¹ The first group typically consists of higher-skill, higher-tech businesses that produce a given good or service relatively more efficiently and therefore more cheaply than their developing country trading partners can produce it. These are the exporters. The second group is labor-intensive businesses that relocate to the developing country to save on production costs. Theoretically such businesses could produce in the developing country for both domestic consumption and for export. The third group is domestic businesses which use imports from the developing country as components in their production processes. *Losers* in the developed country from trade liberalization with a developing country, on the other hand, are often labor-intensive low-wage import-competing businesses (and their workers). These groups would lose market share from cheaper imports.

²¹ In the developing country, winners tend to be labor-intensive producers who can use high-technology manufacturing processes from the developed country to produce more efficiently. Losers tend to be those producers and their employees who formerly produced goods and services which can be more efficiently produced and imported by the developing country partner. Some small Mexican grain farmers, for example, have lost under NAFTA to Mexican imports of efficiently produced American corn.

Figure 4. Winners and Losers in a *Developed* Country Under Three Conditions of Trade with a Developing Country

	Winners	Losers
I. Potential Effects of Trade Liberalization (Example: NAFTA)	<i>Higher-skill, higher-tech businesses</i> could benefit from reduced trade barriers.	<i>Labor-intensive lower-wage import-competing businesses</i> could lose from reduced protections (tariffs) on competing imports.
	<i>Labor intensive businesses that relocate to the country of the trading partner</i> could benefit by reducing production costs.	<i>Workers in import competing businesses</i> could lose if their businesses close or relocate.
	<i>Domestic businesses which use imports as components into the production process</i> may save on production costs.	
II. Potential Effects of Trade Liberalization Modified by Worker Rights Adherence	Adherence to worker rights requirements could raise foreign labor costs slightly, making <i>U.S. imports</i> more competitive.	On the other hand, <i>some multinational corporations wanting to relocate to the developing country to save on labor costs</i> could be discouraged from doing so because worker rights adherence could increase their production costs.
	Consequently, <i>workers in import-competing businesses</i> could be under less pressure to either give back wages or have their worker rights protections threatened.	
III. Real-Life Example: Effects of Trade Liberalization (i.e., NAFTA) Modified by Worker Rights Adherence Under NAALC	NAALC's worker rights effects so far have been sufficiently mild that the end result is more like winners and losers from trade liberalization (I above) than trade liberalization modified by worker rights adherence (II above).	

How Does the Equation Change When Worker Rights Protections Are Added?

How do worker rights provisions in a trade agreement (again with a developing country) change the winner-loser equation? At least one study has found that worker rights adherence may raise labor costs.²² Two recent studies looked at the extent to which adherence to worker rights provisions affected winners and losers. Worker rights provisions which result in worker rights adherence by the developing country could dampen the gains of the winners and lessen the losses of the losers in the developed country trading partner (i.e., the United States). Details of how this works are spelled out in figure 4, part II.

How Does the Scope of Presidential Fast-Track Negotiating Authority Affect the Picture?

How does the scope of Presidential fast-track negotiating authority change the picture? Renewed fast-track authority could grant the President either *broad* (open ended) authority to include worker rights provisions or *narrow* authority to include worker rights provisions in matters that are trade-related.²³ Or, renewed authority could *prohibit* worker rights provisions in trade agreements altogether, or some variant of the above.

One argument for restricted Presidential authority is that fast-track procedures are not intended to be used to implement general policy goals that are not directly related to trade. Another argument for restricted authority is that worker rights policies could interfere with benefits of liberalized trade. As a disguised form of protectionism, they could decrease U.S. market opportunities for its exports or distort or impede U.S. exports or imports.²⁴

²² The two recent studies tried to look at the extent to which adherence to worker rights affected not winners and losers specifically, but four components of trade in general: economic efficiency; comparative advantage; foreign direct investment; and labor costs and/or wages. One study was undertaken by the OECD, an organization that represents mostly developed countries. It looked only at the impact on trade of two worker rights provisions for which data for 75 countries were sufficient: freedom of association and the right to collective bargaining. The other study was undertaken by the Overseas Development Council (ODC), an organization that focuses on developing countries. It included a broad range of measures of worker rights adherence in 133 countries.

