ARE LABOR PROVISIONS PROTECTIONIST?: EVIDENCE FROM NINE LABOR-AUGMENTED U.S. TRADE ARRANGEMENTS

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Labor standards are back in fashion with U.S. trade negotiators. Though labor standards have been written into U.S. legislation for many years, it has only been recently that their inclusion has become the norm rather than the exception.[1] In fact, every major trade arrangement the United States has negotiated since the Trade Act of 2002 has included a labor provision in the main text. This new popularity does little however to resolve the longstanding debate about whether labor provisions serve as a humanitarian tool to address labor rights violations in affected countries, or whether they are a protectionist tool designed to limit access to the U.S. market.

If a labor provision was designed as a tool for protectionist interests, then there should be both historical negotiating evidence and petition submission trends that would support that assumption. We could expect to find congressional proponents with voting records that regularly oppose free trade; or petitions that are submitted unilaterally by U.S. interest groups that would benefit from import protection. In this research paper, I examine nine major U.S. trade arrangements that include labor provisions for evidence of these types of activities. The body of the paper is divided into three sections. Section I establishes the historical background of the major labor provisions. Section II measures the degree of protectionism built into and resulting from these labor provisions. Section III concludes by assessing the future of labor provision based petitions in the organizational strategies of humanitarian interest groups.

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1. U.S. trade arrangements have included various forms of labor criteria since the McKinley Tariff Act of 1890 prohibited imports made by prison labor. However, in this paper I am interested in "modern" labor provisions, that is, those that have been included over the past twenty-five years. For a good list of historical agreements, see INTERNATIONAL LABOR RIGHTS RESEARCH AND EDUCATION FUND, TRADE'S HIDDEN COSTS: WORKER RIGHTS IN A CHANGING WORLD ECONOMY 42 (1988).

I. THE AGREEMENTS

As of 2003, there were approximately fifteen modern U.S. trade arrangements that had been fortified with worker rights provisions.[2] The set of fortified arrangements can be organized into three categories: unilateral preferences, bilateral trade agreements, and free trade areas.[3] Following is a brief historical profile for each.

A. Unilateral Trade Preferences

A unilateral preference is a form of trade arrangement that allows the beneficiary country to export certain goods duty-free or at below-MFN rates into the United States. Unilateral preferences do not require reciprocity and are intended to promote export diversification and economic growth.[4] The United States Government currently maintains four labor-fortified preferences, which are discussed below.

1. Caribbean Basin Trade Partnership Act

The Caribbean Basin Economic Recovery Act of 1983 (CBERA) was established as a means of promoting economic development and export diversification in the Caribbean Basin region by offering duty-free access to the U.S. market for a broad range of goods.[5] Countries had to apply to be considered for designation, and twenty-four countries were eventually deemed eligible for the CBERA preference.[6]

2. These fifteen trade arrangements include CBERA, GSP, ATPA, U.S.-Cambodia Free Trade Agreement, U.S.-Chile Free Trade Agreement, U.S.-Jordan Free Trade Agreement, U.S.-Singapore Free Trade Agreement, NAFTA, AGOA, OPIC, TPA, voting rules for the international financial institutions, WTO voting rules, Section 301, the Tariff Act of 1997. Please note that this paper does not specifically deal with issues of child labor.

3. Discussion about updates to trade legislation are only included when the labor provisions were revised. Revisions to product eligibility or other non-labor provisions are not included in this discussion.

4. However, there is little evidence that supports this goal. In a paper on the GSP, for example, the authors note that it has not significantly increased exports of beneficiary countries. James DeVault, *Political Pressure and the U.S. Generalized System of Preferences*, 22 EASTERN ECON. J. 35 (1996).

5. U.S. DEPT. COMMERCE, GUIDE TO THE CARIBBEAN BASIN INITIATIVE (1994).

6. The twenty-four original countries were Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago. Nicaragua received designation in 1990. There were four countries that never applied to be considered for designation: Anguilla, Cayman Islands, Suriname, and Turks and the Caicos Islands.

The CBERA was the first modern U.S. trade arrangement to include labor criteria in the eligibility requirements of the text. The criteria stated that:

> In determining whether to designate any country a beneficiary country under this title, the President shall take into account . . .
>
> (8) the degree to which workers in such country are afforded reasonable workplace conditions and enjoy the right to organize and bargain collectively . . .[7]

The original motion to include labor criteria was introduced by U.S. Congressman Donald Pease (D-OH), who went on to propose human rights considerations in various other congressional initiatives.[8]

Because the original labor language in the CBERA was vague, and since the U.S. Government had never before conducted a formal labor review, the inter-departmental group assigned to evaluate labor conditions was given a relatively free hand in conducting its investigations.[9] In addition to reading through relevant embassy documents and U.S. Government reports, officials traveled to potential beneficiary countries and interviewed involved actors such as labor unions, employers, and the AFL-CIO international field officers. After the group presented their findings, each potential beneficiary country responded with a letter detailing changes its government was committed to making.[10]

In general, the existence of labor language in the eligibility requirements of a trade arrangement means that once beneficiary status is conferred on a country in the initial review, the labor criteria can not be invoked unless there is a subsequent country review. This was clearly the case with CBERA where the labor provisions were used in a progressive way during the initial country reviews; yet, once countries were conferred beneficiary status, there was little subsequent pressure to improve labor standards through this conduit.

In 1990, the CBERA was amended to make the preference program permanent and re-formulate the labor criteria to match the "list of rights" approach pioneered by the Generalized System of Preferences in 1984.[11] The revised labor criteria read:

> In determining whether to designate any country a beneficiary country under this title, the President shall take into account . . .

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7. 19 U.S.C. § 2701 (c) 8 (1983).

8. His other initiatives are discussed at length in Section II.

9. Interview with a former Analyst in the Department of Labor, in Washington, D.C. (Sept. 10, 2002).

10. *See*, *e.g.*, Steve Charnovitz, *The Caribbean Basin Initiative: Setting Labor Standards*, 107 MONTHLY LAB. REV. 54 (1984).

11. Caribbean Basin Economic Recovery Expansion Act of 1990, Pub. L. No. 101-382.

> (8) whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights. . . .

"Internationally recognized worker rights" are then defined identically to the GSP as:

> (I) The right of association;
>
> (II) The right to organize and bargain collectively;
>
> (III) A prohibition on the use of any form of forced or compulsory labor;
>
> (IV) A minimum age for the employment of children; and
>
> (V) Acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health;

In 2000, CBERA preferences were expanded through the Caribbean Basin Trade Partnership Act (CBTPA).[12] At that time, the labor provisions were strengthened beyond even the GSP language. Whereas GSP looks at whether or not countries are "taking steps" to implement the list of rights, the 2000 CBTPA legislation requires the U.S. Government to evaluate:

> (iii) *The extent to which* the country provides internationally recognized worker rights, including—
>
> (I) the right of association;
>
> (II) the right to organize and bargain collectively;
>
> (III) a prohibition on the use of any form of forced or compulsory labor;
>
> (IV) a minimum age for the employment of children; and
>
> (V) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health . . .[13]

The change in the labor language was rooted in an effort to elevate the compliance standard. Legislators had observed that in the GSP program, criteria on intellectual property and investment used the "extent to which" language and was held to a more rigorous compliance standard than the labor language that only asked that countries be "taking steps."[14]

A general country review was conducted of the twenty-four CBERA beneficiary countries.[15] Though all twenty-four countries

12. United States-Caribbean Basin Trade Partnership Act, Title II, of the Trade Act of 2000, Pub. L. 106-200.

13. Title II Pub. L. 106-200 sec. 211 (emphasis added).

14. Telephone interviews with former staffers in Rep. Levin's office (June 20, 2005).

15. The revised labor language applied to the expanded product list only. Countries that were deemed eligible for 1990 CBERA remained eligible for the 1990 CBERA list of goods.

were certified for the additional benefits, country reviews cited a number of labor concerns including anti-union violence in Guatemala, and restrictive union practices in El Salvador.[16]

2. Generalized System of Preferences

The Generalized System of Preferences (GSP) was first implemented in 1976 and was intended to promote economic development through the expansion of exports. As of 2004, the GSP covered more than 4,600 items from 140 developing countries.[17]

The GSP had not originally contained a labor provision when it was enacted in 1976.[18] However, when the program came up for renewal in 1984,[19] a coalition of activists used the opportunity to call for an amendment that would include labor provisions.[20] In the GSP Renewal Act of 1984, a list of five rights that were called "internationally recognized worker rights" was included in the designation criteria. These five rights were based on those ILO conventions that were both widely ratified, and codified in U.S. law.[21] In designating a beneficiary country, the President must take into account: "(3) whether such country has taken or is taking steps to give to workers internationally recognized worker rights."

