

I. Introduction

The future of multilateral trade deals is in jeopardy after what many consider to be the final collapse of the World Trade Organization's Doha Round of multilateral trade negotiations.¹ Since 1994, after the passage of NAFTA and the expiration of President Clinton's fast track authority, the United States has aggressively pursued somewhat less controversial bilateral and regional free trade agreements (FTAs) with relatively small economies as a way of maintaining an active trade policy in the midst of deadlocked multilateral talks.² There are currently eight such regional or bilateral agreements in effect, while another three that have been signed into law are pending implementation. The recent debacle at Doha has made the pursuit of such regional and bilateral agreements seem all the more necessary, although last year's deadlock on the Free Trade Agreement of the Americas means that far-reaching regional trade agreements are not likely to be reached in the near future. Negotiations for smaller U.S. bilateral agreements are, however, currently under way with Colombia, Peru, Panama, Ecuador, Thailand, Malaysia, the United Arab Emirates, and perhaps most importantly, South Korea. Among the pressing concerns for those wishing to pass such bilateral agreements are the future of the U.S. farm bill, the expiration of President Bush's fast-track authority to negotiate trade agreements (which expires in mid-2007), and the uncertainty over how the Democratically controlled 110th Congress will weigh in on U.S. trade policy.

The opposition front to bilateral U.S. free trade pacts – and trade liberalization more generally – reflects the vast array of economic, social, political, and environmental concerns over unfettered markets and globalization. Of particular interest in many recent trade negotiations – most recently in the debate over the U.S.-Oman Free Trade Agreement – is the effect that FTAs have on domestic and foreign labor interests. Many U.S. labor leaders, NGOs, and left-leaning politicians and pundits are expressing concern over the harmful effect of FTAs on *domestic* workers through downward pressure on real wages, outsourcing of American jobs, and the potential erosion of hard-earned labor standards. Others argue that focusing exclusively on domestic concerns – which are important in their own right – ignores the potentially adverse effects that FTAs may have on *foreign* workers and their wages, working conditions, and livelihoods. In an effort to moderate the potentially harmful effects of trade on domestic *and* foreign labor interests, many have suggested linking trade and labor by incorporating provisions regarding minimum labor standards into the body of all free trade agreements.

The heated debate over trade-labor linkage – or the inclusion of labor standards in trade negotiations and agreements – is nothing new, and has at its core the desire to balance the constructive and potentially destructive forces of increased economic liberalization. But in recent years the debate at the multilateral level has simply gone flat. The World Trade Organization (WTO) has deferred concerns over the enforcement of international labor standards to the International Labor Organization (ILO), as most WTO members have shown little desire or willingness to link multilateral trade concessions with labor standard provisions and enforcement mechanisms. Academic and theoretical arguments for and against trade-labor linkage usually discuss its merits within the multilateral realm alone, ignoring or inadequately

¹ Tarullo, Daniel K. "The End of the Big Trade Deal." The International Economy 20 (2006): 46-49.

² Ibid.

addressing the effectiveness of linkage within smaller bilateral trade agreements. Since U.S. trade negotiations at the *multilateral* level are progressing at a sluggish pace, it is advisable to gain a better understanding of where labor provisions stand – or should stand – in *bilateral* U.S. trade agreements.

All bilateral U.S. trade agreements ratified since 2001 have included labor provisions within the main body of the agreement, though the scale, scope, and appropriateness of such provisions – and their enforcement mechanisms – have varied slightly between different FTAs. But little has been written on whether such agreements have, in the short time before and after their passage, tangibly transformed labor legislation and respect for workers' rights within partner countries. By examining the successes and failures of trade-labor linkage within four bilateral U.S. FTAs, I attempt to demonstrate that tying increased market access with minimum labor standards can foster improved and updated labor legislation, greater respect for workers' rights. I also argue that the primary concerns over trade-labor linkage at the multilateral level have far less relevance at the bilateral level, where the scope of the provisions can be tailored to each particular trading partner, and the leverage of the United States allows it to exert significant influence during the negotiating process. Recent bilateral U.S. FTAs have shown that incremental improvements in labor standards can be achieved through the combined efforts of negotiating trade partners, the International Labor Organization, and domestic and international NGOs. Ultimately, it is argued, the effectiveness and viability of labor provisions at the bilateral level is most dependent on the political will of the negotiating countries to adequately address labor issues during trade negotiations and within signed agreements. With the U.S.-Jordan FTA, the U.S. demonstrated its commitment to “hard” labor standards by including sufficiently enforceable and appropriate labor provisions within the body of the agreement. Since Jordan, however, the labor provisions in U.S. bilateral agreements have been relaxed, as “soft” trade-labor linkage – or the linking of trade and labor issues in the negotiating process – has played a more significant role.³

This paper begins with a review of the WTO and ILO positions on trade-labor linkage, and continues with a survey of the broader theoretical debate, primarily at the multilateral level. The paper then closely examines the efficacy of trade-labor linkage in U.S. bilateral trade agreements with Jordan, Morocco, Bahrain, and Oman – all countries of the proposed 20-entity Middle-East-Free Trade Area.

II. A Review: The Link between International Trade and Labor Standards within Multilateral Agreements and Conventions

³ “Hard” trade-labor linkage involves including labor provisions into the actual free trade agreements themselves, while “soft” trade-labor linkage usually involves fostering changes in labor standards by seeking such changes during the trade negotiating process – prior to an FTA’s ratification.

While literature linking labor issues with international trade dates back to at least the early nineteenth century,⁴ the Havana charter of 1947, designed to launch the International Trade Organization (ITO), is often cited as the first multilateral agreement to make the linkage explicit.⁵

“The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of labor standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labor conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.”⁶

But the failure to ratify the Havana Charter meant that the General Agreements on Tariffs and Trade (GATT), which contained virtually no mention of labor standards or provisions,⁷ would have to serve as a substitute for the ITO. In 1996, only two years after the inception of the World Trade Organization (WTO) – which again contained no explicit protections for labor rights⁸ – the Singapore Ministerial Declaration explicitly directed international labor standard concerns to the UN’s International Labor Organization:

“We renew our commitment to the observance of internationally recognized core labor standards. The International Labor Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.”⁹

The Singapore Declaration, like the unimplemented Havana Charter before it, acknowledges the link between labor and trade but reverses the nature of the linkage.¹⁰ While the Havana Charter addressed unfair labor conditions within export-oriented production and encouraged members to take “appropriate” and “feasible” actions to eliminate such conditions, the Singapore Declaration characterizes intervention as a potential threat to countries’ comparative advantages. It implies that increased trade liberalization is a vehicle for core labor

⁴ Greven, Thomas. "Social Standards in Bilateral and Regional Trade and Investment Agreements." *Dialogue on Globalization* 16 (2005): 1-26.

⁵ Polaski, Sandra. "Protecting Labor Rights Through Trade Agreements: an Analytical Guide." University of California, Davis 10 (2003).

⁶ Havana Charter of the ITO, Article 7 (Fair Labor Standards).

⁷ Article XX of GATT holds that nothing shall prevent members from adopting measures: XX(a) necessary to protect public morals, XX(b) protect human life or health, or XX(e) relating to the products of prison labor, as long as such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

⁸ Sandra Polaski notes this and points to the “Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, Legal Instruments – Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125 (1994).

⁹ See Singapore Ministerial Declaration, 1996. WT/MIN(96)/DEC, paragraph 4.

¹⁰ This argument is made by Clotilde Granger and Jean-Marc Siroen. "Core Labour Standards in Trade Agreements: From Multilateralism to Bilateralism." *Journal of World Trade* 40 (2006): 813-836.

standard *promotion*, not *erosion* – and in doing so it spelled victory for the opponents of multilateral trade-labor linkage.

Clearly, however, the Singapore Declaration did little to solve the trade-labor linkage debate. In 1998 the United Nations' International Labor Organization (ILO) adopted the "ILO Declaration on Fundamental Rights and Principles at Work," which outlined four 'fundamental rights' that *all* ILO members – at all levels of economic development – had to respect, promote, and realize, whether or not they had ratified the relevant conventions. These four fundamental rights, which are based on eight of the ILO's one hundred eighty-seven conventions, are often referred to as 'core' labor standards within the trade-labor linkage debate. They include the following:

1. freedom of association and the right to collective bargaining¹¹
2. prohibition of compulsory labor¹²
3. abolition of child labor¹³
4. the elimination of discrimination in respect of employment and occupation¹⁴

The 1998 declaration, along with the ILO's many other labor conventions, institutional mechanisms, and relatively long history as an international organization, has led many to defer all concerns regarding international labor standards away from the WTO and towards the UN body. But proponents of trade-labor linkage argue that the ILO's 'fundamental rights' are not effectively enforceable because the organization 'has no teeth.' Even though the ILO constitution provides for supervision of implementation of its conventions and a complaints procedure in the event of a violation, there is no enforcement mechanism comparable to that of the WTO.¹⁵ Under the WTO Dispute Settlement Understanding the recourse for recalcitrance includes the suspension of trade concessions and the implementation of trade sanctions. The ILO, on the other hand, has a largely symbolic enforcement mechanism and the ability to "publicize violations of standards to shame countries to improve matters."¹⁶ Besides, critics argue, there is no clear correlation between the ratification of ILO conventions and their effective respect and enforcement.¹⁷ In other words, ratification of the conventions means little when there is no effective enforcement mechanism – or 'teeth' – in place. Amidst such criticisms, the 2001 WTO Doha Declaration simply reaffirmed the sentiment of the Singapore conference regarding core labor standards, adding only: "we take note of the work under way in the International Labor Organization (ILO) on the social dimension of globalization."¹⁸ The most

¹¹ See ILO Conventions 87 and 98.

