Richmond Journal of Global Law & Business

Volume 2 | Issue 2 Article 8

2001

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AN ESSENTIAL ELEMENT OF FAIR TRADE AND SUSTAINABLE DEVELOPMENT IN THE FTAA IS AN ENFORCEABLE SOCIAL CLAUSE

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I. The Justification for a Social Clause

Multinational companies ("MNCs") and governments that are fantasizing about a Free Trade Area of the Americas ("FTAA") should accept the reality that the FTAA is not politically viable for the time being unless the issues of labor rights and other social conditions are addressed in a manner demonstrating that these rights are consistent with the commercial rights that are protected in careful detail in the many pages of the draft FTAA agreement. The rage expressed by protestors in Seattle, Quebec, Genoa and Washington, D.C., although extreme, illustrates the united belief that the global economy is out of balance. There is no principled reason for trade agreements that ensure the intellectual property contained in a compact disc is strictly protected against piracy, while pirates of a different sort can violate international norms relating to labor rights and the environment in the production of those discs. Not even the overused cry of "free trade" excuses the imbalance that results in hundreds of pages in the World Trade Organization ("WTO") agreement devoted to regulation of commercial trade rules, but refuses to include labor or environmental rules, finding such social regulations to infringe upon doctrinal purity.

Those opposing the FTAA span the spectrum from groups that favor trade agreements, but only if they contain a social clause that targets the working poor as beneficiaries of trade,[1] to groups that oppose trade period, whether they are Luddites or protectionists. Former President Clinton could not scrape together a bare majority in 1998 to give him "fast track" authority to negotiate the FTAA, and lost a decisive vote in the Congress. President Bush is hoping that the public will be fooled into thinking that the "Trade Promotion Authority" he is now seeking is different from fast track, but the organized opposition views the name change as a superficial and provocative stunt. Whatever the name, it is unlikely that the Bush Administration will succeed where Clinton failed in attracting votes from moderate to liberal Democrats to support the FTAA, let alone the conservatives in his own party.

The deadlock will only be broken by fundamental change in the perception of what trade is and what it should do. Improving social standards should be the paramount goal of trade and other commercial exchanges, not an eventual side effect. By favoring trade agreements that heavily regulate the commercial rules and by

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[1] *See, e.g.*, Hemispheric Social Alliance, *Alternatives for the Americas*, *at* http://www.asc-hsa.org_ (Apr. 2001).

hypocritically opposing regulations that address social issues, the free traders are essentially recycling the failed theory of "trickle down" economics. Their theory is that by freeing up business to make money, everyone, including the poor, will benefit. A trip to the Maquiladoras at the US - Mexican border, or worse, the garment sweatshops of Honduras, offers compelling evidence that this theory is no more viable than when Herbert Hoover espoused it shortly before the Great Depression. There is no question that the global economy has failed to deliver goods to the working poor, and the quality of life for the large population of working poor is little more than a blip on a graph of macroeconomic indicators. Trickle down economics is even less likely to work in a global, as opposed to national, context because employers become less accountable to their workers and to any particular nation as they globalize. Developing countries are forced to compete against one another to attract new investment by offering cheap labor and lax enforcement of laws.[2] This downward spiral of reverse development lowers living standards for all workers and sends higher profits back to the MNCs, based largely in Europe, the United States and Japan.

An alternative economic vision of trade is that it can be used to provide an opportunity to create better jobs for the working poor in developing countries. Improving the economic situation for these people ought to be the precondition for trade, rather than hoping (against all objective measures of reality) that increased trade might help these target groups through some long-term trickle-down process. Individual nations have differing economic conditions and some nations have a legitimate comparative advantage of relatively cheap and plentiful labor. However, this advantage does not conceptually preclude the requirement in a trade agreement, such as the FTAA, that participating nations agree to abide by a set of core labor rights that set a floor from which each nation can seek to improve upon. This would stop the downward spiral, and would make clear that the objective of increased trade and economic development is to make progress for the workers of each country. Moreover, a global floor for labor standards would mean that there can be no country where a company could flee in order to avoid compliance. Rather than making cheap labor a major criteria for investment, employers would have a greater incentive to focus on training workers to improve productivity.

Similar policies favor including environmental provisions in trade agreements to form an overall social clause.[3] If trade is to be a vehicle for improving living standards for those struggling to survive in developing countries, then a key aspect of managing trade should be to prevent exposing people to hazardous chemicals and to protect against environmental degradation. There is no principled justification for MNCs that have left a developed country to engage in offshore manufacturing to use chemicals or allow other forms of pollution that are prohibited in their home countries. Without enforceable standards in trade agreements, developing countries will be

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[2] This is not unlike the situation in the United States prior to the enactment of the New Deal legislation. Southern states were largely nonunion and offered cheaper labor than the relatively industrialized Northeast. The garment and textile industries in particular began to shift south. The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq. (1994), by creating a minimum wage, regulating hours and working conditions, provided the floor of minimum standards nationally that thereafter prevented the states from competing with one another based on cheap labor and long hours.