These rights are defined as:

> A. Freedom of association;
>
> B. Freedom to organize and bargain collectively;
>
> C. Prohibition on the use of any form of forced or compulsory labor;
>
> D. A minimum age for the employment of children;
>
> E. Protections for decent working conditions, including a minimum wage, maximum hours of work, and occupational safety and health standards. . . .[22]

There were four countries to which the President gave only conditional approval, meaning that they needed to commit to making changes. Stated in Rep. Sander Levin, Remarks at the Center for Strategic and International Studies on U.S. Trade Goals (Mar. 6, 2001).

16. USTR, FOURTH REPORT TO CONGRESS ON THE OPERATION OF THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT (2001).

17. USTR, U.S. GENERALIZED SYSTEM OF PREFERENCES GUIDEBOOK (1999). Additionally, the least developed countries are eligible to export an additional 1700 products at reduced tariff rates.

18. 19 U.S.C. § 2461 (1976).

19. GSP Renewal Act of 1984, Pub. L. No. 98-573, 98 Stat. 3019 (1984).

20. Lance Compa & Jeffery Vogt, *Labor Rights in the Generalized System of Preferences: A 20-year Review*, 22 COMP. LAB. L. & POL'Y J. 199 (2003).

21. Telephone interview with former staffer in Rep. Pease office (Sept. 19, 2002).

22. 19 U.S.C. § 2461 (Trade and Tariff Act of 1984 Title V)

When the GSP Renewal Act was passed, President Reagan initially certified all countries, provisional on a two-year general review.[23] Eleven countries were subject to an in-depth review as a result of the re-certification process, and four of those countries had their GSP status suspended or revoked.[24]

The labor criteria in GSP can be invoked annually through a regulatory mechanism designed by the USTR. From 1985 to 2004, forty-eight countries were the subject of a petition for review. Thirty-eight countries were subject to at least one complete review in that period, and thirteen countries had their privileges under GSP suspended or revoked.[25]

In most cases, petitions are submitted by third parties; however, there have been two cases where the USTR threatened or executed a self-initiated GSP review as a result of on-going worker rights issues.[26] According to a USTR official, self-initiation is a tool the U.S. Government uses when countries continually ignore GSP petitions as empty threats.[27]

3. Andean Trade Promotion and Drug Eradication Act

In 1991, the Andean Trade Preference Act (ATPA) was signed into force.[28] ATPA gives preferential tariff treatment to exports from Bolivia, Colombia, Ecuador, and Peru with the goals of spurring economic development and encouraging countries to find alternatives to drug production.

ATPA adopted the GSP "internationally recognized worker rights" list in its eligibility requirements:

> In determining whether to designate any country a beneficiary country under this chapter, the President shall take into account –
>
> (8) whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights . . .[29]

23. Pharis Harvey, *U.S. GSP Labor Rights Conditionality: Aggressive Unilateralism or a Forerunner to a Multilateral Social Clause?* (International Labor Rights Fund, Washington, D.C.) (undated).

24. Chile and Paraguay were suspended, and Nicaragua and Romania were removed. USTR Chart on GSP Cases, available at Bureau of International Labor Affairs, U.S. Dept. of Labor.

25. USTR, SUMMARY OF GSP CASES (2005).

26. Self-initiation occurred in Guatemala in October 2000 and was used as a threat in Ecuador in 2001.

27. Interview with USTR Official, in Washington, D.C. (Sept. 10, 2002).

28. 19 U.S.C. § 3202(c)(7) (2005).

29. 19 U.S.C. § 3202(d)8 (2005).

Because the labor provisions are in the eligibility criteria, there was an initial set of country reviews that conferred beneficiary status until a renewal or expansion of benefits required re-certification. As in the case of CBERA, the U.S. Government required countries that did not initially satisfy the worker rights criteria to submit letters in which they detailed changes that they had committed to make in response to U.S. Government concerns.

The labor criteria in ATPA were included in large part because this agreement used the CBERA as a template. By the time the ATPA was negotiated, labor criteria had already been included in the CBERA and the GSP, so it stood to reason that it would be included in a similar trade arrangement.[30]

The original ATPA lapsed in 2001 and was re-instated in 2002 as the Andean Trade Preference and Drug Eradication Act (ATPDEA).[31] ATPDEA contained two changes in the labor provision. First, the labor criteria was strengthened beyond "whether or not" to require the President to evaluate:

> (iii) *the extent to which* the country provides internationally recognized worker rights, including—
>
> (I) the right of association;
>
> (II) the right to organize and bargain collectively;
>
> (III) a prohibition on the use of any form of forced or compulsory labor;
>
> (IV) a minimum age for the employment of children; and
>
> (V) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health;[32]

This change in the language was made for reasons similar to the CBTPA change in 2000. By 2002 there was a lot of outside criticism over the "taking steps" language being too low a threshold. The "extent to which" language both raised the bar for country reviews and was sufficiently nuanced to give the least developing countries some room to maneuver domestically.[33] In addition, the "extent to which" language was already in place with other criterion in the ATPA and so was not seen as a significant change.

The second change initiated by the ATPDEA legislation was that Congress amended it such that it would have a GSP-style regulatory

30. Telephone interview with former USTR Official (June 21, 2005).
31. Title XXXI of the Trade Act of 2002, P.L. 107-210.
32. Trade Act of 2002, Title XXXI § 3103(6)b (emphasis added).
33. Telephone interview with USTR official (June 21, 2005).

mechanism.[34] This means that now petitioners may request the USTR to review any ATPDEA country's beneficiary status once per calendar year. To date, there have been several ATPDEA labor-based petition submissions against Ecuador, but in each case the decision has been deferred.

As a result of the expansion of ATPDEA in 2002, all countries had to undergo re-certification.[35] This recertification process has given the U.S. Government room to influence labor conditions in the region. For instance, this has already led to changes in Ecuador where the USTR threatened not to recertify Ecuador unless its government addressed problems of child labor and abuses of workers on banana plantations.[36]

4. African Growth and Opportunities Act

The most recent unilateral preference to be signed into law is the African Growth and Opportunities Act (AGOA), which was passed in 2000.[37] AGOA was signed in order to encourage reform efforts and development in Sub-Saharan Africa.

AGOA also incorporates the GSP five-part definition of internationally recognized worker rights in the designation criteria.

> The President is authorized to designate a sub-Saharan African country as an eligible sub-Saharan African country if the President determines that the country-
>
> (1) has established, or is making continual progress toward establishing-
>
> (F) protection of internationally recognized worker rights, including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health . . .[38]

The labor criteria came out of an amendment to H.R. 434 from Representative Gejdenson (D-CT). It received broad-based support

34. The regulatory mechanism was included because, though enhancement of the agreement was widely supported in Congress as a result of its anti-drug trade role, U.S. industries were clearly concerned with the effects increased exports from the region could have, especially in textiles and certain goods like flowers and asparagus.

35. The original benefits were grandfathered in, but each country had to be re-evaluated for the new benefits.

36. Interview with a Human Rights Watch researcher, in Washington, D.C. (Aug. 19, 2002); interview with an official in the Office of the Assistant USTR for Labor, in Washington, D.C. (Sept. 10, 2002).

37. 19 U.S.C. § 3703 (2005).

38. 19 U.S.C. § 3703, 104(A)1(f) (2005).

in large part because it was based on the established GSP language and was seen as something that would not negatively affect the bill.[39]

Though the labor language is in the AGOA eligibility requirements, the implementing legislation requires annual reviews, which gives interest groups additional room to lobby for labor rights-based revocation of beneficiary status. While these annual reviews often cite ongoing worker rights problems, no countries have had their status revoked as a result.

There were forty-eight countries that were deemed eligible to apply for AGOA. In the end, thirty-six received beneficiary status. While none of the applicant countries were rejected solely on the basis of labor problems, Angola, Burundi, Congo, and Equatorial Guinea were all denied membership for reasons that included labor abuses. In several of these, AGOA was used as a threat to encourage countries to respect labor rights.[40]

B. Bilateral Trade Agreements

A second category of trade arrangements includes those that are concluded on a bilateral basis. The United States maintains a large number of bilateral trade arrangements of various forms. Some focus their coverage on specific goods and services;[41] while others focus only on investment.[42] The U.S.-Cambodia Bilateral Textile Agreement is the only bilateral trade arrangement that includes a labor provision in the text of the agreement.