¹² See ILO conventions 29 and 105.

¹³ See ILO conventions 138 and 182.

¹⁴ See ILO conventions 100 and 111.

¹⁵ Grynberg, Dr. Roman, and Venina Qalo. "Labour Standards in US and EU Preferential Trading Arrangements." *Journal of World Trade* 40 (2006): 619-653.

¹⁶ Elliott, Kimberly Ann. "Labor Standards, Development, and CAFTA." *International Economics Policy Briefs PB04-2* (Washington D.C.: Institute for International Economics, March 2004).

¹⁷ As explained in Granger 2006: for example, the U.S. has ratified only 2 of the 8 core conventions, but it respects the fundamental rights far more effectively than other countries that have ratified all 8 core conventions, such as Egypt or Niger.

¹⁸ See WTO Doha Ministerial Declaration, November 20, 2001; Paragraph XIII.

recent Doha Round of multilateral negotiations also continued through its collapse without formally addressing the trade-labor linkage debate, as most disagreement centered instead on the status of agricultural subsidies in the industrialized world.

Despite the lack of WTO assistance or an effective enforcement mechanism, the work of the ILO – particularly its monitoring and technical assistance – is invaluable in its own right. The 1998 “Declaration on Fundamental Rights and Principles at Work” was instrumental both in shining the global spotlight on international labor standards, and paving the way for labor standard inclusion in smaller, bilateral U.S. trade agreements. Three of the four core ILO principles are reflected in the description of “internationally recognized worker rights” included within U.S. bilateral FTAs, beginning with the U.S.-Jordan Free Trade Agreement in 2001. Generally, proponents of linking trade and labor argued that incorporating ILO standards into bilateral FTAs and then arming them with WTO-style enforcement would give internationally recognized labor standards the ‘teeth’ they needed to foster change and assure compliance. But as bilateral and regional FTAs have started to incorporate labor standards (to varying degrees of success), the debate over linkage at the multilateral level remains deadlocked.

III. The Nature of the Debate: Chief Arguments For and Against the Inclusion of Labor Provisions within Trade Agreements

Before examining country case-studies and specific bilateral agreements one must first confront the broader debate about trade-labor linkage. This largely theoretical debate has been developed over the years within universities, academic circles, and policy research institutions. While the debate itself is nothing new, few of its key questions have clear answers. What are the arguments for and against including labor provisions within trade agreements? Are those arguments made in the name of protectionism, humanitarianism, sound economics, or something else entirely? What are some of the possible effects of incorporating trade-labor linkage in multilateral trade negotiations? How do developing countries weigh in on the debate?

Columbia University economist Jagdish Bhagwati has written extensively on the trade-labor linkage debate and is featured prominently in many articles related to the issue. He argues that those in favor of trade-labor linkage sound “so plausible to the untutored few in the rich countries” that any rejection of linkage comes across as a “morally defective affliction of Republicans and ‘free trade ideologues’” or reflective of indifference on the part of developing country governments to the interests of their workers.¹⁹ The reality of the matter, he argues, is that “if the case for their opposition was presented fairly and without political obfuscation by lobbies in the policy arena, it would be found compelling.” He first divides the arguments in favor of linkage into two camps: one is driven by “egoistical” motives reflecting industrialized country fears that domestic real wages and labor standards will decline in the absence of linkage as capital moves to poor countries with lower standards; and the second stems from “altruistic” concerns about real wages, labor standards, workers’ rights and workplace conditions in partner countries. Bhagwati argues that “egoistical” fears are not justified and are indeed “protectionist” in nature, while linkage is an inefficient, even counterproductive, way to advance labor standards and altruistic concerns worldwide.²⁰

¹⁹ Bhagwati, Jagdish. “Free Trade and Labor.” *Nihon Keizai Shimbun*, September 10, (2001).

²⁰ Ibid.

To debunk concerns about declining domestic real wages resulting from competition with poor countries, Bhagwati says that the mechanism would have to be falling relative prices of labor-intensive goods, such as textiles and shoes, in world trade. This mechanism, however, only functions if over time more poor countries become suppliers of such goods in world trade, thus lowering their prices and making unskilled labor in developed countries uncompetitive. But because poor countries also tend to become richer over time, and move from labor-intensive goods towards skills and capital-intensive exports, they can absorb the new labor-intensive exports from poorer countries that have recently moved into low-skill production.²¹ Downward pressure on developed country wages cannot, therefore, be chiefly attributed to free trade with poor countries; in Bhagwati's view, trade may even mitigate the wage decline that occurs as technical change reduces the demand for unskilled labor.²² As for reduced labor standards in developed countries resulting from free trade, Bhagwati dismisses most of the evidence as anecdotal, and even then he points to domestic pressures such as a reliance on illegal immigrants and poor domestic law enforcement as some of the causes for downward pressure. Efforts on the part of trade unions and other "protectionists" to link trade and labor issues, including calls for a "living wage," are better conceived, according to Bhagwati, as examples of "export" protectionism – reducing rival competitiveness by raising the cost of production.²³

But Bhagwati's concern with the "altruistic demand" for linkage is not that it reflects protectionism, but that linkage in the form of a social clause on labor at the WTO is ineffective.²⁴ By attaching market access to the satisfaction of labor standards, social clause inclusion creates two problems: first, it uses trade sanctions as a way to improve social standards; and second, it makes the WTO the international institution in charge of the job – instead of the ILO, for example. To the common critique that only the WTO "has teeth" in the form of sanctions,²⁵ Bhagwati responds:

"God gave us not just teeth but also a tongue. And today, a good tongue-lashing based on credible documentation by impartial and competent bodies such as a restructured ILO can unleash shame, embarrassment, [and] guilt to push societies towards greater progress on social and moral agendas. The WTO, in any event, is a cash-starved organization, with under \$100 million as its annual budget. Do the Quad powers that continue to deny it any added funds... seriously expect that these complex social issues can be handled by a secretariat that can barely and bravely manage conventional trade analysis?"

Ultimately, like many other economists, Bhagwati argues that social issues as complex as child labor or 'decent wages' cannot be solved through trade sanctions; "trade sanctions can flag the issue[s]; they cannot flog" them.²⁶ Rather, he concludes, international organizations such as the ILO – in conjunction with supportive governments, local communities, and NGOs – must tackle these issues on a case-by-case basis. But perhaps, one could argue, bilateral U.S. trade agreements could "tackle these issues" in exactly this manner; namely, in a collaborative and relatively case-sensitive approach. In examining specific case-studies, it is important to test

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Often voiced by domestic and international labor unions, such as the AFL and the ICFTU, as well as prominent economists, including economist and former Secretary of Labor Robert Reich, for example.

²⁶ Ibid.

whether the collaborative approach Bhagwati is promoting – albeit without the use of trade sanctions – constitutes an “effective confluence of forces” for change in labor legislation and practice.²⁷

Because Bhagwati’s critique of “altruistic” rather than “egoistical” concerns is more directly related to the question of how U.S. bilateral agreements affect labor conditions in partner countries, it makes sense to focus on literature that addresses the ‘humanitarian’ side of the linkage debate. Drusilla K. Brown echoes much of Bhagwati’s critique of altruistic concerns by drawing on a laundry-list of economic studies from the 1990s.²⁸ Upon examining case studies related to some aspect of the ILO’s core labor standards – forced labor, child labor, discriminatory behavior, and freedom of association and collective bargaining – she concludes:

“We cannot make a general statement that universal labor standards derived from commonly held moral values will always produce positive economic outcomes. The effect on economic performance and the lives of workers and their families of legally imposed labor market constraints of the sort contemplated by labor rights activists cannot be presumed to be positive, but instead must be empirically investigated on a country-by-country basis.”²⁹

Brown argues that even if international pressure leads to the passage of more worker-friendly domestic labor law, it’s not clear that the new legislation will change the realities of the labor market in low-income countries. Furthermore, the use of WTO trade sanctions to induce higher labor standards may, on balance, end up hurting the very workers who are the intended beneficiaries of humanitarian concerns and advocacy efforts. Ultimately, Brown argues that “it is not clear that attempts to use trade sanctions to enforce labor standards will strengthen either trade or labor standards, at least not in the world of strong political lobbies.”³⁰ Rather than linking trade and labor issues or using WTO sanctions as a means of achieving the “efficiency, equity, and humanitarian benefits of core standards,” Brown argues for a closer country-specific analysis of political failures and domestic market problems.³¹ This call for a country-specific analysis, coupled with her critique of a “single set of universal labor rules” and WTO sanctions, again allows room for interpretation when it comes to *country-specific bilateral agreements*. In other words, her critique of linkage, along with much of Bhagwati’s argument, focuses on *multilateral* linkage, but does not necessarily carry over to more limited bilateral or regional agreements. It is thus important to separate the multilateral trade-labor linkage debate from the bilateral one – a task often left undone –and to examine whether small-scale labor negotiating objectives can be met on a country-specific level.

José Salazar-Xirinachs³² draws on many of the aforementioned arguments in his articulation of Latin American and Caribbean (LAC) country opposition to trade-labor linkage. He divides the arguments into five categories, all of which are often voiced by developing

²⁷ The term “effective confluence of forces” is from an article in Human Rights Quarterly 26 (2004) 273–299 © 2004 by The Johns Hopkins University Press.