While the studies generally found little evidence that adherence to worker rights provisions significantly affects any of the above four trade-related measures, one study did find one effect: The ODC found (based on about 35 countries for which labor cost data were available) fairly strong results linking the relationship between worker rights provisions and labor costs. It found that labor costs tend to increase as labor standards become more stringent. As a correlative, the ODC study also found that per-capita income was higher where labor standards become more stringent (without designating either per-capita income or labor standards as the cause, and the other as the effect).

²³ It is possible that Congress could permit the President to include worker rights provisions in trade agreements but make them applicable only to matters that are "trade-related." While this term has no precise definition, it could include such employment situations as workers producing for trade, workers whose products compete with imports, and workers producing domestically in businesses established and/or supported by foreign investment.

²⁴ These arguments were taken from Trade Agreements Authority Act of 1995. Report to accompany H.R. 2371; H.Rept. 104-285. Oct. 20, 1995, p. 12.

The argument for broad authority is that it is a "tried and true formula," had bipartisan support, and allowed the content of trade agreements to be determined on a case-by-case basis reflecting the circumstances at the time.²⁵

Most likely winners and losers in the United States could be the same under both broad and narrow scenarios, because U.S. businesses are affected primarily by what goes on in the *trade* sector of the partner country.²⁶ If worker rights provisions are excluded from trade agreements altogether, winners and losers would remain the same as under liberalized trade generally.

How Has NAALC Affected the Mix of Winners and Losers from NAFTA?

NAALC's worker rights effects so far have been mild since they have had very little effect on promoting Mexican enforcement of its own worker rights laws. Therefore, the end result from NAALC is a list of winners and losers that looks more like those from trade liberalization (figure 4, part I above) than from trade liberalization modified by worker rights adherence (figure 4, part II).

NAALC appears to have offered very little protection for U.S. workers in import-competing businesses, from employers who either relocate or close down. Over the long run, however, NAALC may improve the lives of Mexican workers and may be able to help low-skilled U.S. workers who produce goods that compete with imports from Mexico. Many people argue that these are worthy goals and that if NAALC contributes to them, the benefits outweigh the costs.

To put the NAFTA-and-fast-track debate into a larger perspective, the basic argument for including worker rights provisions in trade agreements is that this linkage offers workers at least *some* level of protection from large multinational corporations. Some argue that the level of protection offered under NAALC is not enough: "Worker rights are only one aspect of the overall problem in redefining the international trade and investment regime to restore some of the balance between the power of workers and management;" yet, they have "been asked to carry a disproportionate part of the burden of that re-definition."²⁷

Others counter that protection offered under NAALC goes too far. Some of these argue that worker rights provisions really do not belong in a trade agreement at all. They argue that worker rights provisions should not be included in trade agreements because they are ultimately used for protectionist (not trade-liberalizing) purposes. Others argue that while the Congress has the power to negotiate agreements on worker rights, Congress should implement such an agreement under normal, not fast-track consideration. Thus, the House Ways and Means Committee report on the fast-track reauthorization bill from the 104th Congress included language which read: "Fast-track procedures are not intended to be used to implement other, more general policy goals."²⁸

²⁵ Ibid., p. 28-29.

²⁶ Workers producing for the maquiladora export sector have traditionally earned wages which were substantially higher than those for workers producing for domestic consumption.

²⁷ Levinson, Jerome, op. cit., p. 4.

²⁸ H.Rept. 101-285, op. cit., p. 12.

Fast-Track Proposals

The issue of whether or not to pass new fast-track legislation has arisen anew in the 107th Congress. While relatively quiet during the 106th Congress, it was a major issue during the 105th.