1. U.S.-Cambodia Bilateral Textile Agreement

The 1999 Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products Between the Government of the United States of America and the Royal Government of Cambodia (more simply known as the U.S.-Cambodia Bilateral Textile Trade Agreement) was the result of a confluence of several political forces.

39. *See*, *e.g.*, Markup before the House Committee on International Relations, Feb. 11, 1999, at 16–24.

40. Interview with USTR official, in Washington, D.C. (Sept. 11, 2002).

41. *See*, *e.g.*, the 1996 Russia Agreement on Firearms and Ammunition, *available at* http://www.tcc.mac.doc.gov/cgi-in/doit.cgi?204:64:2bf291b291066ed29edd9bcec435f353161f6b53c6bd56464467275fff92d1fa:210; or the 1993 Ecuador Intellectual Property Rights Agreement, *available at* http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?204:64:2bf291b291066ed29edd9bcec435f353161f6b53c6bd56464467275fff92d1fa:45.

42. *E.g.*, the various Bilateral Investment Treaties the United States maintains.

In 1998, the Administration was under pressure from labor unions that, following their experience with the NAALC, were advocating for enforceable, main-text labor provisions, and in their absence were blocking the passage of any trade initiatives (see for example the TPA discussion following). As a result, President Clinton was actively seeking ways to link trade and labor issues.

In June of that year, the AFL-CIO filed a petition requesting that the U.S. Government withdraw Cambodia's GSP benefits as a result of widespread worker rights abuses in Cambodia's booming textile and apparel sector. As part of the petition review process, the Union of Needletrades, Industrial and Textile Employees (UNITE) submitted a supplementary proposal for a trade agreement that would cover only textiles. This proposal appears to have been the catalyst for cooperation in a number of different agencies and interest groups that then went on to design and support a separate agreement that would tie abuses in the textile sector with exports from that sector specifically.[43] The unlikely coalition included the USTR, UNITE, the Lawyers Committee for Human Rights, and the United States Department of State among others.[44]

Although textiles and apparel are not included in the list of goods covered by GSP, these groups were able to cooperate because of political interest in putting free trade agreements back onto the agenda, support from industry to regulate textile imports from Cambodia, and the willingness of unions to support an agreement with strong labor provisions.

Both the labor criteria and the Cambodia Textile Agreement as a whole are unusual in several ways. The first interesting feature is that there is no specific list of rights to be followed.[45] The requirement is only that Cambodia "substantially comply" with its own labor law, and "support" labor standards.[46]

43. Interview with USTR Official, in Washington, D.C. (Sept. 10, 2002); interview with former Department of Labor staffer, in Washington, D.C. (Sept. 10, 2002).

44. For a good discussion about some of the early proposals see Kevin Kolben, *Trade, Monitoring, and the ILO: Working To Improve Conditions in Cambodia's Garment Factories*, 7 YALE H.R. & DEV. L.J. 79 (2004).

45. The vague wording led to misunderstandings in the early stages of the agreement, for instance, the term "working conditions" was interpreted by factories to mean factory facilities and compensation, while U.S. officials were in fact more concerned with freedom of association rather than actual conditions of work. *See*, *e.g.*, Brenda Jacobs, Partner, Powell, Goldstein, Frazer and Murphy LLP, Remarks at conference on Doing Business in Cambodia Today, at the Johns Hopkins School of Advanced International Studies (Apr. 18, 2001).

46. This is likely because the Cambodia labor code was written with the assistance of the ILO and other international groups and generally considered to be exemplary.

> The Parties . . . seek to foster transparency in the administration of labor law, promote compliance with, and effective enforcement of, existing labor law, and promote the general labor rights embodied in the Cambodian labor code.[47]
>
> The Government of the United States [will determine] whether working conditions in the Cambodia textile and apparel sector substantially comply with such labor law and standards.[48]

Another unique feature of this agreement is that it is the only trade arrangement with an active monitoring mechanism for the labor provision. Factory monitoring is done by the Cambodian office of the International Labor Organization (ILO), which produces annual reports on the surveyed plants.[49] It is these reports that result in another unusual aspect of the agreement—the determination of quotas. A baseline quota increase is built into the agreement, and is granted every year regardless of working conditions. The factory monitoring process can lead to increases greater than the baseline amount. Reports of non-compliance do not activate putative measures; rather they reduce the percentage of over-baseline quota increases.[50]

The U.S.-Cambodia Bilateral Textile Agreement is commonly cited as one of the great successes of labor provisions in trade agreements. Working conditions have generally improved in the country, and factories have been more vigilant in implementing labor laws.[51] However, these triumphs are accompanied by an important domestic cost. Though the Cambodian Ministry of Labor benefited from various technical assistance measures during the period of the ILO monitoring, there was no expansion of capacity in the area of labor inspections. This lack of expansion in inspections resulted from the fact that the ILO monitoring mechanism had temporarily taken over duties formerly associated with the Ministry of Labor.

Though aspects of this Agreement could be replicated, a Cambodia-type agreement is unlikely to be duplicated.[52] This is

47. 1999 Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products Between the Government of the United States of America and the Royal Government of Cambodia, § 10(a).

48. *Id*. § 10(d)

49. ILO, Garment Sector Working Conditions Improvement Project, Kingdom of Cambodia, Synthesis Reports on the Working Conditions Situation in Cambodia's Garment Sector 1-11 (2001–2005).

50. For more background see LEJO SIBBEL, PRESENTATION ON ILO'S WORK IN CAMBODIA, SUMMARIZED IN MONITORING INTERNATIONAL LABOR STANDARDS: NATIONAL LEGAL FRAMEWORKS 22 (Crispin Rigby ed., 2003).

51. SANDRA POLASKI, CAMBODIA BLAZES A NEW PATH TO ECONOMIC GROWTH AND JOB CREATION (Carnegie Endowment for International Peace, 2003).

52. *Id.*

because textiles are Cambodia's major export (70% of total exports in 2000), the United States is its major market, and U.S. quotas were the primary source of Cambodia's competitiveness in this sector. The agreement expired in 2005.

C. Free Trade Agreements

A third category of trade arrangements that include labor provisions are the growing number of free trade agreements the United States maintains with its trading partners. In this section, I review the four that have been enacted as of 2003.

1. North American Free Trade Agreement

The North American Agreement on Labor Cooperation (NAALC) is the labor side agreement of the North American Free Trade Agreement (NAFTA). Labor criteria were not included in the original negotiations for NAFTA under President George Bush. Rather, they were developed as a result of the political atmosphere in the 1992 elections. At that time, organized labor groups were threatening to withhold election-year votes because of NAFTA. Presidential candidate Bill Clinton could not afford to alienate the labor vote, and in a 1992 speech he promised to include labor and environmental standards.[53]

The original U.S. labor proposal was broad-based in scope and included an independent dispute settlement commission. During the course of negotiations, the United States also hardened its position on the need for sanctions. Neither Mexico nor Canada would accept this and the working group scaled it down to the "effective enforcement of domestic law" model.[54]

The list of actionable rights in the NAALC is a variation on the five-point GSP rights list. It includes eleven fundamental labor principals, with varying levels of enforcement. Only three of these labor principles can eventually result in a panel ruling that could recommend sanctions (starred below).

1. Freedom of association and protection of the right to organize.

2. The right to bargain collectively.

3. The right to strike.

53. President William Clinton, Address at North Carolina State University (Oct. 4, 1992).

54. MAXWELL CAMERON & BRIAN TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE 79–207 (2000).

4. Prohibition of forced labor.

*5. Labor protections-for children and young persons.

*6. Minimum employment standards.

7. Elimination of employment discrimination.

8. Equal pay for women and men.

*9. Prevention of occupational injuries and illnesses.

10. Compensation in cases of occupational injuries and illnesses.

11. Protection of migrant workers.

Since the NAALC focuses on countries enforcing their own domestic labor law, unions in all three countries have attempted to use it as a tool for organizing and bargaining.[55] However, labor petitions under the NAALC mechanism have generally been cited as not being satisfactorily resolved.[56]

2. U.S.-Jordan Free Trade Agreement

The U.S.-Jordan Free Trade Agreement (Jordan FTA) was negotiated as a result of the Kingdom of Jordan's political cooperation and support of President Clinton's Middle East peace initiative.[57] It was the first trade agreement to include labor criteria directly in the main text.

The Jordan worker rights criteria encourage Parties to "strive to" incorporate the GSP list of "internationally recognized labor rights" into their domestic law. Specifically it states that:

> each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights . . . and shall strive to improve those standards in that light. . . .
>
> A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties. . . .[58]

Panel proceedings and sanctions are authorized for all of the labor criteria equally and the labor criteria is subject to the same dispute settlement mechanisms as the commercial aspects of the agreement.