²⁸ Brown, Drusilla K. “Labor Standards: Where Do They Belong on the International Trade Agenda.” The Journal of Economic Perspectives 15 (2001): 89-112.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Salazar-Xirinachs, Jose M. “The Trade-Labor Nexus: Developing Countries’ Perspectives.” Journal of International Economic Law (2000): 377-385.

countries around the world: first, those related to political economy, second, those related to the stage of development, third, those related to the logic of trade negotiations, fourth, those related to the efficiency in achieving objectives, and finally, those related to the global architecture of the trading system. Political economy arguments generally involve questioning the motivations behind labor standard inclusion within agreements. According to Salazar-Xirinachs, LAC countries are entirely aware of Bhagwati's two camps of labor standard proponents, and "are concerned that the motivations for including labor issues in trade negotiations are at best mixed, and at worst not really humanitarian at all, but rather expressions of protectionist interests."³³ Furthermore, the selective inclusion of certain provisions, and the notable exclusion of others – such as the rights of migrant workers – contributes to the perception that the negotiating playing field is not level. The stage of development concerns involve the belief that developing countries cannot be expected to import the standards of industrialized nations that have markedly different labor market conditions and levels of poverty and informality. Concerns with the logic of trade negotiations involve the belief that labor-standard conditionality is a win-lose situation in which developed countries impose their protectionist or humanitarian desires upon developing countries. Other arguments consider any labor concessions as the first step on a 'slippery slope', or as added baggage to already complex, overloaded, and controversial trade agreements. Concerns over the efficiency of labor standard provisions echo the Bhagwati and Brown arguments that trade sanctions and conditionality are inherently inefficient means to an otherwise worthwhile end. Perhaps, Salazar-Xirinachs argues, the true problem lies in the lack of LAC countries' capacity to implement labor rights. Addressing the problem would then require increased financial resources, technical assistance, capacity building, and an altered institutional structure – not trade sanctions or conditionalities. The last area of contention – the global architecture of the trading system – involves concerns that discriminating against products based on the production process rather than intrinsic product qualities amounts to "extra-territorial or extra-jurisdictional application of domestic regulations, perverting the long-established GATT/WTO principle of national treatment of goods in the country of import."

Kimberly Ann Elliot of the Peterson Institute for International Economics is much more accepting of a certain degree of linkage at the multilateral level. She, like Bhagwati, believes that it is the ILO – not the WTO – that "has the experience, the people, and the incentive to promote and enforce labor standards."³⁴ Unlike Bhagwati and Brown, however, Elliot sees room for collaboration between the WTO and the ILO in certain situations.³⁵ For example, she envisions a cooperative body to bring these groups together to examine the costs and benefits for the economic development of export processing zones. This cost-benefit analysis, which would consider the treatment of workers in these zones, could "demonstrate that trade and labor standards can reinforce one another in raising living standards in poor countries."³⁶ Elliot's economic arguments for trade-labor linkage rest on her belief that certain core standards can be applied globally without necessarily raising costs, harming developing countries' comparative

³³ Ibid.

³⁴ Elliott, Kimberly Ann. "Dealing With Labor and Environment Issues in Trade." *International Economics Policy Briefs PB01-8* (Washington D.C.: Institute for International Economics, July 2001).

³⁵ Ibid.

³⁶ See: Kimberly Ann Elliot and Richard B. Freeman, "Global Labor Standards and Free Trade: The Siamese Twins of the Global Economy," prepared for a conference on "The Impact on Health of Global Inequalities at Work," Harvard University Center for Society and Health, June 20-22, 2001.

advantages in labor-intensive products, or causing a so-called ‘worldwide race to the bottom.’³⁷ In fact, core labor standards “strengthen markets because they protect workers’ rights to choose whether and under what conditions to work.”³⁸ She also says that “more vigorous enforcement action by the ILO requires not sharper teeth but political will on the part of its members.” Put another way, it is not merely poverty, insufficient resources, and weak governmental capacity that are limiting developing countries’ ability to enforce labor standards – it’s also a lack of political motivation. With respect to recent U.S. bilateral FTAs, Elliot says that “the jury is still out on whether the carrots and sticks included in these agreements are more than window dressing.”³⁹ Although it is still far too early to come up with a final ‘verdict,’ interim follow-ups are not only useful, but necessary. Case studies of the individual U.S. bilateral agreements usually focus on the actual structure of the agreements and the promises made by each government; little has been written on whether or not the provisions have proven useful for furthering workers’ rights or whether promises made have been kept.

Sandra Polaski of the Carnegie Endowment for International Peace argues that “protecting workers’ rights is a winning development strategy in itself, and one that becomes win-win if it also produces greater market access for developing country products.”⁴⁰ She suggests that developing countries “would all gain” if they cooperated on a multilateral strategy of constructing a “global labor standards regime” that they themselves could help to enforce, instead of allowing the countries with the “worst policies, enforcement, and working conditions to set the floor in the competition for global investment and production.”⁴¹ Under such a regime developing countries could:

“... continue to enjoy the comparative-advantage of low cost labor compared to more developed countries, but they would not face the beggar-thy-neighbor strategies whereby footloose investors, producers, and buyers play one low-wage country off against another, putting continued downward pressure on wages and working conditions.”⁴²

According to Polaski, trade-labor linkage is best conceived as a win-win proposition in which foreign producers and investors get lucrative access to industrialized country markets, while foreign workers enjoy policies that promote more “equitable, broad-based development, and greater distribution of the gains from trade to the poor.” Trade-labor linkage is thus a positive sum game in which progress for workers and the poor can be achieved as a “quid pro quo for changes sought by the rich and powerful, such as trade and investment.”⁴³ By adhering to internationally recognized labor standards, developing countries also promote greater rule of law and prove that they intend to compete based their comparative advantage rather than on the unacceptable abuse of their workers. In doing so they forge alliances with politically influential groups within the industrialized bloc – such as progressive politicians, labor unions, human

³⁷ Kimberly A. Elliot and Richard B. Freeman, *Can Labor Standards Improve Under Globalization?* (Washington, D.C.: Institute for International Economics, 2003).

³⁸ Elliot, “Labor Standards, Development, and CAFTA,” 2004.

³⁹ *Ibid.*

⁴⁰ Sandra Polaski, “Trade and Labor Standards: A Strategy for Developing Countries,” Carnegie Endowment for International Peace: Trade, Equity, and Development Project, 2003: 4.

⁴¹ *Ibid.*, 5, 15.

⁴² *Ibid.*, 4.

⁴³ *Ibid.*, 11.

rights NGOs, and consumer groups – all of which are instrumental in getting widespread support for the ratification of FTAs.⁴⁴

With respect to global trade-labor linkage, Polaski argues that the debate has become “ritualized” and “stale,” and that new threats and opportunities in the global economy force developing countries to reassess their own development and export strategies.⁴⁵ For example, China’s accession to the WTO means that many developing countries that once competed strictly on low-wage, low-standard labor are going to be undercut, since Chinese work conditions are comparable and wages are lower still.⁴⁶ In this context, bilateral FTAs with enforceable labor provisions present a unique opportunity, because “increased access to a rich country market and tariff reductions can offset incentives for producers or buyers to go to other countries that allow labor rights violations but have lesser market access.”⁴⁷ Those countries with labor laws and conditions that are largely in line with ILO standards should line up to take advantage of their quality work conditions by seeking FTAs that include labor standard provisions. Industrialized countries – on the opposite end of the spectrum – should increasingly seek trading partners that step up to the challenge posed by labor provisions. Doing so would not only benefit those countries with good track records, but would also encourage others to reform their practices – a task made easier by the fact that improving work conditions can now benefit both business and labor interests in the short-term.⁴⁸

The optimal strategy, according to Polaski, is a combination of bilateral and multilateral efforts:

“Those developing countries that presently ensure good labor standards would pursue bilateral or plurilateral agreements with the United States and the EU to gain market advantages in the short term, while joining with China and other G-77 countries to construct a global floor for labor standards over the medium term, working through the WTO, the ILO, and other relevant multilateral institutions.”⁴⁹

Like Kimberly A. Elliot, Polaski recognizes that compliance with internationally recognized labor rights depends less on expenditures than on “political will, principled leadership, and a culture that requires compliance with the rule of law by the strong as well as the weak.”⁵⁰

While much of the aforementioned theory relates specifically to multilateral negotiations, most of it also informs the discussion on bilateral trade-labor linkage as well. Arguments against

⁴⁴ Ibid., 8.

⁴⁵ Polaski TL 3.

⁴⁶ Although an October 13, 2006 article in *The New York Times* entitled “China Drafts Law to Boost Unions and End Abuse” detailed a recent move by the Chinese government that “underscores the government’s growing concern about the widening income gap and threats of social unrest.” The article explained that China “is planning to adopt a new law that seeks to crack down on sweatshops and protect workers’ rights by giving labor unions real power [i.e., to negotiate worker contracts, safety protections, and workplace rules] for the first time since it introduced market forces in the 1980’s.” Perhaps Polaski’s assessment of China – now a few years old – will become less relevant as Chinese labor laws are updated.

⁴⁷ Ibid., 7.

⁴⁸ Ibid., 13.

⁴⁹ Ibid., 16.

