

2004

## International Trade and Workers' Rights: Practical Tools for Reading Labor Rights Provisions of Free Trade Agreements

Benjamin Holt

*American University Washington College of Law*

Michael Waller

*American University Washington College of Law*

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/hrbrief>



Part of the [Human Rights Law Commons](#), [International Law Commons](#), and the [Labor and Employment Law Commons](#)

---

### Recommended Citation

Holt, Benjamin, and Michael Waller. "International Trade and Workers' Rights: Practical Tools for Reading Labor Rights Provisions of Free Trade Agreements." Human Rights Brief 11, no. 3 (2004): 42-44.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Human Rights Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

# International Trade and Workers' Rights: Practical Tools for Reading Labor Rights Provisions of Free Trade Agreements

by Benjamin Holt & Michael Waller

**W**ORKERS' RIGHTS ARE A CONTENTIOUS PART of the public debate surrounding the enactment of Free Trade Agreements (FTAs). Labor rights advocates criticize these trade regimes for reflecting a zealous pursuit of trade and investment deregulation without creating an institutional infrastructure sufficiently protective of workers' basic needs, such as respectful treatment, high work and safety standards, livable wages and benefits, and rights of association and collective bargaining. Opponents of current FTAs assert that while international free trade may bring certain benefits to a national economy, workers often bear a disproportionate burden because low labor standards, amid competition for scarce investment capital, offer developing countries a comparative economic advantage. The predicted result is that both developing and developed countries engage in a zero-sum race towards labor market deregulation. The North American Free Trade Agreement (NAFTA), which became effective in 1994, was the first FTA to acknowledge the nexus between free trade and the diminishing social and economic protections for workers. The United States, Mexico, and Canada negotiated a side agreement to the NAFTA, the North American Agreement on Labor Cooperation (NAALC), with a stated resolve to "protect, enhance, and enforce basic workers' rights." Subsequent FTAs entered into by the United States with Jordan ("U.S.-Jordan") in 2001, Singapore ("U.S.-Singapore") in 2003, and Chile ("U.S.-Chile"), also in 2003, have reinforced this linkage. Unfortunately, the vaguely worded principles and commitments to labor rights of these FTAs beg questions as to their effectiveness and significance.

Although the above agreements have taken important steps in the process of institutionalizing and articulating the free trade/labor rights nexus, they are wholly inadequate if they do not lead to stronger protections. The objective of this article is to make FTA texts quickly accessible, to provide a critical tool with which to analyze FTAs, and to recognize opportunities for and obstacles to strengthening labor protections. The strategy will be to illuminate the substance of these FTAs with an eye towards strengthening labor provisions in future agreements, an especially urgent task in light of the current trend to create larger free trade regimes such as the Free Trade Area of the Americas (FTAA). The FTAA is a hemisphere-wide trade and investment agenda that has thus far made no effort to address workers' rights.

## PARSING THE TEXTS: INCOMPLETE COMMITMENTS

THE NAALC, U.S.-JORDAN, AND U.S.-SINGAPORE contain five components that are crucial to an understanding of their effectiveness: (1) standing; (2) enforcement and remedies; (3) substantive law; (4) transparency and public awareness (sometimes called "sunshine"); and (5) cooperative activities. Analyzing the labor provisions of an FTA text with these five components in mind provides an overall picture of their value for workers' rights advocates.

## STANDING

On the whole, the opportunities for private individuals to invoke the enforcement mechanisms of the NAALC, U.S.-Jordan, and U.S.-Singapore range from limited to non-existent. Each FTA requires Party governments ("Parties") to create "contact points" or offices that have a duty to receive public input or communications from the private sector. The FTAs provide no specifics as to what is to be done with public comments, except for a requirement that these "contact points" exist and that certain discretionary procedural elements, established at the discretion of the governments, be satisfied. Moreover, the FTAs deny each country the authority to create a private right of action enforceable in their domestic courts for violations of the agreement by another Party. In other words, if the U.S. fails to effectively enforce its labor laws as required by U.S.-Jordan, a Jordanian may not file suit against the U.S. in Jordanian courts.



FTAA March for Global Justice, November 2003.