55. For a discussion of review petitions brought under the NAALC, see Diana Chew & Richard Posthuma, *International Employment Dispute Resolution Under NAFTA's Side Agreement on Labor*, 53 LAB. L.J. 38 (2002).

56. *Id.*

57. *Jordan Gets It*, N.Y. TIMES, Apr. 3, 2001, at A19. *See also,* Robert Bookmiller, *Abdullah's Jordan: America's Anxious Ally*, 2 ALTERNATIVES: TURK. J. INT'L REL. 174 (2003).

58. Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of Free Trade Area, Art. 6.

If an activity is determined to be in violation of the labor criteria, the affected party may take "any appropriate and commensurate measure" to remedy the violation.[59] However, though sanctions are technically allowed, in 2001 the Parties exchanged letters that indicate that the U.S. Government is unlikely to suspend benefits to Jordan.[60]

The inclusion of a labor chapter was a result of influence by labor rights groups. President Clinton wanted to conclude a trade agreement without the benefit of fast track; and Jordan was the first opportunity that arose. He was following through with a promise he had made to labor rights groups that he would include labor provisions in trade agreements.[61]

3. & 4. U.S.-Singapore Free Trade Agreement and the U.S.-Chile Free Trade Agreement

These were the first two free trade agreements the United States concluded under the 2002 Trade Promotion Authority (TPA). Both include nearly identical labor criteria and enforcement mechanisms. The language as written in the U.S.-Chile Free Trade Agreement reads:

> 18.1.2 . . . each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor standards set forth in Article 18.8 and shall strive to improve those standards in that light. . . .
>
> . . . .
>
> 18.2.2 . . . each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to internationally recognized labor standards . . .[62]

While the inclusion of labor language in these two agreements was a direct result of TPA, there is some question about whether the labor language conforms to the TPA requirements.[63] In particular, labor advocates were unhappy with the labor chapters since the dispute settlement mechanism applies only to the criteria that encourage

59. *Id.* at Art. 17.2(b).

60. In the July 23, 2001, Side Letter on Labor and Environment, USTR Robert Zoellick and Jordanian Ambassador Marwan Muashor agreed to attempt to resolve disputes "without recourse to formal dispute-settlement procedures." And that they "would not expect or intend to apply the Agreement's dispute-settlement enforcement procedures . . . in a manner that results in blocking trade," *available at* Trade Compliance Center, U.S. Dept. of Commerce.

61. Telephone interview with AFL-CIO official (Aug. 28, 2002).

62. United States-Chile Free Trade Agreement, ch. 18.

63. *See*, *e.g.*, Stacie Martin, *Labor Obligations in the U.S.-Chile Free Trade Agreement*, 25 COMP. LAB. L. & POL'Y J. 201 (2004).

countries to uphold their own labor laws in a manner affecting trade.[64] This lack of parity of enforcement between labor and commercial aspects appears to run counter to the provisions of the TPA under which it was negotiated.

D. The "Other" Provisions

In addition to the nine major trade arrangements discussed above, there are also a number of other recent U.S. trade-related arrangements that include language on worker rights. They comprise an eclectic group, including Section 301 of the 1974 Trade Act, the Overseas Private Investment Corporation (OPIC) guidelines, the 2002 Trade Promotion Authority, and voting rules for the International Financial Institutions among others. Below is a brief overview of the labor criteria in Trade Promotion Authority, which has significantly impacted the inclusion of labor provisions in trade agreements.

1. Trade Promotion Authority

Trade Promotion Authority (TPA) is the most recent incarnation of what was previously popularly known as "fast track" negotiating authority. In the Trade Act of 1974, Congress expanded the President's authority to negotiate tariff reductions to include non-tariff barriers as well.[65] This expanded temporary authority came to be popularly known as "fast track." Fast track legislation gives the executive the power to present trade agreements to Congress for an up or down vote with limited debate and no amendments in return for meeting congressional requirements in the negotiating process. Fast track-type authority was renewed almost continuously through 1994, when it lapsed until 2002.

Disagreement over the inclusion of "non-trade" provisions like labor and environment were one of the reasons that this legislation lapsed for such an extended period.[66] In 1995, a Republican-supported version of fast track that did not include labor criteria in the principal negotiating objectives was approved in committee, but

64. J. HORNBECK, A FREE TRADE AREA OF THE AMERICAS: STATUS OF NEGOTIATIONS AND MAJOR POLICY ISSUES (CRS Report for Congress, Nov. 17, 2003).

65. The Reciprocal Trade Agreements Act of 1934 gave the President the power to negotiate trade agreements that involved tariff reductions. However, during the Kennedy Round of the GATT, member countries began discussing the reduction of non-tariff barriers. Fast track legislation was implemented to address these changes in multilateral negotiations. For more information, see LENORE SEK, TRADE PROMOTION AUTHORITY: BACKGROUND AND DEVELOPMENTS IN THE 107TH CONGRESS (CRS Report for Congress, Feb. 15, 2002).

66. *Id.*

never made it to a floor vote.[67] Another fast track proposal was submitted to Congress in 1997. Though both the final House and Senate versions did include labor provisions, they were almost completely limited to elements that were intended to ensure that countries do not lower existing standards in ways that affect trade.[68]

When the current version of TPA was passed in 2002, the labor provisions went beyond the discretionary labor criteria that had been the norm under fast track. Labor provisions include:

> The overall trade negotiating objectives of the United States for agreements subject to the provisions of section 2103 are—
>
> > (7) to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade . . .[69]
>
> The principal negotiating objectives of the United States with respect to labor and the environment are—
>
> > (A) to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its environmental or labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party after entry into force of a trade agreement between those countries . . .[70]

The innovation in the labor criteria of the TPA is that it includes an additional provision that makes all principal negotiating objectives subject to the same dispute settlement and equivalent enforcement procedures.[71] This provision was included as a result of the labor criteria negotiating process and the political atmosphere that existed once the Democratic Party won control of the Senate in the summer of 2002. Democrats wanted to avoid labor language that might result in side agreements like the NAALC. The result was that all principal negotiating objectives would be subject to equivalent dispute procedures.

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67. *See* SEK, *supra* note 67, at 3.

68. The House version did allow countries to weaken their labor laws in certain instances. *See*, *e.g.*, MARY-JANE BOLLE, TRADE PROMOTION AUTHORITY: LABOR ISSUES (CRS Report for Congress, Jan. 18, 2002).

69. Trade Act of 2002 § 2102 (A), 19 USCS § 2102(A) (2005).

70. Trade Act of 2002 § 2102 (B) (11), 19 USCS § 2102(B)(11) (2005).

71. Trade Act of 2002 § 2102(b)12(G), 19 USCS § 2102(b)(12)(G) (2005):

> The principal negotiating objectives of the United States with respect to dispute settlement are – (G) to seek provisions that treat United States principal negotiating objectives equally with respect to – (i) the ability to resort to dispute settlement under the applicable agreement; (ii) the availability of equivalent dispute settlement procedures; and (iii) the availability of equivalent remedies.

Under its previous incarnation as fast track, labor criteria had not been subject to the same dispute resolution procedures as other elements of a trade agreement. So far, all of the agreements passed under TPA have included labor provisions. This is in direct contrast to those negotiated under fast track where of the five trade arrangements negotiated, none included labor criteria in the text.[72]

II. ANALYSIS

This section offers a preliminary test of the hypothesis that labor criteria provides protectionist interests with a channel to block imports. To do this, I divide the timeline of a labor provision's existence into three discrete stages—initiation, design, and implementation. Using this temporal framework, I parse out the various ways in which protectionist interests are reflected in the design and application of various labor provisions.

A. Stage 1: Initiation

The first stage of a labor provision's existence is the initiation process. Each of the labor provisions discussed in this paper was initiated either by labor activists, congressional legislators, or more recently, as a result of bureaucratic norms and requirements. Below, I examine whether protectionist intentions motivated these actors' decisions to initiate the process to include a labor provision in a trade arrangement.

1. Labor Rights Interest Groups

Labor rights groups were directly involved in the initiation of the labor side agreement of the NAFTA and the labor chapter of the U.S.-Jordan Free Trade Agreement. This relatively recent assumption of leadership is the culmination of the supporting role labor groups played in earlier labor provisions, and the more direct effects recent free trade agreements are expected to have on U.S. industry.