[3] *See, e.g., supra* note 1.

inviting disaster if MNCs are free to seek manufacturing locations where they can turn back the clock and pollute without regard to the health or safety of workers and neighboring communities.

The remainder of this paper will focus on the substance of a labor clause, and more importantly, on an enforcement mechanism. The overall concept, particularly with regard to enforcement, would be equally applicable to an environmental clause or other social standards.

II. The Substance of a Labor Clause

The most fundamental concept at the forefront of efforts to gain acceptance of an enforceable labor clause is that most countries in the world, and certainly those that would be in the FTAA, have domestic labor laws and have ratified international instruments, including International Labor Organization ("ILO") Conventions, that already require compliance with all of the terms of a reasonable labor clause.[4] What is lacking is not only a clear consensus on the terms of the clause, but more importantly, a mechanism to ensure adequate enforcement for labor laws. While unions and Non-Governmental Organizations ("NGOs") continue to have their territorial battles within and across national boundaries, the MNCs are united in their global vision to protect property and investments. This is evidenced quite dramatically by the success of highly-competitive technology firms cooperating for their mutual interest to secure the inclusion of very strict rules to protect intellectual property rights in the last General Agreement on Trade and Tariffs ("GATT") round creating the World Trade Organization ("WTO")[5] and in the North American Free Trade Agreement ("NAFTA").[6] In sharp contrast, labor and human rights organizations have failed to achieve inclusion of a binding labor clause in these trade agreements. A labor clause to benefit all workers in the global economy will only be achieved through solidarity and united action.

There has been progress of late concerning the substance of the proposed labor clause. The most widely-accepted version of the labor clause was proposed by the International Confederation of Free Trade Unions ("ICFTU"), the international body of national trade union federations. The ICFTU's proposal defines the social clause based on key Conventions of the ILO, which have been ratified by most countries of the world. These include:

the right to associate (ILO Convention No. 87);

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[4] The Southern Cone trade unions made this a primary argument for uniform labor standards and documented the ILO Conventions that had been ratified by all of the countries participating in Mercosur. With respect to the potential countries of the FTAA, the United States has not ratified most of the ILO Conventions, but generally has domestic labor laws which, if enforced, would satisfy most of the key Conventions. For a list of ILO Convention ratifications by country, see *Lists of Ratifications by Convention and by Country*, ILO Doc. Rep. III/5 (1995). A list of ratifications by the countries of the Americas is located in the Appendix.

[5] Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Dec. 15, 1993, Annex 1C, 33 I.L.M. 1, 81 (1994).

[6] North American Free Trade Agreement, *opened for signature* Dec. 8, 1992, pt. VI, ch. 17, 32 I.L.M. 605, 670 (1993).

- the right to organize and bargain collectively (ILO Convention No. 98);
- equal employment opportunity and non-discrimination (ILO Convention Nos. 100 and 111);
- Prohibition of Forced Labor (ILO Convention Nos. 29 and 105); and
- Prohibition of Child Labor (ILO Convention No.138).[7]

This version of the labor clause is endorsed by most of the International Trade Secretariats. Also, the Organization for Economic Cooperation and Development ("OECD") has specifically endorsed a virtually identical version of the clause.[8]

Other suggested additions to a labor clause include minimum standards for health and safety, and an acceptable minimum wage based on the level of economic development of a particular country.[9] At a people's forum, which was convened in Brazil in May 1997 to discuss the creation of a Free Trade Area of the Americas (FTAA), there was an extraordinary showing of unity between unions andNGOs. This unity resulted in a broad declaration supporting a social clause encompassing more than core labor rights.[10] Whether to have a broad or narrow clause remains a strategic choice. It must be noted, however, that the chances of achieving the reality of an enforceable social clause decline as the list of issues covered increase. Governments and companies will unite to resist any comprehensive regulation. At the same time, the coalition for supporting the clause grows as new issues are introduced.

Perhaps the most fruitful approach would be to first agree on the components of the social clause, and then to engage in a prioritization process to phase in the list of rights across several years. As part of this discussion, development aid and debt reduction could be used to offset the costs incurred by a developing country as it phases in the rights of the social clause. The European Union used a similar phase in approach with its Generalized System of Preferences ("GSP") program, first activating prohibitions on forced or child labor, and then gradually phasing in other core labor rights. It makes sound strategic sense to focus first on a labor clause that incorporates existing legal norms and tries to improve enforcement mechanisms. If countries must initially make major changes in their laws to participate, they will have a significant incentive to resist. In contrast, it will be difficult to mount a persuasive argument to resist acceptance of a labor clause that initially binds countries to their existing labor laws and to international obligations that they have already undertaken.

I. A Proposal to Enforce the Terms of a Social Clause

A labor clause, regardless of what the specific terms ultimately are, will make a concrete improvement in the lives of working people in the global economy only if there is an effective enforcement mechanism. It is essential to note, however, that an enforceable labor clause is not a panacea; trade agreements themselves should reflect a primary concern with improving the lives of people and protecting the environment.[11]

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[7] *See, e.g.*, Social Charter for Democratic Development, ICFTU-APRO (1994).