⁵⁰ Ibid., 20.

multilateral linkage tend to focus on the problem of reaching a universal set of labor standards and then expecting all countries at different levels of development to adhere to such standards. In reality, the ILO's core principles have already created a set of universal rules, and all members of ILO are supposedly required to adhere to these principles by virtue of their membership. The only question then is whether or not these universally accepted rules could ever be adequately enforced, monitored, and encouraged. An examination of the actual effect of U.S. bilateral agreements on foreign labor conditions should examine this question by moving beyond theoretical argumentation and into empirical evidence of changes on the ground.

IV. The Move From Multilateralism to Bilateralism: Getting Labor Provisions on the U.S. Trade Agenda

While the move towards trade-labor linkage at the bilateral level is a relatively recent occurrence, U.S. trade programs at the regional level have been incorporating labor issues since the mid-1980s. The U.S. Generalized System of Preferences (GSP) program gives certain developing country goods duty-free access to the U.S. market, but denies such preferential access to any country that “has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country.”⁵¹ Those “internationally recognized worker rights” reflect three of the ILO's four fundamental principles, but exclude discrimination and include minimum standards for acceptable conditions of work, such as minimum wages, occupational health and safety, and hours of work. Under the GSP agreement, civil society actors such as NGOs and trade unions can petition the USTR to suspend or revoke benefits for beneficiary countries that are allegedly violating GSP conditions, including the labor provisions. In a 2005 article published by *Human Rights Quarterly*, William Douglas, John-Paul Ferguson, and Erin Klatt argue, in the context of six case-studies related to GSP, that the interaction between unions, NGOs, the ILO, and U.S. trade laws produces an “effective confluence of forces” in support of workers’ rights.⁵² In this “effective confluence of forces,” the unions and NGOs provide the necessary oversight of labor practices, the ILO provides the rules of the game, and the U.S. government provides the effective enforcement mechanism. Put more simply, “the unions and NGOs provide the ‘eyes and ears,’ the ILO provides the ‘brains,’ and U.S. trade legislation provides the ‘teeth.’”⁵³ The procedure in most of the six case-studies is relatively simple: trade union bodies or watchdog NGOs rely on ILO conventions and country compliance reports to prepare petitions to submit to the USTR, which then reviews the petitions and determines whether or not the country in question is “taking steps” to afford “internationally recognized worker rights” to its workers.⁵⁴ Ultimately, it is the withdrawal of GSP benefits – or at the least the threat of such a suspension – that incites the offending government to amend its labor legislation or practice to better reflect international standards. The “confluence of forces” model and the six case studies examined by Douglas, et al. suggest that a degree of progress is attainable through such trade-labor linkage, but is not necessarily sufficient or irreversible.⁵⁵ It is

⁵¹ Legislation Authorizing GSP (19 U.S. 2461 ET SEQ.), Title 19 of the U.S. Code: Customs Duties Chapter 12: Trade Act of 1974, Sec. 2462(2)(G) – subsequently amended in 1980s and 90s.

⁵² William Douglas, John-Paul Ferguson, and Erin Klatt, *Human Rights Quarterly* 26 (2004) 273–299 © 2004 by The Johns Hopkins University Press.

⁵³ *Ibid.*, 273.

⁵⁴ Case studies include Bangladesh, the Dominican Republic, El Salvador, Guatemala, Korea, and Swaziland.

⁵⁵ Douglas, et. al., 298.

worth exploring whether or not this same “confluence of forces” effectively fosters improved foreign labor legislation in the context of bilateral U.S. trade agreements, many of which are negotiated with former GSP beneficiaries.

The proliferation of U.S. bilateral agreements in the last five years is in part related to the sluggish pace of recent multilateral negotiations. While WTO rules do not allow any members to make Most Favored Nation (MFN) status conditional upon the existence of minimum labor standards, the WTO’s enabling clause does allow countries to pursue preferential, regional, and bilateral FTAs of their own. Between 1994 and 2002 Congress did not grant the President so-called ‘fast track authority’ to negotiate such agreements, which would have granted the executive branch the power to sign FTAs that Congress could either ratify or turn down, but not amend. As a result, only one FTA – the U.S. Jordan Free Trade Agreement – was passed during this period. Since 2002, however, after the narrow passage of the 2002 Bipartisan Trade Promotion Authority Act (TPA) – which simultaneously granted President Bush fast-track authority and obligated the Office of the U.S. Trade Representative (USTR) to seek labor provisions in FTAs – a flurry of such agreements has allowed U.S. trade policy to remain active in the midst of seemingly irreconcilable differences at Doha.⁵⁶ At the time of TPA’s passage, Sandra Polaski highlighted the President’s new negotiating authority as an opportunity for the U.S. government and its potential trading partners to link trade and labor standards in a constructive fashion.⁵⁷ While the new TPA included the usual features of fast-track, one of its “principal negotiating objectives” instructed USTR to “promote [both] respect for worker rights...consistent with core labor standards of the ILO” and “an understanding of the relationship between trade and worker rights.”⁵⁸ TPA went a step further by mandating that all principal negotiating objectives were to be treated “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.”⁵⁹ But since these clauses are only vaguely defined as “negotiating objectives,” the extent to which they are sufficiently followed and achieved depends almost entirely on the political will of the Presidential administration in power and the expertise of USTR negotiators. Today, with the window for fast-track negotiation coming to a close, it is time to assess how closely the USTR has adhered to the negotiating objectives of TPA, and whether or not doing so has made tangible differences for foreign labor legislation and worker conditions.

V. Trade-Labor Linkage in Bilateral U.S. FTAs: Affects on Labor Legislation and Practice in Jordan, Morocco, Bahrain, and Oman

The U.S. currently has FTAs in effect with Israel, Canada, Mexico, Jordan, Chile, Singapore, Australia, Morocco, and most of the CAFTA-DR countries, while more recent pacts with Bahrain and Oman have been signed into law but not yet implemented. Beginning with Jordan in 2001, all bilateral U.S. FTAs have included labor chapters within the body of the agreement; the North American Free Trade Agreement (NAFTA), ratified in 1993, included only

⁵⁶ Fast-track expires in mid-July 2007.

⁵⁷ Polaski TL, 11.

⁵⁸ TPA, Sec. 2102(a)(6).

⁵⁹ 2102(b)12(G).

a side agreement on labor entitled the North American Agreement on Labor Cooperation (NAALC).⁶⁰ While the Jordan Agreement stands out from the rest by having the most expansive and enforceable labor provisions, all other FTAs ratified after Jordan contain virtually identical treatment of labor standards, as all were negotiated by the Bush Administration under the auspices of the 2002 TPA. Therefore, the differences between the agreements themselves are less revealing than the differences between the negotiating partners and the unique circumstances under which each agreement was signed. Many have criticized the labor standards of the more recent FTAs, particularly CAFTA-DR and U.S.-Oman, as being inappropriate in light of the partner country's history of inadequate labor laws and worker abuses. I have chosen to closely examine how trade-labor linkage in U.S. bilateral FTAs has affected labor interests in Jordan, Morocco, Bahrain, and Oman. The case of the Jordan FTA demonstrates how "hard" trade-labor linkage – via enforceable and wide ranging labor provisions within the agreement – can complement the efforts of NGOs, unions, and the ILO to ultimately create an "effective confluence of forces" in support of improved labor legislation and practices. The cases of Morocco, Bahrain, and Oman also involve FTA labor provisions, but these provisions lack the enforceability and possibly the effectiveness of the Jordan provisions. However, these three cases do exemplify how demanding labor concessions during trade negotiations – "soft" trade-labor linkage – can foster improved legislation prior to the ratification of an agreement. Although many of the issues raised in these case-studies are entirely relevant to other U.S. trading partners, the countries chosen for study are related in that each is an Arab, predominantly Muslim nation and a proposed member of the 20-entity Middle-East-Free Trade Area.

The U.S.-Jordan Free Trade Agreement

The U.S.-Jordan FTA, signed in the final months of the Clinton Administration and ratified in late September 2001 under the Bush Administration,⁶¹ is widely regarded as having the most substantive labor provisions and rigorous enforcement mechanism of any trade agreement to date.⁶² It is the first such agreement to include labor standard provisions within the main text of the agreement itself and perhaps the only FTA to garner widespread support from both domestic and international labor and business groups.⁶³ At the time of its passage the AFL-CIO was "proud to join with Jordanian trade unions and businesses in supporting the agreement," while AFL-CIO President John Sweeney hailed the pact as a "significant first step towards incorporating enforceable workers' rights... into a bilateral trade agreement."⁶⁴ In the years following FTA implementation, annual Jordanian exports to the United States – about 90% of which are textiles and apparel from the country's qualified industrial zones – soared to nearly \$1.3 billion by 2005, up from only \$229 million in 2001.⁶⁵ While the partnership has delivered on its promise of liberalized and expanded trade, recent reports of worker abuses have raised the

⁶⁰ The U.S.-Israel Free Trade Agreement, which has been in effect since September 1, 1985, has no comparable treatment of labor issues.

⁶¹ The agreement was signed by President Clinton on October 24, 2000. It entered into force under the Bush Administration on December 17, 2001.

⁶² Polaski, Sandra. "Protecting Labor Rights Through Trade Agreements: an Analytical Guide," 18-19.

⁶³ See article 6 of the "Agreement Between the United States of America and the Hashemite kingdom of Jordan on the Establishment of a Free Trade Area"; Signed October 24, 2000.