The earliest labor provisions were drafted with the assistance, though not the leadership, of various AFL-CIO member unions and other activist groups. Labor unions responded enthusiastically to a

72. (1) the Tokyo Round of the GATT in 1979, (2) the U.S.-Israel Free Trade Agreement in 1985, (3) the U.S.-Canada Free Trade Agreement in 1988, (4) the NAFTA in 1993, and (5) the Uruguay Round Agreements in 1994.

request for their assistance by Rep. Donald Pease in the design of labor language for the 1983 CBERA and the 1984 GSP.[73] Some of the groups involved in these early projects included the United Auto Workers; the United Electrical, Radio and Machine Workers of America; and the United Steelworkers of America, in addition to various human rights groups.[74] This early enthusiasm was partially a result of the limited product coverage in CBERA and GSP,[75] and partially because foreign countries were not yet seen as a threat to jobs.[76]

By the early 1990s, U.S. workers were being hit hard by falling international demand as a result of the strong dollar, and the large trade deficit. Foreign competition in the U.S. market was resulting in factory closures in sensitive sectors. As a result, U.S. organized labor became very vocal in its resistance to reducing trade barriers that might cause firms to relocate their manufacturing facilities. Organized labor strongly opposed NAFTA because unlike earlier trade preferences, the free trade agreement would cover substantially all trade, including sensitive sectors.

Labor and human rights activist groups began coalescing over NAFTA during the approval process for fast track in 1990.[77] It was clear that fast track legislation would be used to push NAFTA through, and so labor groups along with other human rights activist organizations used the fast track process to voice their opposition.[78]

73. Interview with former Pease staffer, Washington, D.C. (Sept. 10, 2002).

74. There was an informal group of labor and human rights activists that had joined together to advocate for human rights considerations in U.S. legislation. Other attendees included Human Rights Watch, the Institute for Policy Studies, and Bread for the World, among others. Correspondence with several members of the original group (2001–2005), *see also* INTERNATIONAL LABOR RIGHTS AND EDUCATION FUND, *supra* note 1.

75.The GSP program, for example excludes most import-sensitive sectors including:

> (i) textile and apparel articles which are subject to textile agreements; (ii) watches, except as determined by the President pursuant to section 503(c)(1)(B) of the Trade Act of 1974, as amended; (iii) import-sensitive electronic articles; (iv) import sensitive steel articles; (v) footwear, handbags, luggage, flat goods, work gloves and leather wearing apparel, the foregoing which were not eligible articles for the purposes of the GSP on April 1, 1984; (vi) import-sensitive semi-manufactured and manufactured glass products; (vii) any agricultural product of chapters 2 through 52 inclusive, that is subject to a tariff-rate quota, in excess of the in-quota quantity for such product; and (viii) any other articles which the President determines to be import-sensitive in the context of the GSP.

USTR, ADDENDUM TO THE GSP GUIDEBOOK, *revised* Oct. 4, 2004.

76. Domestic issues were of greater concerns to unions at the time. *See*, *e.g.*, William Davis, *Collective Bargaining in 1983: A Crowded Agenda*, 106 MONTHLY LAB. REV. 3 (1983).

77. FREDERICK MAYER, INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS 67–106 (1999).

78. FREDERICK MAYER, NEGOTIATING THE NAFTA: POLITICAL LESSONS FOR THE FTAA (Duke University Working Paper Series, No. SAN01-17, July 2001).

This coalition of human rights groups continued to cooperate in opposition to NAFTA even after fast track was renewed in 1991.[79]

Once fast track was approved, the labor movement turned its attention to the presidential campaign and used its voter base to pressure democratic candidate Clinton to commit to include labor criteria in the NAFTA. Congressional testimony indicates that organized labor in the United States wanted to include labor provisions both to ensure that Mexican workers could reap some advantage from increased investment,[80] and also to protect U.S. jobs by encouraging harmonization to U.S.-level wages and working conditions.[81]

When democrats took the White House in 1992, it became clear that as a result of domestic and international pressures, the Clinton Administration was going to insist on a side agreement, not a direct change to the NAFTA text. President Clinton's decision to negotiate a side agreement led to a split in the labor activist coalition—some members felt a side agreement would provide a false legitimacy to labor criteria, while others felt that it was better than no labor criteria at all.[82] This split, in addition to negotiators' concerns that strong labor criteria encroached on national sovereignty, resulted in wide-ranging, but weakly enforceable set of labor rules.

The weak labor side agreement contrasted with the well-worded and widely-supported environmental side agreement to the NAFTA.[83] The difference was that environmental groups had worked with the Administration and had remained a united force throughout the negotiating process.[84] This was a lesson labor learned and applied when the U.S.-Jordan FTA negotiations began.

Despite President Clinton's failure to receive an extension of fast track authority in 1998, he was eager to conclude a free trade agreement with political ally Jordan. The absence of fast track meant that the President needed to have strong support from his constituents in order to pass any trade agreement. Organized labor saw the opportunity and mobilized to successfully promote the inclusion of

79. Pharis Harvey, The North American Agreement on Labor Cooperation: A Non-Governmental View, Address at Conference on Social Clauses and Environmental Standards in International Trade Agreements: Links, Implementation and Prospects (May 1996).

80. *See*, *e.g.*, (statement of J. Cunningham, AFL-CIO) before the Committee on Foreign Relations on the NAFTA, Oct. 27, 1993.

81. *See*, *e.g.*, (statement of Dennis Skelton, Teamsters) before the Subcommittee on Employment, Housing and Aviation of the Committee on Government Operations, House of Representatives, Sept. 9, 1993.

82. Harvey, *supra* note 79.

83. *See*, *e.g.*, *supra* note 80.

84. CAMERON & TOMLIN, *supra* note 54.

labor criteria in the body of the agreement. Their goal was one of establishing precedent rather than a direct attempt to change working conditions in Jordan, which already had fairly good domestic labor standards.[85] In both of these agreements, the activism of labor groups was the reason that labor provisions were considered and ultimately included.

2. The Legislative Champion

Labor provisions are contentious to the point that, before 2002 TPA, they would not "automatically" be included in a trade arrangement. They needed to be supported by what Lance Compa and Jeffery Vogt dubbed a "legislative champion."[86] The existence of a legislative champion is important primarily when a trade agreement is expected to increase imports to the United States in a way that may adversely affect domestic producers and workers. Conversely, the need for a legislative champion is eased in cases where the trade arrangement is a close copy of a previous arrangement, when the arrangement has a wide scope that includes more than just commercial clauses, or where standards are included as a result of pre-existing legislation. Congressional legislators were responsible for initiating labor provisions in the 1983 CBERA, the 1984 GSP renewal, and the 1990 CBTPA. Though it is difficult to conduct an examination of the personal motivations of publicly elected officials,[87] I attempt here to evaluate their motives through published testimony, public information about their constituencies, and the types of bills they have sponsored and supported.

a. Don Pease

Congressman Don Pease (D-OH) was the congressional initiator and leader for labor provisions in the original CBERA and GSP, among others.[88] He began his first congressional term in 1976, and he quickly gained a reputation for supporting human rights and worker

85. Thea Lee, Address before the Middle East Institute, National Press Club (Oct. 6, 2004).

86. Compa & Vogt, *supra* note 20.

87. For an economist's explanation of the difficulties associated with assessing congressional motives, see ALAN KRUEGER, OBSERVATIONS ON INTERNATIONAL LABOR STANDARDS AND TRADE (NBER, Working Paper No. 5632, 1996).

88. He was also involved in OPIC and Section 301 of the U.S. trade act, instructions for U.S.-designated executive directors of the international financial institutions like the World Bank, and foreign aid appropriations.

rights legislation. He was well known for championing labor standards as a moral imperative for human rights reasons.[89]

Rep. Pease came from Ohio's 13th District, which is slightly more manufacturing-oriented than the state as a whole. And while it experienced high manufacturing unemployment from closed factories during the 1970s, it recovered quickly in when the recession ended in the early 1980s.

Rep. Pease was supportive of free trade;[90] however, he was also concerned with the results increased imports could have on the domestic economy.[91] These two goals merged in his efforts to include labor criteria in trade agreements in order to ensure that countries that were receiving preferential access to the U.S. market would be following established standards and human rights policies.[92] As his colleagues noted, Rep. Pease "was the first member of this body to seriously pursue the enforcement of labor standards in developing countries and international trade agreements."[93]

b. Sander Levin and Charles Rangel

When the CBTPA came up for renewal in 2000, there were two congressmen who led the negotiations to enhance the labor criteria in line with the expanded product coverage that was being proposed. Representatives Sander Levin (D-MI) and Charles Rangel (D-NY) pushed the idea that expanded market access should be accompanied by enhanced labor standards.