## ENFORCEMENT AND REMEDIES

### The NAALC Labyrinth

While these FTAs establish complicated and legalistic enforcement procedures, each fails to provide remedies for workers who suffer from violations of domestic law. Other groups, such as investors, can demand money damages. NAFTA, for example, provides individual investors with clear recourse to money damages while the NAALC denies any remedy to aggrieved workers. Through its labyrinthine provisions, the NAALC essentially establishes a three-tiered system of enforcement: submissions, evaluation, and arbitration. The complaint process begins at National Administrative Offices (NAOs) which, among other functions, serve as the contact point for public submissions. The NAALC, however, does not mandate procedures for the submission process but instead gives each NAO the authority to establish its own rules of procedure.

In the U.S. NAO, once submissions have been accepted for review, the process looks much like a trial with the features of investigation, a public hearing, and a final report with recommendations. However, these reports do not lead to enforceable judgments, effectively leaving the prospect of a negotiated solution between the Parties

*Benjamin Holt and Michael Waller are J.D. candidates at the Washington College of Law.*

as the *de facto* ruling. For example, if a group of Canadian workers were to allege that Canada failed to enforce their right to organize, the U.S. NAO may very well determine that a violation occurred and recommend that the Parties negotiate a solution. However, the NAO can do no more than this. To date, NAOs have received twenty-six public communications and the Party-negotiated outcomes, while at times filled with symbolic value, have been composed of less than imposing remedies, such as seminars, conferences, reports and outreach sessions. Although these outcomes may raise awareness of the workers' plights, they do not effectively respond to the abuses of their rights.

While in practice no case has yet moved beyond this first stage of enforcement, the NAALC authorizes Parties to seek further analysis through an Evaluation Committee of Experts (ECE) as the second step in enforcement. If an ECE determines that it has jurisdiction over a particular matter, it will make non-binding recommendations to which Parties must respond in writing. After another round of consultations aimed at reaching a resolution, a Party may move to the third tier of enforcement and request the formation of an arbitration panel made up of three labor law "experts." In theory, where an arbitral panel finds a violation of the relevant labor standards, the Parties are encouraged to agree on an "action plan" to remedy the situation. If no such accord can be reached or implemented, the arbitral panel "may" be reconvened with the power to "impose a monetary enforcement assessment." This power is entirely discretionary, and a fine may not exceed \$20 million (U.S.), regardless of the nature of the violation. For the sake of perspective, private companies have recovered up to \$16.7 million (U.S.) for violations of the NAFTA's far-reaching investment chapter. Additionally, in the unlikely event that such a fine would be imposed, the money is not paid to the workers whose rights have been violated but rather into a "fund" that is used to improve labor law enforcement by the violating Party. Finally, if a Party refuses to pay a monetary assessment, the complaining Party may suspend related "NAFTA benefits in an amount no greater than that sufficient to collect the monetary enforcement assessment."

The NAALC's evaluation and arbitration procedures, limited though they are by the available substantive law described below, do contain some teeth. Since these procedures are only available to governments, however, they ultimately pose little threat to employers who exploit vulnerable workers. Workers who suffer actual harms have no ability to directly utilize the final two tiers of enforcement, which have sat completely idle since their creation in 1994.

### **Moving Away from the NAALC: U.S.-Jordan and U.S.-Singapore**

U.S.-Jordan is more generous to workers than the NAALC, but is limited in its own ways. Unlike the NAALC, one dispute settlement mechanism governs the entire agreement. Workers and workers' rights activists, who argued for the inclusion of labor standards within the main body of the FTA, considered this to be a significant though limited gain. When a conflict arises over the operation or interpretation of the agreement, a Party may request consultations with the other Party which, if unsuccessful, will be referred to the Joint Committee created to oversee the entire agreement. If the Joint Committee cannot settle the matter, a dispute settlement panel will attempt to resolve

the issue. After a final intervention by the Joint Committee, the complaining Party can "take any appropriate and commensurate measure" if the problem persists. This phrase implies that a Party could go so far as to suspend trade benefits under appropriate circumstances. The process is certainly less cumbersome procedurally and broader in scope than the NAALC, but it does not provide for public initiation of complaints.