⁶⁴ See "AFL-CIO Letter on Jordan FTA," Signed by President John Sweeney; Feb. 8, 2001; Posted on IUST on Feb. 16, 2001.

⁶⁵ *The Washington Times*, "Jordan Shutting Abusive Factories," June 17, 2006.

brows of domestic unions and progressive politicians, tested the effectiveness of the FTA's labor provisions, and reenergized the debate over bilateral trade-labor linkage.⁶⁶

The labor article in the agreement recognizes the right of each government to establish its own domestic labor laws and regulations, but obliges each country to “strive to ensure” that those laws provide for labor standards that are consistent with “internationally recognized labor rights,” explicitly defined as:⁶⁷

- (a) the right of association;
- (b) the right to organize and bargain collectively;
- (c) a prohibition on the use of any form of forced or compulsory labor;
- (d) a minimum age for the employment of children; and
- (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

This list of “internationally recognized labor rights,” which is essentially lifted from the U.S. Generalized System of Preferences program, is significant in at least two respects: first, it created the template that subsequent bilateral agreements would follow; and second, it deviated slightly from the ILO's list of eight “core” labor standards.⁶⁸ For example, the ILO's provision outlawing discrimination in respect of employment and occupation is notably absent,⁶⁹ while “acceptable conditions of work” – a hotly contested issue usually outside the range of union descriptions of internationally recognized “core” standards – is included.⁷⁰

Each country is further obligated to “effectively enforce its labor laws”⁷¹ and explicitly prohibited from waving or derogating from such laws in order to boost bilateral trade.⁷² The inclusion of a non-derogation clause within the Jordan FTA presented a victory for organized labor and a yet another step beyond previous agreements, as no such provision was included in the NAALC.⁷³ It is important to note, however, that the “effectively enforce your own laws” standard (EEYOL) was only considered sufficient at the time of passage because Democrats, Republicans, and NGOs alike believed that existing labor laws within both the U.S. and Jordan adequately reflected all the basic ILO “core” principles.⁷⁴ Many proponents of the Jordan FTA openly considered the EEYOL standard to be insufficient with respect to most potential trading partners, but adequate in light of Jordan's unique track record on labor legislation, friendly

⁶⁶ As Thea Lee, AFL-CIO policy director, said at a June 27, 2006 event at The Center for American Progress: “These provisions don't work if they aren't enforced.”

⁶⁷ See Article 6, Paragraph 6.

⁶⁸ The NAALC also deviated from the ILO's list; for example, the NAALC addressed minimum wages and protection for migrant workers.

⁶⁹ See ILO conventions 100 and 111.

⁷⁰ Grynberg (2006) suggests that minimum wage inclusion “addresses the long-standing concerns of many law-makers and trade unions that trade liberalization will result in the so-called “race to the bottom,” with a decrease in standards as US workers are forced to compete with developing countries.” – page 630.

⁷¹ Article 6, Paragraph 4(a).

⁷² Article 6, Paragraph 2.

⁷³ Grynberg (2006), 630.

⁷⁴ This is true despite the fact that neither country has ratified all eight “core” conventions; the U.S. has ratified two of the eight, while Jordan has ratified seven (This was true as of the time of signing and is still the case of this writing.).

relationship with the United States, and relatively healthy labor movement.⁷⁵ The EEYOL provision would later be adopted – to the dismay of many pro-trade politicians, NGOs, and academics – in most U.S. bilateral trade agreements with little regard for the unique state of labor legislation in the partner countries.⁷⁶

The greatest difference between the Jordan FTA and all previous and subsequent bilateral pacts involves the outlined, but still untested, enforcement and dispute settlement mechanism. Under the Jordan FTA *all* commitments within the article on labor are subject to the dispute settlement process, including: (1) pledges to “strive to ensure” that the ILO’s fundamental rights and those specifically outlined in the agreement are protected by domestic law and not relaxed in order to encourage trade; and (2) commitments to “strive to improve” domestic laws in light of these internationally recognized labor rights.⁷⁷ This contrasts with the NAFTA settlement process where proceedings, sanctions, and penalties are only authorized if there is ineffective enforcement of certain trade-related, mutually recognized labor laws; international standards cannot be considered.⁷⁸ While many of the Jordan FTA’s labor commitments are so abstract and vague that they seem impossible to litigate, Sandra Polaski argues that “it would not be impossible [to litigate them] in extreme cases, such as a wholesale repeal of labor rights protections, or a broad waiver of labor rights in export processing zones.”⁷⁹ In other words, backing such expansive pledges with strong enforcement mechanisms may seem unnecessary with a country like Jordan, but may be essential in insuring against egregious violations in countries with less progressive and updated labor records.

In addition to allowing dispute over any and all labor provisions, the agreement also mandates ‘parity of enforcement,’ in which commercial and labor obligations are treated equally within the dispute settlement process.⁸⁰ In the event of a breach of obligations – be they exclusively labor *or* commercial-related – the challenger can request consultations and refer the dispute to a neutral dispute settlement panel, which then prepares a report for a Joint Committee. If the Joint Committee fails to resolve the dispute, the affected party is entitled to unilaterally “take any appropriate and commensurate measure,”⁸¹ including the imposition of ‘trade sanctions,’ which may withdraw some of the benefits granted by the agreement until the partner comes into compliance. The ‘parity of enforcement’ model contrasts sharply with the two-tiered approach to enforcement characteristic of most other U.S. bilateral agreements. Specifically, under the two-tiered system violations of commercial provisions usually result in trade sanctions

⁷⁵ Sweeny (2001) stated: “While [the Jordan FTA] commitments were an important breakthrough, it should be understood that they are likely to be effective only in the case of countries whose laws already conform to ILO standards, as do Jordan’s. For countries whose labor laws are inadequate, much more elaborate mechanisms are need to be put in place, to ensure that domestic laws are brought up to international standards on a clear timetable.”

⁷⁶ Polaski (2003) argues (in June 17, 2003 “Testimony on the Implementation of the U.S. Bilateral Free Trade Agreements with Singapore and Chile”): “[EEYOL] can only protect and reinforce labor rights and be a meaningful trade discipline where – and only where – the country’s labor laws are adequate. Otherwise we would simply lock in low and unacceptable labor standards through our trade agreements...an approach like [EEYOL] would not protect labor rights in Central America in any meaningful way.”

⁷⁷ Polaski (2003).

⁷⁸ Such as occupational safety and health, child labor, and minimum wage laws – as described in Grynberg (2006) page 630. International (i.e., ILO) standards and laws are not explicitly considered.

⁷⁹ Polaski Carnegie testimony. <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1294>.

⁸⁰ As it is called by Human Rights Watch, and cited in Greven (2005) page 27.

⁸¹ Article 17, Paragraph 2(b).

that are proportional to the trade impact of the violation, while breaches of labor obligations may only result in a capped fine on the culpable party.⁸²

With its all-inclusive dispute settlement coverage and its equal treatment of commercial and labor violations, the Jordan FTA created a high watermark against which all other U.S. bilateral pacts have since been compared. But when reports of pervasive labor rights abuses surfaced in 2006,⁸³ amidst the debate over FTAs with Oman and Peru, many labor rights advocates began to question the efficacy of even the strongest form of FTA labor provisions. A May 2006 report on Jordanian garment factories by the National Labor Committee, a New York-based NGO, detailed what the group's executive director called "the worst conditions [he had] ever seen."⁸⁴ The report documented egregious labor rights violations in more than 25 of Jordan's roughly 100 garment factories, some of which were engaged in human trafficking of foreign guest workers from Bangladesh, Sri Lanka, and China. Foreign workers were often stripped of their passports, trapped in involuntary servitude,⁸⁵ and coached to lie to government and company inspectors about working conditions. Many of those interviewed for the report complained of 20-hour work days, the withholding of paychecks, the denial of minimum wages or overtime pay guaranteed by Jordanian law, and even physical beatings and sexual abuse. Such violations highlighted Jordan's failure to effectively enforce its own laws and called its commitments to upholding and furthering internationally recognized labor rights into question. But the events following the publication of the report would prove that the combined efforts of watchful NGOs, the ILO, and devoted partner governments could effectively address the worker abuses and realign Jordanian workplace conditions with international standards.

Within a month of the NLC report's release, Jordanian Trade Minister Sharif Ali Zu'bi admitted that the government's "verification and inspection regimes may have failed," in some cases "miserably," and that the report's findings – some of which the Jordanian government disputed – warranted the closing of certain factories and better enforcement of Jordanian law.⁸⁶ After a visit to the U.S. in which Zu'bi met with U.S. trade officials and members of Congress, the minister claimed Jordan would maintain a no-tolerance policy on violations of Jordanian labor law, even if shutting down half of the export factories in Jordan was necessary in order to end the abuse.⁸⁷ According to *Inside U.S. Trade*, the Jordanian Labor Minister also criticized his own ministry for "focusing too much on issuing foreign guest worker permits, and too little on enforcing wage and hour laws and imposing sanctions or bringing charges against violators."⁸⁸ The Ministry of Labor did, however, promptly investigate all 28 companies discussed in the NLC report, and reported that 17 had violated Jordanian laws, while another 6 of the factories were no longer in operation.⁸⁹ Overall, the Jordanian ministers were both willing to admit to their own shortcomings and those of their country's garment factories, but also careful to note

⁸² This fine – which has a maximum allowable value – is usually then spent in the offending party's territory to work towards ending the particular violations of labor rights.