1997 House and Senate-Reported Fast-Track Reauthorization Bills

On October 8, 1997, the Senate Finance Committee and on October 23, 1997, the House Ways and Means Committee reported similar bills to extend presidential fast-track negotiating authority: S. 1269 (Roth, S.Rept. 105-102) and H.R. 2621 (Archer, H.Rept. 105-341, Part I).

Under previous fast-track language in the Omnibus Trade and Competitiveness Act of 1988, presidential authority to include worker rights provisions in trade agreements negotiated on a fast-track basis was open-ended, and not subject to any limitations: In part, the 1988 act identified as a principal negotiating objective for any trade agreements negotiated on a fast-track basis simply, "to promote respect for worker rights."

In contrast to this broad authority, both House and Senate bills sharply limited Presidential authority to include worker rights provisions in trade agreements negotiated under fast-track procedures. They did this by setting up three sets of negotiating objectives. However, while two of these sets — "principal negotiating objectives" and "international economic policy objectives" — included references to worker rights, only the narrowly-prescribed "principal" negotiating objectives were to be included in trade agreements implemented under fast-track procedures.

Principal negotiating objectives in both House and Senate bills permitted in agreements slated for fast-track consideration, therefore, only those worker rights provisions aimed at preventing foreign governments from: lowering or "derogating from" their existing domestic labor standards (e.g., child labor standards) in order to attract investment or gain an advantage in international trade. (Details of the language differences between the House and Senate bills are spelled out in figure 5.)

Figure 5. Comparison of 1997 House and Senate Language Permitting Worker Rights Provisions in Trade Agreements Negotiated on a Fast-Track Basis

<p style="text-align: center;">SENATE S. 1269 (Roth) S. Report 105-102, Oct. 8, 1997</p>	<p style="text-align: center;">HOUSE H.R. 2621 (Archer) H. Report 105-341, Part I, Oct. 23, 1997</p>
<p>PRINCIPAL NEGOTIATING OBJECTIVES: <i>(may be included in agreements considered under fast-track procedures)</i></p> <p>REGULATORY COMPETITION: Sec. 2(b)(15)(B): A primary negotiating objective is to prevent the use of foreign government regulation and other government practices including the lowering of or derogation from existing labor (including child labor), . . . standards for the purpose of attracting investment or inhibiting United States exports.</p>	<p>PRINCIPAL NEGOTIATING OBJECTIVES: <i>(may be included in agreements considered under fast-track procedures)</i></p> <p>LABOR . . . AND OTHER MATTERS: Sec. 102(b)(7): A principle negotiating objective is to address the following aspects of foreign government policies and practices regarding labor. . . that are directly related to trade: A) to ensure that foreign labor practices do not arbitrarily or unjustifiably discriminate or serve as disguised barriers to trade; and B) to ensure that foreign governments do not derogate from or waive existing domestic labor measures, including measures that deter exploitative child labor, as an encouragement to gain competitive advantage in international trade or investment. NOTHING in this subparagraph is intended to address changes to a country's laws that are consistent with sound macroeconomic development.</p>
<p>INTERNATIONAL ECONOMIC POLICY OBJECTIVES: <i>(may not be included in agreements considered under fast-track procedures)</i></p> <p>Sec. 2(c)(1)(C): An international economic policy objective is to promote respect for worker rights by:</p> <p>(i) reviewing the relationship between worker rights and trade; and (ii) seeking to establish in the ILO a mechanism for the systematic examination of and reporting on the extent to which ILO members promote and enforce the following worker rights:</p> <ul style="list-style-type: none"> ● freedom of association; ● the right to organize and bargain collectively; ● prohibition on the use of forced labor; prohibition of exploitative child labor; and ● prohibition of discrimination in employment. <p>Sec. 2(c)(2) Nothing in this subsection shall be construed to authorize the use of trade agreement approval procedures to modify U.S. law.</p>	<p>INTERNATIONAL ECONOMIC POLICY OBJECTIVES: <i>(may not be included in agreements considered under fast-track procedures)</i></p> <p>Sec. 102(c)(1)(C): A U.S. priority is to promote respect for worker rights and the rights of children and an understanding of the relationship between trade and worker rights, particularly by working with the International Labor Organization to encourage the observance and enforcement of core labor standards, including the prohibition on exploitative child labor.</p> <p>Sec. 102(c)(2): Nothing in this subsection shall be construed to authorize the use of the trade authorities procedures to modify U.S. law.</p>