In contrast to U.S.-Jordan, however, U.S.-Singapore strictly limits the type of issues that can be the subject of consultations and dispute settlement under the agreement. Where consultations have been unsuccessful, the complaining Party can refer the matter to the Joint Committee. In turn, if the Joint Committee cannot resolve the dispute, a Party can request the formation of dispute settlement panel which will eventually issue a final report to the parties. If the panel finds that there has been a violation of the agreement, the Parties should attempt to resolve it through negotiations. If no such resolution is possible, then the panel will reconvene to impose an annual monetary assessment, which is capped at \$15 million (U.S.) per year, on the party complained against. If the assessment is not paid, the complaining party may impose trade sanctions "as necessary to collect the assessment, while bearing in mind the Agreement's objective of eliminating barriers to bilateral trade." The agreement also

establishes a "Labor Cooperation Mechanism" which is meant to oversee general principles, facilitate consultations between Parties, and make non-binding recommendations related to labor issues.

### **SUBSTANTIVE LAW**

#### **The NAALC Bottleneck**

Each agreement strictly delimits the substance of available labor protections. Within the NAALC, each stage of enforcement imposes new conditions and restrictions on the enforceable substantive law. NAOs may accept for review submissions covering a broad range of issues in "relation to the other Party's labor law, its administration, or labor market conditions in its territory." For instance, many of the submissions accepted at the NAO level have involved core worker rights like the right to organize and freedom of association. However, once a Party requests the establishment of an ECE, the relevant law narrows dramatically. An ECE can only analyze "patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labor standards as they apply to the particular matter considered" in earlier ministerial consultations. Two caveats further constrain the applicable law: the "pattern of practice" must be trade-related and "mutually-recognized labor laws" must govern the practice in question.

Such limitations mean that Mexico cannot dispute individual violations of labor laws in the U.S., but only those labor standards protected by law in both countries. Facial challenges of unfair laws and complaints about the absence of certain labor protections are simply not relevant before an ECE, were one to ever be formed. The definition of "technical labor standards" refers to a short list of labor laws and regulations that pertain to prohibitions against forced labor, child-labor laws, minimum employment standards (like minimum wage), employment discrimination, equality of pay between genders, occupational



A protestor concerned about the impact of the FTAA on jobs.

health, compensation for injuries and protection of migrant workers. For example, an ECE could only investigate an allegation that the U.S. government was not enforcing its child labor laws if the complaining Party, for instance Mexico, also had child labor laws. Moreover, Mexico could only request an ECE if it alleged that the U.S. was persistently failing to live up to its own standards. Mexico could not complain that the U.S.' child labor laws did not sufficiently protect children.

A bottleneck occurs at the arbitration, or third stage of the enforcement mechanism. At this stage, Parties may only discuss complaints addressing a "persistent pattern of failure" to "effectively enforce" a Party's domestic law relating to "occupational safety and health, child labor, and minimum wage technical labor standards" that were the subject matter of the pertinent ECE report. Another constraint accentuates the bottleneck. An accused country may argue pursuant to Article 49 that its alleged failure to enforce "reflects a reasonable exercise of [the government's] discretion with respect to prosecutorial, regulatory, or compliance matters" or "results from *bona fide* decisions to allocate resources to enforcement" of other labor matters that are a higher priority. For example, if Canada accused Mexico of failing to enforce child labor laws in its textile industry, Mexico could argue that its resources were better spent on the promotion of safer working conditions in *maquiladoras*.

### Only the Bare Essentials: U.S.-Jordan and U.S.-Singapore

Determining the substantive law of the U.S.-Jordan FTA is simpler than with the NAALC. There is no tiered process that limits the scope of applicable law depending on the stage of enforcement. Parties have two obligations: (1) they must "strive to ensure" that their domestic laws protect five enumerated labor rights (right of association, right to organize and bargain collectively, no forced labor, no child labor, and minimum wages, hours of work and occupational safety and health), and (2) they must "not fail to effectively enforce" their laws with respect to these enumerated labor rights. Like the NAALC, violations must be trade-related and systematic to be enforceable, and *bona fide* decisions regarding the allocations of resources provide a defense. The five listed labor rights are more narrow than the NAALC's eleven principles of labor, but they can be carried further through the enforcement process.