[8] ORGANIZATION FOR ECONOMIC COOPERATION AND DEV., TRADE EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE (1996).

[9] *See, e.g.*, George E. Brown et al., *Making Trade Fair*, 9 WORLD POL'Y J. 309, 325-26 (1992).

[10] *See Building a Hemispheric Social Alliance to Confront Free Trade* para. 1, *at* http://www.developmentgap.org/beloeng.html (May 15, 1997).

[11] *A Just and Sustainable Trade and Development Initiative for the Western Hemisphere*,

A trade agreement that has an enforceable mechanism for seeking redress will not lead to sustainable development if, at the same time, it permits widespread exploitation of workers and the environment.

The discussion that follows is intended to raise the key issues that must be addressed in developing an enforcement mechanism. All of the elements discussed below are essential, but there are several options for achieving the objective of a given element. Those choices must be resolved as part of an overall political strategy, and are highlighted here to facilitate discussion. Sample language is offered in discussing some elements in order to better illustrate the concept.

A. Compliance with the social clause as a condition to participation in the FTAA.

A firm principle must be that all countries seeking to participate in the FTAA must be in compliance with the labor clause as a condition for membership. Each country would participate in an extensive review of its law and practice to determine compliance with the standard. If a country is found not to be in complete compliance, it could have probationary membership, provided it agrees to implement specific reforms within a specified number of years, subject to ongoing monitoring. The necessary revisions to law and practice could be identified as part of the harmonization process discussed in the next section. If at the end of the probationary period a country fails to be in complete compliance, then its membership in the FTAA would be terminated with the right to reapply only when there is complete compliance with the labor clause.

Issues to be Resolved:

1. *Who determines compliance with the labor clause?*

Ideally, this would be something the ILO could do. Certainly, in the context of an agreed format by the participating nations, the ILO is well-suited to assessing whether any given country is in compliance with core ILO Conventions. Indeed, the ILO already performs this function to a certain degree through its annual review of members' compliance with ratified conventions.[12] Further, when there are persistent problems with a particular country's compliance with one or more conventions, there is a procedure to create a Commission of Inquiry to investigate fully.[13] The ILO thus has the experience and mandate to perform this function.[14] If, however, the ILO declines to participate, or the process for getting its cooperation is too cumbersome, or, as some assert, the ILO is too lethargic to play a constructive role in international workers' rights enforcement, then the FTAA could allow for the creation of a panel of

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Alliance for Responsible Trade, Citizen Trade Campaign, and the Mexican Action Network on Free Trade (July 19, 1994).

[12] Art. 22, Constitution of the ILO (May, 1989).

[13] *Id.* at art. 26.

[14] Steve Charnovitz, *Trade Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 TEMPLE INT'L & COMP. L. J. at 160-63 (1997) (discussing the ILO's unique qualification to assess compliance with its Conventions).

experts to make these determinations.[15] The current draft FTAA follows this format with respect to disputes between countries relating to commercial issues. There is no reason why other panels could not be formed with expertise in labor issues. The panels could be drawn from a balance of labor ministry staff from the participating countries and outside experts, or, as was agreed to in the North American Agreement on Labor Cooperation ("NAALC"), could be made up entirely of credible, outside experts.[16] Likewise, trade unions participating in Mercosur have proposed using a "Committee of Specialists" to evaluate compliance with social standards. Regardless of the composition of the panel, for purposes of discussion it will be referred to as the "Panel of Experts."[17]

2. Can a country not in compliance participate in the FTAA on a probationary basis while implementing a plan to be in compliance?

To encourage participation, there should be a reasonable probation period of about two years to comply with the standard of the labor clause. The reason for this recommendation is simply to acknowledge the reality that most countries will not be in complete compliance, and allowing a probationary period will provide some incentive to make progress in this area. This represents the benefit that trade agreements, like the FTAA, provide for an opportunity to make progress on workers' rights. If the barrier for participation is too high, then the result will be no trade agreements and no opportunities to make progress. Assuming this approach is accepted, then the Panel of Experts should draft a very specific work plan, including recommendations for reform of labor laws and improving enforcement mechanisms, to bring a country into compliance with the labor clause. It should be made clear that the failure of a country to comply with implementation of a plan within the probation period will result in automatic expulsion and the option of reapplying only when there is total compliance. No country will take its obligation seriously if there is a regular pattern of extending time.

B. Participation in a process to harmonize laws upwardly to be consistent with the labor clause.

The premise of the labor clause is that at least one or more of the countries participating in the FTAA either does not have adequate laws or is not enforcing its laws. Otherwise, a labor clause would not be necessary. In order to emphasize that individual countries maintain primary responsibility for ensuring the conditions of the labor clause to allow for unique national solutions, and to avoid creating new multilateral institutions that exist in perpetuity, a process of upward harmonization is

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[15] Further concerns are whether the ILO could in fact perform all of the functions required in enforcing the social clause and whether giving the ILO enforcement powers would cause employer and government representatives to take concerted action to dilute the standards set by the Conventions, which to date have been more viewed as of academic interest since there is no threat of enforcement.