⁸³ See 2006 reports by The National Labor Committee (U.S. Jordan Free Trade Agreement Descends Into Human Trafficking," May 2006) and the AFL-CIO's *Solidarity Center* Report.

⁸⁴ *The New York Times* (2006).

⁸⁵ Quote from report – lifted from *The Washington Times* (2006).

⁸⁶ *Jordan Times*, "Salem outlines measures to protect workers' rights in QIZs," August 14, 2006.

⁸⁷ *Inside U.S. Trade*, "Jordan Shuts Down Plants in Response to Critical Labor Report," June 23, 2006.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

that less than 10% of the factories were causing serious problems.⁹⁰ Concrete actions to address the violations were only taken after the Jordanian government consulted and received technical assistance from both the U.S. government and the ILO. In response to the government's own investigation – and in a show of its commitment to upholding the labor provisions of the FTA – the government said it would freeze entry for new guest workers until the export factories came into full compliance with the law, and would hire additional inspectors in an effort to improve monitoring within the country's qualified industrial zones.⁹¹ Furthermore, the government also ensured that no guest workers that aided in the report would be deported, and that all employees of plants closed by the government had been provided employment at other factories.⁹²

A September 2006 NLC update on the situation reported that the Jordanian government's efforts had already led to substantial improvements in 80% of the country's garment factories. The update also cautioned that serious cases of human trafficking and wage and hour violations still existed within the country and deserved attention.⁹³ At around the same time as the NLC update, the AFL-CIO and the National Textile Association filed a complaint under the labor chapter of the U.S. Jordan FTA, urging the U.S. government to initiate dispute settlement proceedings until all of the violations were remedied. The complaint marked the first time that a business association formally joined in filing a workers rights case under a trade agreement; but, by the AFL-CIO's own admission, the goal was not to have economic sanctions imposed, but to increase pressure on the Jordanian government and thereby advance workers' rights without having to resort to the use of 'teeth.' As of this writing, U.S. officials have never seriously considered using the FTA's tough enforcement mechanisms,⁹⁴ but this is by no means a sign of the agreement's failure or an indication that such rigorous enforcement mechanisms are unnecessary. Rather, it demonstrates that when the governments party to an FTA have the political will to sufficiently address concerns over internationally recognized worker rights, then the 'teeth' included in the agreement may never have to 'bite' in order to get compliance and action. In an 'effective confluence of forces,' labor NGOs, the ILO, and partner governments can work collaboratively towards improving working conditions on the ground without stifling trade or harming law-abiding businesses. In the case of Jordan, the NLC report and mainstream media coverage flagged the issue and alarmed domestic politicians and unions, as well as Jordanian trade and labor officials.⁹⁵ The enforceable labor provisions within the FTA – themselves derived from the ILO's labor principles – provided a reference point with which Jordanian workplace conditions could be compared. Finally, and most crucially, informal pressure from U.S. legislators incited an already willing Jordanian government to take swift action in the interest of its country's labor population.

The efficiency of 'hard' trade-labor linkage and the 'confluence of forces' in this context should not, however, be taken for granted. Even if all bilateral FTAs included equally

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ NLC Report, "An Update on the Situation in Jordan – September 2006," September 27, 2006.

⁹⁴ According to *Inside U.S. Trade* (6/23/06): The Jordanian Trade Minister "said no [American] officials raised the possibility of holding formal consultations on the labor issues between the U.S. and Jordan under the Free Trade agreement between those countries, and said there were no threats of sanctions as a result of the revelations.

⁹⁵ The findings of the NLC report have been noted in articles in *The New York Times*, *The Los Angeles Times*, and *The Washington Times*, among others.

stern enforcement measures – and they do not – it is unlikely that a partner country would have the political will and the resources to respond to violations as swiftly and willingly as Jordan did after the NLC Report. It is also important to remember that advancing international labor standards is an ongoing process, and that the ‘confluence of forces’ is therefore constantly at play. Perhaps, had Jordan not been as quick in its response to the NLC report, the threat of economic sanctions could have served as an effective ‘stick’ to induce prompt action and compliance with the agreement’s labor provisions. But the model for ‘hard’ trade-labor linkage included in the U.S.-Jordan FTA is by no means perfect. The implementation of the FTA probably increased the prevalence of worker abuses as it simultaneously boosted the volume of production and trade. The Jordanian government’s quick response has, however, demonstrated the potential for trade-labor linkage to moderate some of the negative effects of liberalized and expanded trade on foreign workers. Ironically, but perhaps not surprisingly, the U.S.-Jordan FTA contains far more stringent and wide-ranging enforcement mechanisms than the FTAs with Morocco Bahrain, and Oman – all countries with more disconcerting labor records and less political will to enforce international standards. Advocates of trade-labor linkage have derided USTR for weakening the “hard” linkage approach taken in the Jordan FTA and replacing it with one that makes the labor provisions far less enforceable – especially given that the partner countries in question are far less likely to respond to ‘bark’ than ‘bite.’

The U.S.-Morocco Free Trade Agreement

The U.S.-Morocco Free Trade Agreement, ratified in July of 2004 after similar agreements with Chile and Singapore, purportedly furthers the Bush Administration’s “commitment to promote more tolerant, open and prosperous Muslim societies,” according to USTR Robert Zoellick.⁹⁶ While all U.S. bilateral FTAs negotiated under TPA include a labor chapter that closely resembles that of U.S.-Jordan, key differences hinge on the *enforceability* – rather than the substantive content – of the labor provisions. Prior to the passage of the Morocco deal, the Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC) called the agreement (1) a “big step backwards from the Jordan FTA and our unilateral trade preference programs [such as GSP],” and (2) an arrangement that “will not protect the core rights of workers in either country.”⁹⁷ Many labor groups and House Democrats agreed with the LAC assessment, at least initially, arguing that the agreement’s excessive reliance on the “effectively enforce your own laws” standard offers insufficient protection for workers because Moroccan labor laws are inadequate to begin with. Proponents of the FTA pointed to recent changes in Moroccan labor law – specifically, a new Moroccan Labor Law passed in July 2003 – as evidence of Morocco’s commitment to workers’ rights and willingness to cooperate with the U.S. Eventually, the FTA garnered widespread support within both the House and Senate after a July 14, 2004 letter from the Moroccan government quieted Democratic concerns over the ambiguity of some of the new Moroccan labor laws, and paved the way for the FTA’s passage within the U.S. Congress.⁹⁸

⁹⁶ Labor Advisory Committee for Trade Negotiations and Trade Policy Report to the President, the Congress and the United States Trade Representative on the U.S.-Morocco Free Trade Agreement, April 6, 2004, page 1.

⁹⁷ Ibid.

⁹⁸ FTA passed in late July 2004 by votes of 323-99 and 85-13, and went into effect on January 1, 2006.

Within the body of the FTA the partners declare their desire to “promote basic workers’ rights” and “strengthen the development and enforcement of labor...laws and policies.”⁹⁹ Again, both parties recognize the partner’s right to establish its own domestic labor laws, but each also reaffirms its obligations as a member of the ILO. Each party promises to “strive to ensure” that domestic laws reflect “internationally recognized labor rights”¹⁰⁰ and that those laws are not weakened in order to encourage trade or investment.¹⁰¹ However, unlike in the Jordan agreement, *none* of the aforementioned labor obligations and assurances – many of which are derived from Congressional objectives outlined in the Trade Promotion Authority Act of 2002 – is subject to any dispute settlement process. In other words, there is no formal enforcement mechanism concerning these labor pledges. The only labor provision that is subject to dispute settlement recourse is the article that assures that “neither party shall fail to effectively enforce its labor laws” in a manner that affects trade between the parties (EEYOL).¹⁰² In determining what constitutes “effective enforcement,” each party recognizes that the partner may exercise discretion with respect to how it domestically investigates, prosecutes, and regulates its labor laws; such discretion also extends to compliance matters and decisions over the allocation of resources.¹⁰³ In other words, parties are in compliance with EEYOL whenever a “course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.”¹⁰⁴ Critics of the “right to exercise discretion” clause claim that it undermines the already weak EEYOL standard because a country can conceivably argue that most of its decisions regarding enforcement are based on the exercise of such discretion, and therefore in line with the agreement’s provisions.¹⁰⁵

The reduced scope of enforcement is coupled with a ‘two-tiered’ system of penalty assessment: breaches of *commercial obligations* may be met with economic sanctions that are proportional to the trade impact of the violation, while failure to effectively enforce one’s own *labor laws* may only lead to the assessment of a capped fine.¹⁰⁶ The Labor Advisory Committee’s Report on the Morocco FTA summarizes and assesses two-tiered enforcement of disputes as follows:

“In commercial disputes, the violating party can choose to pay a monetary assessment instead of enduring trade sanctions, and in such cases the assessment will be capped at half the value of the sanctions. In labor disputes, however, the assessment is capped at an absolute level, no matter what the level of harm caused by the offending measure. Not only are the fines for labor disputes capped, but the level of the cap is so low that the fines will have little deterrence effect. The cap in the Morocco agreement is \$15 million – less than 1.8 percent of our total two-way trade in goods with Morocco last year.”¹⁰⁷

⁹⁹ From Preamble to the U.S.-Morocco Free Trade Agreement.

¹⁰⁰ See article 16.7 of the U.S.-Morocco FTA.; These “internationally recognized worker rights” are substantively the same as those defined in the U.S.-Jordan agreement; although the Morocco agreement adds: “For greater certainty, nothing in this agreement shall be construed to impose obligations on either Party with regard to establishing the level of minimum wages.”