Representative Levin was first elected to Congress in 1982. He is known for his interest in using trade agreements to shape globalization outcomes.[94] He has been an overall supporter of free trade agreements both because he sees them as a means of expanding opportunities for workers in the United States, and also because they

89. *See*, *e.g.*, Kenneth Swinnerton & Gregory Schoepfle, *Labor Standards in the Context of a Global Economy*, 117 MONTHLY LAB. REV. 52, 54 (1994).

90. Troubling Trade Figures: Extension of Remarks, Congressional Record, E2570 (July 19, 1989) (statement of Rep. Donald J. Pease).

91. Records indicate that Rep. Pease was particularly concerned with helping Americans who had lost their jobs to foreign competition. For example, he initiated HR 5900, HR 914, and HR 2425.

92. *See*, *e.g.*, Cong. Rec. H3279 discussion (June 20, 2001) (Statement of Jerry Costello). *See also,* other labor standards-oriented bills supported by Rep. Pease include: HR 2485, HR 2307, HR 6090, HR 3786, HR 4733, and HCR 247.

93. Cong. Rec. H3279 discussion (June 20, 2001) (statement of Rep. Sherrod Brown).

94. *See*, *e.g.*, short bio for Sander Levin, Does America Want a Steel Industry? The Political and Economic Implications of President Bush's Section 201 Decision, Address at The New America Foundation (Feb. 28, 2002). *See also,* Sander Levin*, Why I Oppose CAFTA*, WASHINGTON POST, July 11, 2005, at A15.

represent an opportunity to raise living standards in partner countries.[95] His interest in labor rights is in their role as a means to ensure that preferential access to the U.S. market does not result in a race to the bottom.[96]

He is also supportive of programs that help domestic industries and workers adjust to increasingly open trade.[97] This appears to be a result of both his overall view of trade policy as a means of shaping globalization and also of his constituency. Rep. Levin represents Michigan's 12th congressional district where auto manufacturing and the steel industry are the main employers. Both of these sectors have experienced declining growth as a result of foreign competition.

Representative Rangel was first elected to the U.S. Congress in 1970. He hails from New York's 15th district, which is one-half African American and other Hispanic, one-third Dominican, and one-tenth white. Though he tends to focus his legislative efforts on domestic concerns such as urban empowerment legislation and support for minorities, he was instrumental in further liberalizing trade with Africa in 2000 during his time on the Ways and Means Committee. His support for various free trade agreements such as CBTPA and AGOA stems from his commitment to helping developing countries move forward economically; particularly those he feels have been neglected by the United States.[98]

This section reveals several interesting facts about the role of a legislative champion. The first is that they tend to focus on labor rights in their more general role as human rights that need to be protected through minimum standards. The second is that they see trade arrangements as ways of leveraging improved worker rights while also encouraging development through market access. The third fact this analysis reveals is that these legislators were able to gain the support of their districts because of the limited product coverage of unilateral preferences, since none of the three legislators expected their districts to be adversely affected by increased imports from these unilateral preference programs.

95. *Available at* http://www.house.gov/levin.

96. Dear Colleague Letter from Sander Levin (Apr. 30, 2003), *available at* http://www.citizen.org/print_article.cfm?ID=10054.

97. *See, e.g.,* HR 2308, HR 1120, HR 1573, HR 5100, and HR 1068.

98. *See*, *e.g.*, H.R. Conf. Rep. on HR 434, at H2572 (statement of Rep. Charles Rangel), (May 4, 2000).

B. Stage 2: Design

Though the initiators appear to have promoted labor provisions for primarily humanitarian reasons, there is no guarantee that the legislative process would translate their intentions directly into the provisions' functional aspects. Following, I assess four structural features that resulted from the design process to assess the extent to which they encourage interest groups to file petitions with the intent of blocking imports.

1. Accessibility

Accessibility is the degree to which labor provisions can be invoked by groups other than the parties to the trade arrangement. Labor provisions exhibit two forms of accessibility—direct and indirect. The remainder of this paper will focus only on the dynamics of directly accessible labor provisions.

Directly accessible labor provisions can be found in GSP, NAALC, ATPDEA, and all of the free trade agreements. The regulatory mechanisms in these trade arrangements enable any interested outside party to request that the U.S. Government review the eligibility status of its partner country during an established review process.[99]

A large proportion of petitions to initiate the review process are declined straightaway, and of those that are reviewed, decisions to withdraw trade preferences are rare. In the GSP and the NAALC, less than 60% of filed petitions have been accepted for review,[100] and less than 10% have resulted in the withdrawal of benefits.[101]

Despite this poor track record, interest groups continue to submit petitions through the GSP, NAALC, and ATPDEA with some frequency.[102] The explanation cannot be that the potential import-blocking benefits outweigh the costs of petition submission, since the amount of trade that could be limited is quite small.[103]

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99. GSP offers the petition process to "interested parties," while the free trade agreements offer the process to "any person."

100. In the case of GSP, only 40% of submitted petitions were accepted for review. In the case of NAALC, 60% of submitted petitions resulted in a recommendation for consultations.

101. In the case of GSP, of 105 petitions received, 10 reviews resulted in suspension. In NAALC, no petitions have resulted in sanctions or fines.

102. GSP has received 105 labor petitions, NAALC has received 31 petitions, ATPDEA has received 3. The petition process for the free trade agreements has only been in place since December 2004, and no petitions have yet been filed.

103. *E.g.*, in the case of GSP, the volume of imports that come into the United States under that program are too small to have any profound effects as a result of the withdrawal of beneficiary status. Kimberly Elliott, Preferences for Workers? Worker Rights and the U.S.

A more appealing explanation is that petitioners are weighing the resource costs of submitting a petition against the non-commercial benefits that can result from the existence of a credible threat. In fact, the case of ATPA provides additional evidence that accessible eligibility criteria is both intended and used mainly for its threat effect.

When ATPA was first enacted in 1991, the labor elements in the eligibility criteria were not accessible through a petition process. However, when ATPA was renewed as ATPDEA in 2002, it was redesigned to include a petition mechanism similar to that of the GSP. The reason this new petition process was included was to provide petitioners with an additional source of leverage to ensure ATPDEA commitments were being followed. According to a member of the working group, a number of U.S. firms had been having problems with arbitration of disputes in Andean countries.[104] The petition process was included to give interest groups a means of putting additional pressure on Andean governments to follow the arbitration clause obligations they had agreed to under the ATPA. These firms felt that the GSP product coverage did not provide enough of a threat to the countries in question and so wanted to be able to access the ATPA preference program directly. Their intent was not to stop imports, but rather to introduce a credible threat effect in arbitration proceedings. The resulting GSP-type regulatory mechanism was implemented in 2003[105] and has already been petitioned a number of times using various eligibility criteria, including labor.

A second group of trade arrangements are those that do not have directly petitionable labor provisions. This group includes the CBTPA, AGOA, and the U.S.-Cambodia Bilateral Textile Agreement. Though these trade arrangements do not include an explicit petition process, their labor provisions are indirectly accessible by third parties in two ways. The first channel is GSP. Each beneficiary country is also a recipient of GSP, which includes comparable labor criteria. As a result, if a country has its GSP benefits revoked because of labor violations, there has also been a violation of the eligibility criteria in the unilateral preferences.[106] A second indirect means of accessibility is that during eligibility reviews,

Generalized System of Preference, Address at Conference on Globalization and Inequality (May 1998) (*revised* May 8, 2000).

104. Interview with USTR official, Washington, D.C. (June 23, 2005).

105. The interim rule was published as 68 Fed. Reg. 5542 (Feb 4, 2003) No. 23.

106. Though this is generally the case, it can be over-ridden by politics. In 1987, Nicaragua lost its GSP privileges as a result of violating worker rights criteria, yet it was granted CBERA eligibility in 1990. It received a waiver for reasons of national security.

federal register notices and hearings call for public input in the eligibility review process. The submissions and testimony are then reviewed and used in the inter-departmental committee's evaluation process.[107] As both the ATPA case and historical background of the other directly accessible labor provisions suggest, direct accessibility is a feature that enables regular petition submissions, however, it was not necessarily intended to change trade flows.

2. Complexity

The degree of difficulty built into the petition process is a second design feature that could affect the frequency of petitions. Those labor provisions that are covered by a direct petition mechanism exhibit two distinct degrees of complexity—those that are straightforward and have a clear path to a dispute ruling, and those that lack discrete timelines and have steps that vary according to the labor criteria that is being petitioned.