[16] *See* North American Agreement on Labor Cooperation, Sept. 9, 1993, arts. 23-24, 32 I.L.M. 1499, 1507 (1993) (stating that in limited cases, the NAALC allows for the formation of an "Evaluation Committee of Experts").

[17] If the social clause includes environmental standards, then the Panel of Experts would include experts in this field as well.

recommended. Fundamentally, this will reduce concerns of loss of national sovereignty by emphasizing that the primary intent is to encourage countries to rapidly improve their own enforcement processes to assume responsibility for upholding the law. This will require each country to improve its laws and enforcement mechanisms and to assume direct responsibility for enforcement of the provisions of the labor clause. This is one of the major strategies for achieving implementation of the European Economic Community Treaty,[18] and was also advanced as a key aspect for the social charter proposed for Mercosur and by trade union advocates at the Asia Pacific Economic Cooperation ("APEC") People's Summit. This is in sharp contrast with NAFTA, which, in the NAALC, precluded review of or changes to the domestic labor law of the signatories.[19]

Achieving harmony among the relatively similar economies of the European Community is significantly different from attempting to unite the Americas with the extremely diverse levels of economic development, but harmonization should be accepted initially as the ultimate goal. It is important to add, however, that with respect to the issue of minimum wages, or other issues that are based on relative economic conditions, the suggestion is not that standards be harmonized to be identical. The issue is whether there is a minimum wage, for example, that is reasonable for the level of economic development in the given country. In many developing countries, the minimum wage is the prevailing wage. Therefore, for most workers, the most immediate concern is having the minimum wage equal the liveable wage based on local economic conditions. This should be a key issue of the harmonization discussion. Another issue that must be addressed is whether the laws of a given country provide for sufficient remedies and penalties to encourage compliance by employers.

A further principle of harmonization is that countries that lack the resources and capacity to improve the enforcement of labor laws must be provided with direct assistance from international aid organizations and developing countries to support these activities and offset the costs of compliance. This is a form of development aid that could lead to concrete and sustainable development benefits for working people.

Issues to Be Resolved:

1. *Who participates in the harmonization planning process?*

Certainly, representatives of the member countries should be participants, but there should be direct participation from labor unions, NGOs, employers, and other concerned organizations, as well as from acknowledged experts. Perhaps the Panel of Experts could provide staff resources for the harmonization process, since the inspections will reveal the precise issues to be addressed with harmonization.

2. *How long should the harmonization process take?*

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[18] *See, e.g.*, Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 1001-1004 (1995).

[19] *See supra*, note 16, at art. 3, sec. 1, 32 I.L.M. 1499, 1503, 1515 (1993) (requiring that "[e]ach Party shall promote compliance with and enforce its own labor law . . ." The Labor Principles of Annex 1 specifically "do not establish common minimum standards for [the parties'] domestic law.")

The ultimate decision on this issue depends upon which group of countries is involved. If the entire world is participating through a reformed WTO process, for example, that would obviously require a much longer period than adding another country to NAFTA. It is essential, however, to have a clear time frame with specific steps beginning with assessing the laws that need to be improved, amending the laws, and then fully enforcing the new laws. With respect to the FTAA and the wide diversity of economic conditions in its member states, a significant time frame should be envisioned. If the subject countries have already agreed to be bound by the labor clause, then amending and implementing changes to domestic law to ensure compliance with the labor clause should not require any major changes in the way things are done, and therefore should not require an overly lengthy period of time. The focus should be on designing a reasonable time period to phase in enforcement.

C. Participation in an information audit by companies operating in more than one country of the FTAA.

There must be a firm recognition that employers, not governments,[20] are initially to blame for denying workers their rights; the government's role is to enforce the law. A major goal for effective enforcement of a labor clause is to develop a way to regulate the employment practices of companies operating in the countries bound by the labor clause. Most of the problems relating to a denial of the rights created in the labor clause would be solved if companies respected the law. This is in sharp contrast with the current draft of the FTAA, which like the WTO and NAFTA, focuses its enforcement process only on member states.

In order to have a basis for monitoring the activities of companies, more information is needed. This process can be initiated by requiring as part of the enforcement mechanism for a labor clause, that all participating countries cooperate in developing an annual Labor Information Audit of businesses operating in two or more of the trade agreement countries. The audit would be conducted by independent monitors, and would be required of any company that seeks to export or import within the area covered by the trade agreement. The companies would be required to report information pertaining to all of their operations, whether under their own corporate form or through subsidiaries, joint ventures, contractors, or other business forms. The information would be publicly available to inform governments and organizations seeking to enforce domestic laws or the provisions of the labor clause, and would include:

a) location,
b) total number of employees, categorized by job classification and pay grade,
c) wages paid for each job classification and/or pay grade specified by form of payment (i.e., hourly, daily, weekly, monthly etc. or average wages for piecework),
d) total benefits provided to all individual or groups of employees, present unionization status of any employees specifying the name of the union, number of represented employees, status of, and a copy of the most recent collective bargaining agreement, affiliation of union with any central labor body or confederation,

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[20] Of course governments, when acting as employers, can and do violate their own labor laws.

e) health and safety records, and
f) some record of employment practices that might violate the law in one or more trade area countries.