The House bill contained additional restrictions beyond those in the Senate bill. Among other things, it limited worker rights provisions in trade agreements negotiated on a fast-track basis, to cases where foreign government labor practices are "directly related to trade." Secondly it excluded from trade agreement bargaining, changes to worker rights laws in another country which "are consistent with sound macroeconomic development."

The third group of negotiating objectives, "international economic policy objectives," included an additional reference to worker rights but was excluded from fast-track procedures. Both bills identified as an international economic policy objective, to promote "respect for worker rights" through the International Labor Organization (ILO). The effect was to restrict fast-track procedures to implementing labor provisions identified in principal negotiating objectives.²⁹ Other labor agreements requiring congressional implementation would have had to be considered under normal legislative procedures, as would *all* labor agreements if fast-track were not extended.

Limitations on fast-track procedure are a major issue for congressional debate. Some argue that the limitations streamline trade agreements by focusing them on traditional trade issues. Such limitations, they maintain, are necessary to prevent the use of labor standards as barriers to trade. Moreover, they permit economies to develop naturally on the basis of their own comparative advantage; rather than potentially stunting their growth by imposing worker rights requirements on them as they are struggling to grow.

Many of those who oppose the limitation, like Representative Gephardt, argue that provisions in both the House and Senate bills would have "validate[d] the status quo" rather than being a "force for progress." Progress would have been met if "people and the environment were given the same protections and enforcement in trade treaties as copyrights." Including and enforcing worker rights protections would have helped to create more of a consuming class; more people would have been able to buy more U.S. products. Companies would not have continued to chase low wages, exporting jobs overseas simply to reduce production costs. This might have helped to halt the widening income gap between winners and losers that is being observed in many countries.³⁰

U.S.-Jordan Free Trade Agreement³¹

The U.S.- Jordan free trade agreement, signed on October 24, 2000, incorporated provisions from both the NAALC and the House and Senate-reported fast-track bills from the 105th Congress. In addition, for the first time, it incorporated labor provisions in the body of the agreement and made them subject to the same

²⁹ In addition, the legislation generally tightens what may be contained in implementing bills compared to prior law. See H.R. 2621, Sec. 103(b)(3)(b) and S. 1269, Sec. 3(b)(3)(A).

³⁰ Gephardt Letter on Fast Track (to Ways and Means Committee Democrats). Reprinted in *Inside U.S. Trade*, October 10, 1997, p. 18-19.

³¹ The agreement can be found at:
[<http://www.ustr.gov/regions/eu-med/middleeast/US-JordanFTA.shtml>].

dispute resolution procedures as other provisions in the trade agreement. Letters exchanged by the U.S. and Jordanian governments, however, vowed to resolve differences under the agreement without resorting to sanctions.

Similar to the NAALC agreement, the U.S.-Jordan agreement provides that [article 6 (4)(a)] “a party shall not fail to effectively enforce its [own] labor laws.” It adds to this phrase “in a manner reflecting trade,” which reflects language in the House-reported bill that limits addressing foreign government labor policies to those that “are directly related to trade.”

Similar to House- and Senate-reported fast-track language, the U.S.-Jordan free trade agreement also [(Article 6(2))] provides that “each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from [domestic labor laws] as an encouragement for trade with the other Party.”

H.R. 3005: Bipartisan Trade Promotion Authority Act of 2001

H.R. 3005 (Thomas et al) the *Bipartisan Trade Promotion Authority Act* (BTPAA) of 2001 was introduced on October 3, 2001, and passed on October 9, to extend fast-track or trade promotion authority, as it has come to be called in the 107th Congress, to July 1, 2005.