The least complex petition process is the GSP-style mechanism of ATPDEA and GSP. Submissions can come in one time per year, and then are reviewed and decided upon over the following year.[108] This is a straightforward mechanism with petition guidelines published for general use.

A more complex style of petition mechanism exists in the NAALC and the free trade agreements. These both have multi-layered dispute settlement mechanisms that favor dispute resolution through consultation rather than the application of sanctions. Though the labor provisions all allow for the application of sanctions for some labor criteria in the final ruling, there are numerous steps to be taken before a panel is even formed to consider sanctions. This multi-layered process also does not include explicit timelines, which means that decisions can potentially be delayed indefinitely.

Increasing complexity in the petition process is unlikely to have a deterrent effect for petitioners. The reason is that increasing complexity is reflected exclusively in the free trade agreements, and when a country signs on to an FTA, the United States graduates it from unilateral preferences. This means that the FTA represents the

107. For a discussion of the membership and activities of the inter-agency committee that reviews countries' beneficiary status, see WILLIAM CLATANOFF, PRESENTATION ON ILO'S WORK IN CAMBODIA, SUMMARIZED IN MONITORING INTERNATIONAL LABOR STANDARDS: NATIONAL LEGAL FRAMEWORKS (Crispin Rigby ed., 2003).

108. For specifics, see USTR, GSP GUIDEBOOK (1999).

only source of trade-based leverage that labor rights interest groups have at their disposal.

3. Coverage

A third design feature that we might expect to affect the frequency of petition submissions is the scope of worker rights that are included in the labor provision. The labor provisions in this paper can be divided into three groups in terms of coverage—internationally recognized worker rights (IRWR), IRWR plus other worker rights, and IRWR plus a requirement to follow existing domestic labor law.

The most basic coverage is labor provisions that require signatories to follow "internationally recognized worker rights." This is the list of five rights that was pioneered in the GSP and has also been included in nearly every labor provision that has been negotiated to date. There are only two instances where this list has not been included. The first is the NAALC where all five rights are ultimately included, but in an expanded form. The other instance is in the U.S.-Cambodia Bilateral Textile Agreement. As mentioned earlier, the list was not included here since Cambodia's labor law already incorporated the list.

The NAALC constitutes the second category of coverage: the internationally recognized worker rights "plus." In the NAALC list of covered rights, the GSP-based list of five rights is expanded to include the right to strike, equal pay between genders, protections for migrant workers, and prohibition of employment discrimination. It should be noted, however, that none of these additional rights are sanctionable under the agreement.

The third type of coverage is labor provisions that require that in addition to following the internationally recognized worker rights, countries should strive to uphold their existing domestic labor laws. This is the approach the U.S. Government has been taking with the free trade agreements including the U.S.-Jordan FTA, U.S.-Chile FTA, and the U.S.-Singapore FTA.

While it is tautological that broader coverage provides a wider scope for petition submissions, this does not appear to affect the frequency of petitions. NAALC contains wider coverage than other labor provisions, yet the majority of NAALC petitions cite labor rights that are identical to the list of internationally recognized worker rights, such as freedom of association and collective bargaining criteria. Another reason that wider scope may not result in increased petitions is that, particularly in the case of the more recent labor

provisions, not all labor criteria are equally adjudicable. The following section explains the effects that this may have on petitions.

4. Sanction Type

The fourth design feature that is likely to affect petition frequency is enforceability. Invoking a labor provision takes a good deal of organizational resources on the part of the petitioner. And since worker rights interest groups tend to have limited resources, if there is a weak enforcement mechanism it may not be seen as worthwhile to put forth the expense to promote workers' rights through these channels.[109] All directly-accessible labor provisions ultimately allow for the revocation of trade benefits; however, one category enables revocation for all of the labor criteria, while the other focuses on a monetary reward and can only result in sanctions for some aspects of the labor criteria.

Of the six trading arrangements with direct petition mechanisms, only the GSP, ATPDEA, and U.S.-Jordan FTA have mechanisms whereby a complaint could reasonably result in the revocation of trade benefits for all labor criteria.[110] In each of these trade arrangements, the petition process is the same for its commercial and labor aspects. Despite the lack of actual revocations, a petition against any aspect of the labor provision could potentially result in changes to trade flows.

A second type of enforcement mechanism is the partial two-step monetary reward with sanctions as a last resort. This group includes the free trade agreements and NAALC. As the previous section outlined, these are the same labor provisions that have petition processes that are difficult to navigate. Sanctions are only possible for certain labor criteria, and only after the offending party has failed to pay monetary fines.

The potential for a ruling that will block imports is an important incentive for petitioners. And while all labor-criteria have some potential to revoke trade benefits, only the GSP and ATPDEA have an established path leading directly to the withdrawal of benefits. The newer agreements tend to focus on negotiations rather than sanctions,

109. *See*, *e.g.*, Terry Collingsworth, *The Key Human Rights Challenge is Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183 (2002).

110. As discussed previously, though the language of the U.S.-Jordan Free Trade Agreement technically allows for the use of sanctions, the exchange of diplomatic letters makes this an unlikely result.

which is a distinct disincentive to any petitioners, particularly those with protectionist intentions.

The four design elements illustrate that while some features encourage petitions, the petition process itself was not designed to block trade. Rather, the design features indicate that it was intended to be used to exploit the threat effect. In recent years, this role has become more explicit with the layering of obligations and prioritizing of certain rights.

C. Stage 3: Petition History

The third stage of a labor provision's existence in which it could be expected to encourage implementation by protectionist interests is during the actual petition process. Based on available case histories of GSP and NAALC petitions, I assess frequent petitioners for evidence that they submit petitions with the primary intention of blocking imports to the U.S. market. I examine their constituencies, their organizational goals, and the role cross-national cooperation plays in both the strategies of the main petitioners and in the submissions of the petitions themselves.

1. Constituency of Petitioners

Most primary petitioners have no specific commercial constituency. Nearly all labor-based petitions are submitted by human rights[111] or labor rights interest groups.[112] Human rights groups clearly have no commercial constituency, and so can be removed from suspicion of protectionist intent. However, since labor rights groups can represent workers in particular industrial sectors, their petition submissions need to be examined more closely for evidence of protectionist intent.[113]

Of the petitions submitted by labor rights groups, the majority were submitted by the AFL-CIO and the International Labor Rights Fund. For the purposes of this paper, I remove both from the group of actors with specific commercial interests because neither represents discrete commercial sectors. This leaves three GSP petitions and ten

111. Human rights groups include, for example, Human Rights Watch, the Lawyers Committee on Human Rights, US/LEAP, and the Human Rights Law Clinic of the American University.

112. Labor rights interest groups include, for example, the International Labor Rights Fund, UE, Teamsters, and the AFL-CIO.

113. Organized labor groups constitute a large proportion of primary petitioners in both the GSP (35%) and the NAALC (55%).

NAALC petitions that have been submitted by interest groups that represent specific commercial concerns. The breakdown of these submissions below reveals that petitions that are unilaterally submitted by specific commercial interests rarely result in changes in trade flows.

In the case of NAALC, there have been thirty-one total cases in all three National Administrative Offices as of May 2005. In only ten of these did the primary petitioners represent discrete constituencies in their countries.[114] Of those ten petitioners, only five did not include a co-petitioner from the defendant country.[115] And in all five of those cases, the review was declined or withdrawn. This indicates that of reviewed NAALC petitions, 100% were filed by multi-national coalitions of labor rights groups.

In the case of the GSP, of 105 total petitions, only three primary petitioners had a specific constituency.[116] Of those three petitions, only one was accepted for review and in that case the country was found to be "taking steps."

From this data we can conclude that few of those interests groups that choose to invoke labor criteria in the petition process have a discrete commercial constituency. And of those that do, they tend to partner with international co-petitioners that represent the sector whose imports would be blocked if the petition were successful.

2. Organizational Goals and Labor Petitions

The institutional goals of the most frequent petitioners are generally not limited to promoting labor rights through trade agreements. The AFL-CIO promotes worker rights both in the United States and abroad, the International Labor Rights Fund advocates for worker rights in developing countries, and Human Rights Watch investigates human rights abuses and advocates for victims of human rights violations.

Petitioning groups generally have an established set of tools they use to attempt to address labor rights abuses in partner counties, and using labor criteria is rarely the first attempt at a solution. In the

114. Petitioners include the Teamsters, UE, CWA, Association of Flight Attendants, Florida Tomato Exchange, Organization of Rural Route Mail Carriers, UNITE-HERE, and the United Steelworkers Union.