Issues to Be Resolved:

1. *Who would conduct the audits?*

To ensure credibility, the audits must be performed by "independent" auditors. Whether this includes representatives from the respective governments is optional, but it would be desirable to improve the enforcement capacity of government inspectors. The Panel of Experts could certainly be recruited to survey the companies as well, but if the ILO is ultimately selected to serve as the Panel of Experts, it would not necessarily be the ideal group to survey employers. Perhaps a body of independent experts within each country could be appointed to focus exclusively on performing the annual labor audit.

2. *How would company compliance be required?*

There will have to be some commitment by the governments to mandate company compliance as part of the FTAA. This should include a thorough audit of each country's labor laws to clarify employer obligations under the law.

3. *What is the result if a company is found in the audit to be violating either the labor laws or the labor clause?*

Any violation of the labor laws discovered in the audit should be reported to the country where the violation occurred. There should be a process of monitoring to ensure that the country has taken action to enforce the law. Violations of the labor clause by companies are dealt with in the next two provisions.

D. Require that companies operating in more than one country of the FTAA comply with the terms of the labor clause.

The audit described in part (C) above, is designed to develop information to promote better compliance with labor standards. However, in order to ensure that companies comply with the law, they should be required to abide by the terms of the labor clause, in addition to the labor laws in the countries where they operate. This is not a radical proposition. The OECD[21] and the ILO[22] have both called for developing codes of conduct for MNCs that incorporate similar substantive standards as the proposed labor clause. Binding the companies to the labor clause would provide an alternative, albeit more mandatory, mechanism for ensuring company compliance. This provision is essential to clarify the responsibility of MNCs in participating in efforts to improve respect for labor laws. Once harmonization occurs following completion of part (B) above, compliance with the provisions of the labor clause would be redundant with compliance with the labor laws.

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[21]Organization for Economic Cooperation, *Guidelines for Multinational Enterprises*, *at* http://www1.oecd.org/daf/investment/guidelines/minbrooke.pdf (2000).

[22] International Labor Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, *at* http://ilolex.ilo.ch:1567/english/multiq.htm (2000).

Issues to Be Resolved:

1. *The relationship between obligations created by the labor clause and any effort to develop a binding code of conduct.*

It is important not to create conflicting obligations for the companies. The best course would be to view codes of conduct as offering a private regulatory system to further ensure compliance with the labor clause.

2. *What is the scope of a company's responsibility? Should it extend to the subcontractor level?*

Since an increasing percentage of global production is done by subcontractors, it would seem essential to hold the buyer-company responsible for the conditions of production for products it sells.

3. *What happens if a company refuses to agree to be bound by the labor clause?*

There could be a discussion about a grace period for companies that cannot comply immediately due to the need to make comprehensive changes in the way they operate. That could be a legitimate issue. However, for companies that simply refuse to cooperate, the penalty should be the same as for companies that are found to have violated the labor clause, discussed in part (E) below.

E. Remedies following a violation of the labor clause by a member country and/or a company operating within a member country.

This, of course, is ultimately the issue that will cause resistence to participation by governments. Whether it is the United States or Haiti, no government wants another authority to have enforcement power over it. This provision will necessarily be more complex. The enforcement issue should be discussed in the context of emphasizing that the ultimate goal would be to never have to use it because compliance will have been achieved through the harmonization process discussed in part (B), above. Affirmative enforcement of the standards should be viewed as an unusual and extreme occurrence. The system should create sufficient incentives to encourage compliance so that outside enforcement can be avoided. The norm should be that national processes will be used to uphold the fundamental rights protected by the social standard. However, there certainly will be issues of failure to comply, and the mechanics of an enforcement mechanism will be an integral part of the overall provision. To facilitate discussion, suggested language will be offered to accomplish the key points.

1. Notice of Violation

To refute the perception that the labor clause will override national authority, it must be constantly emphasized that any penalty imposed against a participating government would flow from a voluntary trade agreement that all member states have agreed to abide by, that imposes substantive standards in the labor clause that each country is already bound to through domestic labor law, or international instruments, including ILO Conventions. The power to avoid penalties rests with the member states' ability to avoid violations. To strongly emphasize this point, the first clause of

the remedy provision should require notice and opportunity to correct faults. Suggested language is as follows:

> Prior to any investigation or hearing of any sort under this or any other provision, any complaint submitted to the Panel of Experts that a party has violated any provision of the labor clause must be provided to the appropriate authority of that party in writing with any documentation. No action may be taken by the Panel of Experts, nor any penalty imposed, nor will the allegation be considered a violation for purposes of cumulating violations, if the party that is the subject of the allegation addresses the allegations to the satisfaction of the complaining party within 30 days of the provision of notice.