¹⁰¹ Article 16.2.2; the non-derogation clause in U.S.-Jordan applied only to trade – investment was not mentioned.

¹⁰² Article 16.2.1(a).

¹⁰³ 16.2.1(b).

¹⁰⁴ *Ibid.*

¹⁰⁵ Human Rights Watch, as sighted in Greven on page 28.

¹⁰⁶ Article 20.12.2 states that these fines shall not exceed \$15 million annually.

¹⁰⁷ LAC Report, 6.

The ‘two-tiered’ penalty assessment and narrow focus on EEOYOL contrasts with the recommendations of the Labor Advisory Committee, which had advocated enforceable obligations that (1) “respect the core labor standards of the International Labor Organization” and (2) are “on parity with other provisions of the agreement [as in the Jordan FTA].”¹⁰⁸ Others have similarly derided the Morocco FTA for backtracking on the labor provisions of the Jordan agreement. But while the framework of the agreement itself is problematic, it bears few differences from others negotiated under TPA. Besides, since the agreement has only been in effect since January 1, 2006, there has not been ample time to determine how having the pact in effect has altered working conditions within Morocco. Therefore, the context in which of the Morocco FTA was negotiated, signed, and ratified is far more telling – at least as of this writing – than the actual content of the agreement itself.

An examination of key events that took place in the time leading up to the Congressional vote on the agreement reveals how linking trade and labor issues during negotiations – ‘soft’ linkage – can foster improved foreign labor legislation before the agreement is ratified, even if the finalized FTA is too weak on labor. ‘Hard’ linkage in the form of economic sanctions can only incite updated foreign labor legislation *after* an agreement goes into effect: when labor provisions are sufficiently enforceable, the potential withdrawal of trade benefits serves as a disincentive for violating minimum labor standards. In the time before an agreement is ratified, however, U.S. politicians and trade negotiators can also influence a partner country’s actions by tying support for an FTA to the completion of certain objectives. Clearly, USTR negotiators prioritize these objectives in a manner that reflects the goals and political will of the Administration in power. Since 2002, USTR objectives on securing foreign labor rights have often taken a back seat to its concerns over the enforcement of intellectual property rights or the elimination of foreign subsidies. But during the same period, many House Democrats in the Republican-controlled 108th and 109th Congress have secured improved foreign labor legislation by tying their legislative support for FTAs to concessions from partner governments. While the President’s fast-track authority does not allow U.S. Senators or Congressmen to negotiate or amend bilateral FTAs, politicians can still wield ‘soft’ power in the form of their vote.

In the case of the Morocco FTA, House Democrats made it clear that their support for the deal hinged almost entirely upon how closely Moroccan labor law adhered to ILO core principles. During the negotiating process, which lasted about 1.5 years, Morocco made “historic reforms to improve women’s rights, and codified new labor rights and protections based on key International Labor Organization conventions.”¹⁰⁹ Most significantly, a comprehensive new Moroccan labor law “enacted badly needed labor law reforms intended to address years of criticism from the ILO, U.S. State Department, and international labor movement.”¹¹⁰ According to the Office of the USTR, it was the “prospect of a free trade agreement with the United States” that helped “to forge a domestic consensus for labor law reform in Morocco,

¹⁰⁸ LAC Report, 2.

¹⁰⁹ According to former U.S. Trade Rep. Mickey Kantor, in USTR Fact Sheet on Labor In Morocco FTA: Morocco FTA Leads to Progress on Lab or Reform, 6/23/04.

¹¹⁰ LAC Report page 4; The law was passed in 2003, but enacted on June 8, 2004.

spurring efforts that had been stymied for more than 20 years.”¹¹¹ Specifically, the 2004 Labor Law:¹¹²

- Raises the minimum employment age (from 12 to 15);
- Reduces the work week from 48 to 44 hours with overtime rates payable for additional hours;
- Calls for periodic review of the Moroccan minimum wage, which was raised by 10% as a result of the new labor law;
- Improves worker health and safety regulations, addresses gender equity in the workplace, and promotes employment of the disabled; and
- Guarantees rights of association and collective bargaining and prohibits employers from taking actions against workers because they are union members.

Despite these drastic and long-overdue changes, many House Democrats – concerned over the extent to which the new laws were fully consistent with the ILO’s core standards – withheld their support for the agreement until they received clarifications on the new law from the Moroccan government. In a letter addressed to Rep. Sandy Levin, the Moroccan ambassador to the U.S. welcomed the congressman’s inquiries, and addressed – to the satisfaction of many Democrats – the concerns over labor conditions and standards in Morocco.¹¹³ The ambassador answered many of the Democrats’ specific questions regarding the new law, noted the ILO’s direct involvement in writing the legislation, and committed to a continued relationship with the ILO in order to adequately implement the new rules. Ultimately, many House Ways and Means Democrats threw their support behind the agreement:

“...in light of the major reforms of July 2003--which addressed flaws in Morocco's labor laws relative to the ILO standards, which were negotiated with the full participation and ultimate endorsement of Morocco's independent labor movement, and which were based in many cases on the advice of the ILO; in light of the history and situation in Morocco; [and] in light of Morocco's commitment to implement its laws consistent with ILO core labor standards.”¹¹⁴

The recent Moroccan labor reforms demonstrate that a softer, less formal form of trade-labor linkage can be effective in getting partner countries to update their labor laws, but the relatively weak enforcement mechanism of the agreement still left many NGOs, domestic unions, and House Democrats upset. In a Ways and Means Committee Report,¹¹⁵ a number of Democrats criticized the Bush Administration’s “ideological rigidity” and pursuit of “the same model regardless of the realities in each country with which it negotiates,” but also argued that the Congress had not taken the same “cookie-cutter approach” in debating the FTA’s merits. The Democrats also said that the “enforce domestic law’ standard continues to be the wrong one.” Furthermore, if the agreement had contained a “fully enforceable provision requiring both

¹¹¹ USTR “Fact Sheet on Labor in Morocco FTA,” June 23, 2004.

¹¹² According to USTR fact sheet (see previous footnote).

¹¹³ Letter from Moroccan Ambassador Aziz Mekouar to Rep. Sandy Levin, July 14, 2004.

¹¹⁴ See Section VII.I on Additional Views with respect to Labor.

http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp108Sp5oP&refer=&r_n=hr627.108&db_id=108&item=&sel=TOC_47868&

¹¹⁵ See Section VII.I on Additional Views with respect to Labor.

http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp108Sp5oP&refer=&r_n=hr627.108&db_id=108&item=&sel=TOC_47868&

countries to implement and enforce” the ILO’s core labor standards, “then it would have sailed through both chambers of Congress easily and without delay,” according to the Democratic House members. Instead, the use of EYOL, “regardless of what that law happens to say,” led members to closely scrutinize Moroccan labor law, until they eventually felt comfortable ratifying the deal.

While the Bush Administration’s departure from the ‘hard’ linkage model of the Jordanian FTA model left many unsatisfied with the deal, the softer trade-labor linkage model was by no means unique to the Moroccan agreement. It did, however, have important implications given the differences between Morocco and other countries that had partnered with the U.S. on similarly structured FTAs, such as Australia and Chile. In the case of Jordan, the condition for an ‘effective confluence of forces’ in support of workers’ rights ultimately depended upon enforceable FTA labor provisions *and* the Jordanian government’s progressive stance on labor legislation. As explained earlier, even with enforceable provisions it is difficult to ensure compliance with ILO standards unless the partner country is willing to contribute to the forces for change rather than simply react to them. With the Morocco FTA, few of the labor provisions are enforceable and the country boasts only recent labor reforms rather than a history of labor protections or a vibrant labor movement. While progress was indeed made prior to the agreement’s ratification through ‘soft ‘ linkage and the collaborative efforts of the ILO, U.S. State Department, USTR, and House Democrats, such a collaboration may be less fruitful in the future when there are weak disincentives for violations and fewer incentives for positive change. If, for example, NGO reports detailing widespread worker abuses were to surface, it is unclear whether the Moroccan government will respond effectively in the absence of enforceable provisions.

The U.S.-Bahrain Free Trade Agreement

The Bahrain-U.S. FTA created the fourth partnership between the U.S. and a member of the Bush Administration’s proposed Middle-East Free Trade Area. In recommending passage of the bill, Ways and Means chairman Bill Thomas called Bahrain a “regional leader in political reform” that had recently proved its commitment to change by enacting a new constitution in 2002 and subsequently convening its first Parliamentary session since 1975.¹¹⁶ In nearly all respects, the trade bill closely mirrors the Morocco pact, allowing only the “effectively enforce your own laws” provision to be brought under dispute settlement. It garnered support from twenty-six of the twenty-seven trade advisory commissions, with the Labor Advisory Committee arguing that the pact simply “allow[s] deficiencies in Bahrain’s labor laws to persist.”¹¹⁷ By the time it was passed the bill enjoyed widespread bipartisan support in Congress, but again only after House Democrats received assurances from the Bahraini government that those labor laws deemed inconsistent with ILO standards would be reformed significantly. Unlike the divisive debates over DR-CAFTA and the Oman FTA, the Bahrain pact was the product of true bipartisan efforts to reach a compromise across the aisle.¹¹⁸

¹¹⁶ IUST “Ways & Means Presses on Labor Issues in Hearing on Bahrain FTA,” Sept 30, 2005.