The substantive law in U.S.-Singapore is even more limited than in the above agreements. Although the actionable laws in U.S.-Singapore are virtually identical to U.S.-Jordan, no other labor-related complaints may be the subject of consultations or dispute resolution. This distinction can be significant. For example, while the "strive to ensure" language in U.S.-Jordan may be vague, it could be the basis for a complaint because all aspects of that agreement are subject to its dispute resolution mechanisms. For labor-related misconduct under U.S.-Singapore, a failure to "strive to ensure" labor standards in accordance with the minimum set out in the agreement could not be raised between the Parties as a complaint.

### TRANSPARENCY AND PUBLIC AWARENESS

"Sunshine," or public awareness of labor rights violations, deters abusive employment practices, though its effectiveness is dubious when unsupported by robust enforcement provisions. Article 1 of the NAALC admonishes the Parties to "foster transparency in the administration of labor law" as an objective of the agreement. To this end, the NAALC calls on each Party to "ensure" that any administrative, quasi-judicial, or judicial hearings on labor enforcement be open to the public and transparent. Each Party must also make its laws, regu-

lations, procedures and administrative rulings available in a way that allows interested persons to become "acquainted with them." However impressive these tentative attempts to foster transparency and education may appear, Parties and the institutional bodies created by the agreement retain almost complete discretion in making decisions or reports produced under the NAALC publicly available.

While the substantive commitment to transparency may seem insincere under the NAALC, U.S.-Jordan makes both motive and function clear: there is simply no mention of transparency or public information at all. Perhaps aware of the political currency that attends such terminology, U.S.-Singapore devotes Article 17.3 to "procedural guarantees and public awareness," calling generally for transparent administrative, judicial and quasi-judicial processes. Significantly, the agreement offers no further explanation. However, the Parties may, at their discretion, make public decisions concerning implementation of any provision of the labor chapter.

### COOPERATIVE ACTIVITIES

The NAALC promotes "cooperative activities" among the Parties and, while no mention is made of these in U.S.-Jordan, they have reappeared in U.S.-Singapore and other recently enacted FTAs. Over the last ten years, the NAALC Council and NAOs have sponsored many seminars, studies, and public events geared towards providing the public, NGOs, and government officials with information about the legal systems and labor conditions in each of the three countries. Topics have included, among others, the conditions of migrant agricultural workers in the U.S., the rights of working women in North America, and occupational health and safety. At least one author has suggested that these efforts have "deepened the reservoir of comparative labor law and industrial relations expertise among the three countries...[and] have encouraged development of a tri-national web of contacts" among labor unions, NGOs, governments, and employers. Such an optimistic judgment seems easy to dismiss. However, in the absence of more substantive remedial measures, it is worth noting that cross-border organizing, increased public awareness, and a better understanding of foreign legal systems will be an integral part of any movement to secure and protect workers' rights in the global economy.

### RECOMMENDATIONS

IT IS IMPORTANT TO ARTICULATE A THOUGHTFUL CRITIQUE of the many ways in which FTAs fail to protect workers. Workers' rights advocates, however, must challenge the hollow provisions of current agreements by offering concrete alternatives. Policy makers need a rich literature of possibilities to draw upon. Some general suggestions follow: (1) FTA architects must develop truly multinational complaint processes accessible to aggrieved workers, as well as their governments; (2) FTAs need to incorporate labor provisions into the main texts of the agreements without prejudicial caveats, especially in the context of remedies; (3) states parties should integrate labor standards into the agreements regardless of domestic law and encourage cross-national understanding of domestic laws and labor conditions; and finally, (4) procedural commitments to public awareness should invoke tough penalties if ignored.

The 1994 enactment of the NAALC was a watershed event for workers' rights advocates, and the integration of the U.S.-Jordan labor provisions into the main text of the FTA might, in fact, be a step forward. Nonetheless, the reality is that current FTAs offer no real relief and scant hope to workers struggling against the free trade mantra "labor market flexibility."

HRB