2. Penalties for Failure to Correct Violations of the Labor Clause

Given that each country will have passed, by necessity, an assessment of compliance with the labor clause as per part (A) above, to qualify for participation in the FTAA, there should not be too many issues of inadequate law. However, if a country fails to remedy a violation of the labor clause, which would normally mean it refuses to enforce its laws, there must be a system of penalties to encourage compliance. There should be a clear recognition that normally the government does not violate the rights protected directly, but is charged with enforcing the law with respect to companies operating within its territory. Penalties directed at companies, with the cooperation of the host government, should resolve most problems. The penalties therefore should be designed to encourage enforcement. Again, this leaves solving the problem within the firm control of the individual governments and allows them to act to prevent any protectionist use of the labor clause. If a country ultimately refuses to enforce its own laws as per the commitment made in accepting the labor clause, then the remedy must be exclusion from the trade agreement and the corresponding benefits. The following provision is an effort to accomplish these objectives:

> Any products found by the Panel of Experts to be made in violation of any of the provisions of the labor clause shall be deemed to be tainted products that may not be shipped within the FTAA. Following such a finding, all member countries have the right to immediately ban the importation of that product from the country that was the subject of the finding. Alternatively, the countries could impose a tariff on the product to reflect the unfair cost advantage of producing the product in violation of the labor clause. If it is not practical to identify within a class of products which items were made in violation of the labor clause, all products within the class are subject to the ban unless the producer can demonstrate with satisfactory evidence that his or her products were not made in violation of the labor clause.
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> Any party to the FTAA, or any person or organization adversely affected by a violation of the labor clause, may bring a formal complaint to the Panel of Experts within one year of the occurrence

of the last act constituting a violation. In order for a country that is a party to the agreement to bring a complaint to the Panel of Experts, that country must itself be in full compliance with the labor clause. The Panel of Experts, which shall develop its own rules of procedure to be submitted for approval to the parties to the FTAA, must hold a public hearing on all complaints and must resolve all complaints with a written opinion within 180 days of the filing date.

Following a finding by the Panel of Experts that there was a violation of the labor clause, the country where the violation occurred shall immediately institute proceedings to enforce the law with respect to the company or entity identified as denying the rights of the labor clause. The country shall file with the Panel of Experts monthly reports, available for public inspection, indicating steps being taken to enforce the law. In no case shall the enforcement process at the first level of adjudication available in the country take more than six months to complete.

In any case in which a single company, and for purposes of the labor clause a single company includes all subsidiaries or other entities under its direction or control, is the subject of more than two findings by the Panel of Experts of a violation of the same provision of the labor clause within a one year period, whether or not the violation occurred in the same country of the trade area, the third violation will be deemed a systematic failure to comply with the law. The company will be suspended from the benefits of the FTAA for a period of one year, and all products produced by the company within the trade area must be subject to tariff treatment by all member countries as if they were produced outside the trade area and may be subject to any other trade sanctions any country within the trade area wishes to impose. Appropriate steps must be taken by member countries to prevent transshipments of products through a non-sanctioned company. After a one year period, the company may apply to have the suspension lifted and must then participate in a new audit as per part (C) above to determine whether the company is in complete compliance with the labor clause.

In any case in which a member country is the subject of more than two findings by the Panel of Experts of failing to enforce the same provision of the labor clause within a one year period, whether or not the violation concerns the same company or entity, the third violation will be deemed a systematic failure to enforce the law and the country will be suspended from the benefits of the FTAA, allowing all other countries to adjust tariffs or otherwise impose sanctions as if the subject country was not a party to the trade agreement. This penalty will also apply in any case in which a country fails to comply with any of the affirmative requirements of this enforcement provision to provide information to the Panel of

Experts or otherwise cooperate in obtaining enforcement of the labor clause. If the violations are specific to a particular sector of the economy, the Panel of Experts may opt to impose the penalty only with respect to that sector. After a one year period, the country may reapply for membership through the provisions of part (A) above.

Issues to Be Resolved:

All of the issues addressed in the recommended language should be thoroughly debated to identify the best options. Some general explanation may be helpful in focusing the discussion. The emphasis is on respecting national sovereignty by acknowledging that countries must have the primary responsibility for enforcing laws within their territory, and the labor clause serves as a backup device, as well as a monitoring instrument. There are significant opportunities for countries to avoid penalties, first by requiring notice and an opportunity to correct, then by permitting up to two violations before permitting penalties for systematic violations, assuming the country otherwise cooperates in resolving the first two violations. Whether this standard should be higher or lower is certainly something that should be thoroughly debated. Further, penalties should be focused on the removal of trade benefits with the possibility of banning the tainted products from trade. The permissible remedies should be the focus of special attention in discussions. There certainly are other options, including monetary fines. A key objective is to create a reasonable mechanism that would not be viewed as too onerous by countries. It seems fair that the trade agreement provides specific benefits if a country or company complies with the provisions, including the labor clause, and they lose those benefits if they violate the provisions. Likewise, with respect to companies, penalties are designed to achieve compliance and provide an incentive to cooperate to avoid suffering loss of market access.