115. The five cases that did not include a co-petitioner include: 940001 (International Brotherhood of Teamsters), 940002 (UE), 9801 (Ass'n. of Flight Attendants), and 9802 (Florida Tomato Exchange).

116. Haiti 1987 (UE), Mexico 1991 (Minnesota Government), El Salvador 2004 (Teamsters).

majority of cases, formal labor petitions are used to support ongoing advocacy campaigns.[117]

Though petitions are neither the only nor the primary tool used by petitioning organizations to affect labor rights issues, some organizations do have specific departments or employees devoted to the submission of petitions. The International Affairs Department of the AFL-CIO Headquarters has a position that is specifically tasked with GSP petitions and monitoring. The US/LEAP has a Trade and Worker Rights Project that focuses specifically on exploiting labor provisions in trade agreements as a tool for worker rights programs. And Human Rights Watch created a new staff position in January of 2002 for a Trade and Labor researcher. These types of focused positions and projects enable these organizations to achieve some degree of monitoring of countries for petition opportunities. However, even in these cases, the monitoring is used to alert the main organization to potential problems, not necessarily as a trigger for a petition.

The organizational use of petitions as one of a set of advocacy tools suggests that labor-based submissions are not intended to revoke trade privileges. Rather they are enacted as an escalation of tactics to achieve non-commercial goals.

3. Cross-national Petition Cooperation

As a result of both petition norms and submission requirements, there are few, if any, instances of petition submission where the petitioner submitted unilaterally without the consultation and cooperation of labor groups in the defendant country.

In the case of NAALC, of the five unilateral submissions, all were declined or withdrawn from the review process. In the GSP petitions, while there are frequent instances where the main petitioner is a single U.S. group, every one of these groups has internal requirements to consult and cooperate with affected groups in the defendant country. Both the AFL-CIO and Human Rights Watch only submits a complaint if groups on the ground support the submission[118] and the US/LEAP points out that this type of pressure must only be applied with support from affected workers.[119] In fact, in an exception that

117. Jonathan Graubart, *Giving Teeth to NAFTA's Labour Side Agreement*, *in* LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION 203 (John Kirton & Virginia Maclauren eds., 2002).

118. Interview, AFL-CIO official, Washington, D.C. (Aug. 19, 2002); Human Rights Watch researcher, Washington, D.C. (Aug. 19, 2002).

119. *See* the US/LEAP Web site, http://www.usleap.org.

supports this viewpoint, in September 2004, the US/LEAP submitted a "non-petition" to the USTR about the labor rights situation in Colombia.[120] In this document, they specifically noted that, "As a matter of policy, US/LEAP and other worker rights advocacy organizations do not submit petitions without the general support of the labor unions in the country at issue."[121] However in the case of Colombia, though workers did not want a petition, the conditions were so abusive that the organization urged the USTR to review the situation itself and not to see the lack of petitions as an approval of the labor rights situation in that country.

In addition to organizational self-regulation, the way in which official petition guidelines are written make it difficult for a group to successfully achieve a petition review without the assistance of affected groups in the beneficiary country. In the case of free trade agreements, petitions must show that "relief has been sought under the domestic laws of the other Party" and that "the matters referenced in the submission demonstrate action inconsistent with another Party's commitments."[122] In GSP, petitioners must "identify the product of interest, including a detailed description of the product." And "describe the action requested together with a statement with the reasons for the action and any supporting information."[123]

III. CONCLUSION: THE FUTURE OF WORKER PROTECTIONS

The objective of this paper was to establish if labor provisions in U.S. trade arrangements have been used by protectionist interests to block imports. The results suggest that while provisions clearly open the door to submissions designed to block trade, the protectionist characterization is unrealistic—it is neither why the labor provisions were included, nor is it an accurate portrayal of how they have been used in practice.

This does not mean that protectionist interests do not attempt to use trade arrangements to block imports. It is irrefutable, for example, that the industrial countries have been using provisions of the WTO to maintain barriers in certain sectors such as textiles and agriculture. And it is these same countries that are imposing countervailing duties on imports from the developing countries. The

120. US/LEAP, Letter to the USTR Regarding Worker Rights and the ATPA Eligibility for Colombia (Sept. 15, 2004), available in USTR Reading Room.

121. *Id.*

122. 69 Fed. Reg. 77127 (Dec. 23, 2004), No. 246

123. Sample petition in the GSP Guidebook, USTR, GSP GUIDEBOOK (1999).

result is that a disproportionate number of developing country-based exporters suffer adverse consequences from WTO-sanctioned retaliatory trade measures.[124] In addition, there are clauses in the unilateral preferences that enable interest groups to lobby the U.S. Government to graduate products from the preference, or to temporarily limit imports of covered products. Clearly, there are a number of channels that protectionists can and have used to block imports.

Though labor rights interest groups realize the potential of labor provisions in trade arrangements, they are also becoming disillusioned with the leverage potential that labor criteria can provide. This is both because the politics involved with the review process mean that few petitions result in changes in trade flows,[125] and because more recent trade agreements have limited the categories of worker rights that might result in sanctions. As a result, the NGOs and labor unions that were interviewed for this paper are all developing strategies to supplement their use of labor rights provisions in trade agreements. The International Labor Rights Fund, for example, has begun to file lawsuits using the Alien Tort Claims Act. This enables the group to bring lawsuits in the United States court system on behalf of foreign workers. According to the ILRF, the goal of using this new mechanism is to frighten corporations into more effectively enforcing worker rights in their subsidiaries.[126]

Organized labor in the United States also appears to have adopted a new paradigm for their international interactions. As corporations have expanded their operations abroad, U.S. unions have come in contact with their counterpart unions in other countries. This has led them to adopt new strategies for cross-border solidarity and organizing. In the early days of NAFTA, several U.S. unions

124. Anne Krueger, *The Developing Countries and the Next Round of Multilateral Trade Negotiations* (World Bank Working Paper, 1999).

125. There is ample evidence of the importance politics plays in petition decisions. In the early years of GSP, the United States Government accepted so few petitions for review that in 1989 all twenty-three organizations that had filed labor petitions under the GSP agreement joined together in a lawsuit charging that the United States Government, under the Administrative Procedures Act, had failed to implement the program as per Congressional Intent. This suit was rejected. More recently, according to a USTR official, in the case of the initial AGOA certification, the review group recommended that Eritrea and Ethiopia not be certified as a result of their use of child soldiers. However, both were let in with the hope that the trade preference might help them in their efforts to end the war.

126. The use of multinational corporations as a channel for labor rights enforcement has become more attractive as their role as a tool of globalization has become irrefutable. Olivier Boiral goes so far as to charge them as bearing a large degree of the responsibility for holding up the international labor conventions. *See* Olivier Voiral, *The Certification of Corporate Conduct: Issues and Prospects,* 142 INT'L. LAB. REV. 317, 322 (2003).

tried petitioning the NAALC to assist ongoing organizing campaigns. However the groups were generally frustrated with the lack of immediate results.[127] U.S. unions are now looking more toward actions like simultaneous international walkouts, or corporation-wide solidarity actions, or even "virtual committees," which keep workers in the same company in contact with their counterparts in its foreign subsidiaries.[128]

Whatever their form, labor provisions in trade arrangements continue to provide important benefits in terms of worker rights. In the unilateral preferences, petitionable labor provisions provide a threat effect through which labor rights interest groups can leverage ongoing advocacy campaigns. In the free trade agreements, leverage over working conditions is greatest during the negotiation process when the U.S. Government pressures partner countries to improve working conditions and domestic labor laws before the agreement is signed. In both cases, direct and indirect invocation of the labor provision is not intended as a means of blocking imports, since actionable results are unlikely and generally unintended. Rather, worker rights advocates in both the United States and its partner countries use the threat of affecting trade flows as one of many tools to support ongoing labor rights improvements and stimulate solidarity efforts. Instead of serving as a tool for protectionist interests, labor provisions serve as one of a variety of tools for worker rights advocates to open political space for change through the threat of protectionist outcomes.

127. There are several unpublished accounts of NAO cases. These include Communications Workers of America; Testimony in the Public Forum on the Effects of Sudden Plant Closure and the Impact on the Principle of Freedom of Association and the Right of Workers to Organize (1996); and Robin Alexander, Experience and Reflections on the Use of the NAALC, United Electrical, Radio and Machine Workers of America (unpublished memorandum) (on file with author).

128. *See*, *e.g.*, Arthur Shostak, *Today's Unions as Tomorrows Cyberunions: Labor's Newest Hope*, 23 J. LAB. RES. 237 (2002); *see also* Larry Cohen, Address at University and College Labor Education Association (Sept. 18, 2000).