The language is more specific and more detailed on the issue of worker rights than was the language in the 1988 OTCA. The OTCA included three worker rights provisions in the *principal* trade negotiating objectives with respect to dispute settlement: (a) to promote respect for worker rights; (b) to secure a review of the relationship of worker rights to GATT articles; and (c) to adopt as a principle of the GATT that the denial of worker rights should not be a means for a country or its industries to gain competitive advantage in international trade.

The BTPAA, by comparison, (Sec. 2(a)) incorporates similar language in identifying *overall* trade negotiating objectives (which may not be considered under dispute settlement procedures): “to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO (as defined in section 9(2)) and an understanding of the relationship between trade and worker rights.”³²

³² Although the bill refers to core labor standards of the ILO, the definition of “core labor standards” included in section 9(2) is actually the definition of “internationally recognized worker rights” included in section 502(a)(4) of the Trade Act of 1974, as amended. Both sources included similar first four rights with slight nuances of difference; (a) the right of association ; (b) the right to organize and bargain collectively; (c) prohibition of forced or compulsory labor; (d) minimum age for the employment of children. The ILO core labor standards, instead of focusing on prohibition of forced labor and child labor focuses on “elimination” of them. In addition, the 1974 Trade Act and ILO core labor standards have different fifth standards: While the Trade Act definition adopted in H.R. 3005 includes acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, the ILO identifies as its fifth core labor standards, the elimination of employment and occupational discrimination.

The BTPAA also identifies a number of other labor-related objectives as *principal negotiating objectives* in trade agreements (Sec. 2(b)(10)):

- (A): to ensure that a party “does not fail to effectively enforce its . . . labor laws through a sustained or recurring course of action or inaction in a manner affecting trade;”
- (B): to recognize that parties to the agreement “retain the right to exercise discretion” in investigatory, prosecutorial, regulatory, and compliance matters, and “to make decisions regarding the allocation of” enforcement resources relating to “other labor. . . 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;”
- (C): to strengthen the capacity of U.S. trading partners to promote respect for “core labor standards (as defined in section 9(2));” and
- (G): to ensure that labor. . . policies and practices of parties to trade agreements with the United States “do not arbitrarily or unjustifiably discriminate against United States exports or serve as disguised barriers to trade.”

The principal negotiating objectives of the United States *with respect to dispute settlement and enforcement* of trade agreements (Sec. 2(b)(11)) include seeking such enforcement mechanisms as:

- (C): “early identification and settlement of disputes through consultation;”
- (D): “trade expanding compensation;” and
- (E): “a penalty” that “encourages compliance,” “is appropriate,” and “has the aim of not adversely affecting parties or interests not party to the dispute while maintaining the effectiveness of the enforcement mechanism.”

In addition to negotiating objectives, the bill also provides that the President shall (Sec. 2(c)):

- (1): seek greater cooperation between the WTO and the ILO;
- (2): seek to establish consultative mechanisms among parties. . . to promote respect for core labor standards, and report to the House Committee on Ways and Means and the Senate Finance Committee on the content and operation of such mechanisms;
- (5): review the impact of future trade agreements on U.S. employment, and report to the House Ways and Means and Senate Finance Committees on such review;

- (7): have the Secretary of Labor consult with any country seeking a trade agreement with the United States concerning that country's labor laws and provide technical assistance to that country if needed;
- (8): submit to Congress a report describing the extent to which the country or countries that are parties to the agreement have in effect laws governing exploitative child labor;
- (11): report to the House Ways and Means Committee and the Senate Finance Committee on the effectiveness of the penalty or remedy in enforcing U.S. rights under the trade agreement, and on whether the penalty or remedy was effective in changing the behavior of the targeted party, and whether the penalty or remedy had any adverse impact on parties or interests not party to the dispute.