IV. Conclusion

There are no doubt many approaches to devising an enforceable labor clause for the FTAA that would achieve the objective of using trade as a vehicle to improve conditions for workers. The approach outlined above is one effort to raise issues that are being neglected in the current FTAA discussions. In previous NAFTA negotiations, labor and environmental issues were ignored, and later had to be tacked on, for political reasons, as "side agreements." Little has been learned by the commercial and political interests involved in the FTAA negotiations if they attempt again to force upon the people of the FTAA countries an agreement that ignores the issues that are most important to the vast majority of the people. This time the opposition is much better organized and more informed about the issues. There will be no FTAA unless the agreement recognizes that labor rights and environmental protections are central to any trading system that purports to be operating for the benefit of all people, not just powerful commercial interests. Without regulation, these forces could turn back the clock and operate in the Americas as they used to operate in the United States a century ago.

APPENDIX

CONVENTIONS OF THE INTERNATIONAL LABOR ORGANIZATION (ILO) RATIFIED BY COUNTRIES IN THE AMERICAS

Central America

Country	Ratified
Belize	C005, C007, C008, C010, C011, C012, C016, C019, C022, C026, C029, C042, C058, C081, C087, C088, C089, C094, C095, C097, C098, C099, C101, C105, C108, C115
Costa Rica	C001, C008, C011, C014, C016, C026, C029, C045, C081, C087, C088, C089, C090, C092, C094, C095, C096, C098, C099, C100, C101, C102, C105, C106, C107, C111, C112, C113, C114, C117, C120, C122, C127, C129, C130, C131, C134, C135, C137, C138, C141, C144, C145, C147, C148, C150, C159, C169
El Salvador	C012, C104, C105, C107, C159, C160
Guatemala	C001, C010, C011, C013, C014, C015, C016, C019, C026, C029, C030, C045, C050, C058, C059, C062, C063, C064, C065, C077, C078, C079, C080, C081, C086, C087, C088, C089, C090, C094, C095, C096, C097, C098, C099, C100, C101, C103, C104, C105, C106, C108, C109, C110, C111, C112, C113, C114, C116, C117, C118, C119, C120, C122, C124, C127, C129, C131, C138, C141, C144, C156, C159, C160, C161, C162, C167
Honduras	C014, C027, C029, C032, C042, C045, C062, C078, C082, C087, C095, C098, C100, C105, C106, C108, C111, C116, C122, C138
Nicaragua	C001, C002, C003, C004, C105, C006, C107, C008, C009, C110, C011, C012, C013, C014, C015, C016, C017, C018, C019, C020, C021, C022, C023, C024, C025, C026, C027, C028, C029, C030, C045, C063, C077, C078, C087, C088, C095, C098, C100, C105, C110, C111, C115, C117, C119, C122, C127, C131, C135, C136, C137, C138, C139, C140, C141, C142, C144, C146
Panama	C003, C008, C009, C010, C011, C012, C013, C015, C016, C017, C019, C020, C021, C022, C023, C026, C027, C029, C030, C032, C042, C043, C045, C052, C053, C055, C056, C058, C063, C064, C065, C068, C069, C071, C073, C074, C077, C078, C080, C081, C086, C087, C088, C089, C092, C094, C095, C096, C098, C100, C104, C105, C107, C108, C110, C111, C112, C113, C114, C116, C117, C119, C120, C122, C123, C124, C125, C126, C127, C159

North America

Country	Ratified
Canada	C001, C007, C008, C014, C015, C016, C022, C026, C027, C032, C045, C058, C063, C068, C069, C073, C074, C080, C087, C088, C100, C105, C108, C111, C116, C122, C147, C162
Mexico	C006, C007, C008, C009, C011, C012, C013, C014, C016, C017, C019, C021, C022, C023, C026, C027, C029, C030, C032, C034, C042, C043, C045, C046, C049, C052, C053, C054, C055, C056, C058, C062, C063, C080, C087, C090, C095, C096, C099, C100, C102, C105, C106, C107, C108, C109, C110, C111, C112, C115, C116, C118, C120, C123, C124, C131, C134, C135, C140, C141, C142, C144, C150, C152, C153, C155, C160, C161, C163, C164, C166, C167, C169, C170, C172, C173
United States	C053, C054, C055, C057, C058, C074, C080, C105, C144, C147, C160

South America

Country	Ratified
Argentina	C001, C002, C003, C004, C005, C006, C007, C008, C009, C010, C011, C012, C013, C014, C015, C016, C017, C018, C019, C020, C021, C022, C023, C026, C027, C029, C030, C031, C032, C033, C034, C035, C036, C041, C042, C045, C050, C052, C053, C058, C068, C071, C073, C077, C078, C079, C080, C081, C087, C088, C090, C095, C098, C100, C105, C107, C111, C115, C124, C129, C139, C142, C144, C151, C154, C156, C159
Bolivia	C001, C005, C014, C017, C019, C020, C026, C030, C042, C045, C077, C078, C081, C087, C088, C089, C090, C095, C096, C098, C100, C102, C103, C105, C106, C107, C111, C116, C117, C118, C120, C121, C122, C123, C124, C128, C129, C130, C131, C136, C160, C162, C169
Brazil	C003, C004, C005, C006, C007, C011, C012, C014, C016, C019, C021, C022, C026, C029, C041, C042, C045, C052, C053, C058, C080, C081, C088, C089, C091, C092, C093, C094, C095, C096, C097, C098, C099, C100, C101, C102, C103, C104, C105, C106, C017, C018, C109, C110, C111, C113, C115, C116, C117, C118, C119, C120, C122, C124, C125, C126, C127, C131, C133, C135, C136, C137, C139, C140, C141, C142, C144, C145, C147, C148, C152, C154, C155, C159, C160, C161, C162, C168
Chile	C001, C002, C003, C004, C005, C006, C007, C008, C009, C010, C011, C012, C013, C014, C015, C016, C017, C018, C019, C020, C022, C024, C025, C026, C027, C029, C030, C032, C034, C035, C036, C037, C038, C042, C045, C063, C080, C100, C103, C111, C115, C122, C127, C136, C144, C156, C159, C162
Colombia	C001, C002, C003, C004, C005, C006, C007, C008, C009, C010, C011, C012, C013, C014, C015, C016, C017, C018, C019, C020, C021, C022, C023, C024, C025, C026, C029, C030, C052, C062, C080, C081, C087, C088, C095, C098, C099, C100, C101, C104, C105, C106, C107, C111, C116, C129, C136, C159, C160, C167, C169, C170
Ecuador	C002, C011, C024, C026, C029, C035, C037, C039, C045, C077, C078, C081, C086, C087, C088, C095, C097, C098, C100, C101, C102, C103, C104, C105, C106, C107, C110, C111, C112, C113, C114, C115, C116, C117, C118, C119, C120, C121, C122, C123, C124, C127, C128, C130, C131, C136, C139, C141, C142, C144, C148, C149, C152, C153, C159, C162
Equatorial Guinea	C001, C014, C030, C100, C103, C138
Guyana	C002, C005, C007, C010, C011, C012, C015, C019, C026, C029, C042, C045, C050, C064, C065, C081, C086, C087, C094, C095, C097, C098, C100, C105, C108, C111, C115, C129, C131, C135, C137, C137, C139, C140, C141, C142, C144, C149, C150, C151
Paraguay	C001, C011, C014, C026, C029, C030, C052, C049, C060, C077, C078, C079, C081, C087, C089, C090, C095, C098, C099, C100, C101, C105, C106, C107, C111, C115, C116, C117, C119, C120, C122, C123, C124, C159, C169
Peru	C001, C004, C008, C009, C010, C011, C012, C014, C019, C020, C023, C024, C025, C026, C027, C029, C032, C035, C036, C037, C038, C039, C040, C044, C045, C052, C053, C055, C056, C058, C059, C062, C067, C068, C069, C070, C071, C073, C077, C078, C079, C080, C081, C087, C088, C090, C098, C099, C100, C101, C102, C105, C016, C107, C111, C112, C113, C114, C122, C139, C151, C152, C156, C159, C169
Suriname	C011, C013, C014, C017, C019, C027, C029, C041, C042, C062, C081, C087, C088, C094, C095, C096, C101, C105, C106, C112, C118, C122, C135, C144, C150, C151
Uruguay	C001, C002, C003, C004, C005, C006, C007, C008, C009, C010, C011, C012, C013, C014, C015, C016, C017, C018, C019, C020, C021, C022, C023, C024, C025, C026, C027, C030, C032, C033, C042, C043, C045, C052, C054, C058, C059, C060, C062, C063, C067, C073, C077, C078, C079, C080, C081, C087, C089, C090, C093, C094, C095, C096, C097, C098, C099, C100, C101, C103, C105, C106, C108, C110, C111, C112, C113, C114, C115, C116, C118, C119, C121, C122, C128, C129, C130, C131, C132, C133, C134, C136, C137, C138, C139, C141, C144, C148, C149, C150, C151, C153, C154, C155, C156, C159, C161
Venezuela	C001, C002, C003, C004, C005, C006, C007, C011, C013, C014, C019, C021, C022, C026, C027, C029, C041, C045, C080, C081, C087, C088, C095, C097, C098, C100, C102, C103, C105, C111, C116, C117, C118, C120, C121, C122, C127, C128, C130, C138, C139, C140, C141, C142, C143, C144, C149, C150, C153, C155, C156, C158