¹¹⁷ LAC Report, page 4, July 14, 2004.

¹¹⁸ Rep. Charlie Rangel had this to say about the deal: “I think this committee is breaking new ground today on how we handle trade agreements...I do hope that moving forward on this small, but very important trade agreement might serve as an indication of what we can do when we work together.” From IUST, Nov. 25, 2005.

The debate over the Bahrain FTA primarily involved two areas of concern: (1) the country's labor law (mostly a concern to House Democrats), and the country's economic boycott of Israel (a concern of Senators from both parties). Within the House, Democrats had struck a deal with Ways and Means Chairman Bill Thomas not move the agreement forward until the Bahraini government showed some progress in addressing concerns over its labor law.¹¹⁹ The USTR seemed more than pleased with Bahrain's efforts at reform and argued that Bahrain's labor protections were stronger than those of both Jordan and Morocco.¹²⁰ Recent changes in Bahraini labor law and the adoption of a new constitution in 2002 permitted independent labor unions for the first time since the early 1970s, recognized freedom of association, and allowed both domestic and foreign workers to join trade unions.¹²¹ The USTR also noted recent efforts of the Bahrain Ministry of Labor to create a more responsive system of complaints, increase the number of inspectors, upgrade their standards and training, and better educate laborers of their workplace rights. House Democrats praised the country for its "leadership and courage" in its reform efforts and appreciated its recent amendments to labor law, but some – notably Reps. Cardin, Rangel, and Levin – pointed to approximately six areas of labor law that seemed inconsistent with ILO standards. According to *Inside U.S. Trade*, Democrats were concerned that:¹²²

- Laws prohibit the formation of more than one trade union in a single enterprise;
- The law require unions to join a national federation of unions;
- Laws are not clear on the kind of penalties that can be imposed for anti-union discrimination;
- Laws do not provide for reinstatement for workers fired for union activity;
- Foreign workers who are not being paid by their employers can only change employers after three months of non-payment;
- The law provides onerous requirements for authorizing strikes.

After consultations between the Bahraini government, prominent Democrats, and USTR, Bahrain committed in writing to interpret and enforce its existing laws in an ILO-consistent manner and to amend its legislation regarding the organization of unions.¹²³ The assurances were further backed up by a USTR letter that promised to consider these new obligations as enforceable under section 15.6 of the agreement. As with the Morocco deal, the Democrats' exercise of 'soft' trade-labor linkage during the negotiating process eventually led Bahrain to make commitments to international labor standards that were notably absent in DR-CAFTA.

The Bahrain pact represented a victory for both political parties and the USTR in that each got most of its concerns addressed prior to the passage of the pact. However, many who voted for the FTA in a bid for compromise still criticized the administration's interpretation of TPA and derided the enforcement mechanisms of its negotiated agreements. House Democrats

¹¹⁹ IUST "Ways & Means Presses on Labor Issues in Hearing on Bahrain FTA," Sept 30, 2005.

¹²⁰ See USTR Trade Facts Sheet: "Bahrain's Labor Protections are Stronger than Jordan and Morocco," April 14, 2005.

¹²¹ From USTR Trade Fact Sheet entitled "U.S.-Bahrain Free Trade Agreement FTA Supports Bahrain's Labor Reforms," September 12, 2005.

¹²² IUST "Labor Deal with Democrats to Determine Bahrain FTA Timing," Nov. 11, 2005.

¹²³ From IUST, "House, Senate Committees Approve Bahrain FTA Unanimously," November 25, 2005.

threw their support behind the FTA under the assumption that Bahrain would enact the promised labor reforms and that USTR would keep track of the Bahraini government's progress. In a March 29, 2006 letter, Reps. Rangel, Levin, Cardin, and Becerra expressed their concerns over the USTR's failure to adequately follow-up with the Bahraini government and ensure that all promises to modify labor legislation and beef up enforcement had been kept. In the debate over the Oman FTA, many argued that promises – the likes of which pushed the Bahrain deal through the Congress – were no longer adequate because of the lack of sufficient follow-up once an agreement passes. The limits of 'soft' trade-labor linkage thus involve the inability of negotiating parties to adequately follow-up and enforce promises that are made outside of an FTA's main provisions. While assurances, side letters, and changes in legislation are important steps in the right direction, they cannot adequately substitute for 'hard' provisions that come armed with WTO-style enforcement mechanisms, especially when the negotiating partner has a history of weak labor laws or worker abuses.

The U.S.-Oman Free Trade Agreement

The U.S.-Oman FTA (OFTA), sent to President Bush's desk for signing in late September of 2006, enjoyed far less bipartisan support than did earlier agreements with Jordan, Morocco, and Bahrain. At the time of negotiations, the Sultanate of Oman – a hereditary monarchy where political parties are non-existent and the law can only be amended by royal decree – had a spotty record of workers' rights violations and perhaps the most antiquated labor laws of any previous U.S. bilateral trade partner.¹²⁴ Disagreement between House Democrats and the USTR over the adequacy of the agreement's labor protections and Oman's controversial record on labor rights placed significant pressure on the Omani government to reform its labor laws in the time leading up to the pact's passage. After months of such pressure and debate within the Congress, the Sultan of Oman eventually issued a royal decree that amended the country's labor laws to better reflect international standards and workers' rights. While the reforms did not satisfy most opponents of the FTA, particularly NGOs and a majority of House Democrats, they did represent a dramatic shift in the course of Omani labor law – and one that was unlikely to have occurred in the absence of U.S. pressure. At the very least, OFTA opponent and AFL-CIO president John Sweeney argued, the debate over the pact and the closeness of the vote reflect “the tremendous progress” that the workers' rights movement has made “over the last decade in bringing the issues of fairness and workers' rights to the center of the trade debate.”¹²⁵

The OFTA labor chapter contains all the same key stipulations as the Morocco and Bahrain FTAs, including the exclusive enforceability of the EYOL standard, 'two-tiered' treatment of commercial and labor violations, and a “cooperative mechanism” to upgrade and improve labor standards. But if the bipartisan support for the Bahrain FTA represented a small step forward for trade-labor linkage, then the Oman agreement represents two steps back. Oman's labor record, characterized by the AFL-CIO as “the weakest of any country with which we have ever negotiated a free trade agreement,”¹²⁶ resurrected concerns over whether effectively enforcing one's own laws was sufficient in the context of a history of labor abuses,

¹²⁴ “Statement by AFL-CIO President John Sweeney On Passage of U.S.-Oman FTA in House,” July 20, 2006.

¹²⁵ Ibid.

¹²⁶ Ibid.

sub-par labor legislation, undemocratic rule, and subdued civil society actors. Recent U.S. State Department reports on Oman reveal ineffective enforcement of many ILO conventions, including the core principles outlined within OFTA. As of mid-2006, prior to the Sultan's decree, Omani labor laws did not address strikes or explicitly provide for the right to collective bargaining.¹²⁷ Although workers had the right to form representational committees, the "effectiveness of the committees was questionable" because they were not authorized to discuss wages, hours, or conditions of employment, and instead dealt with less contentious issues such as living conditions at company-provided housing.¹²⁸ Membership in these committees could be terminated if members committed "any act that causes material or moral harm to the committee or the establishment or its workers or the public interests of the Sultante," while leadership positions were restricted to those who could speak and write Arabic.¹²⁹ These restrictions on association and collective bargaining run counter to the ILO's fundamental conventions¹³⁰ and are especially problematic in a country in which foreign workers constitute at least 50% of the work force and as much as 80% of the private sector work force.¹³¹ Although the USTR said it was aware of "no evidence suggesting that goods are produced in Oman using slave labor or with the benefit of human trafficking,"¹³² the 2004 State Department Human Rights Report states:

"[Omani] law prohibits forced or compulsory labor, including of children; however, there were reports that such practices occurred. The Government did not investigate or enforce the law effectively. Foreign workers at times were placed in situations amounting to forced labor. Employers have withheld documents that release workers from employment contracts and allow them to change employers. Without such a letter, a foreign worker must continue to work for his current employer or become technically unemployed, which was sufficient grounds for deportation."¹³³

The State Department's 2006 Trafficking in Persons report also cites Oman as a destination country for men and women primarily from Pakistan, Bangladesh, and India who "migrate willingly, but may subsequently become victims of trafficking when subjected to conditions of involuntary servitude as domestic workers and laborers."¹³⁴ On the topic of acceptable conditions of work, State Department reports mention cases of withheld wages, sexual abuse in the workplace, and a minimum wage that was "insufficient to provide a decent standard of living for a worker and a family."¹³⁵

In light of such concerns, and in response to the 2006 NLC report on workers' rights abuses in Jordan, many Democrats and NGOs expressed apprehension over the OFTA provisions, the adequacy of Oman's own laws, and the reliability of its promises to upgrade labor

¹²⁷ '05; 6b.

¹²⁸ '3, 6b.

¹²⁹ '05, 6a.

¹³⁰ Oman has ratified conventions regarding the elimination of forced labor (29 and 105) and child labor (138 and 182); it has not ratified conventions guaranteeing freedom of association and collective bargaining (87 and 98) and the elimination of discrimination in employment (100 and 111).

¹³¹ '04, 6e.

¹³² June 22, 2006 letter from USTR to Sen. Charles Grassley, Chairman of the Senate Finance Committee.

¹³³ 04 6c.

¹³⁴ Chapter VI of 2006 Trafficking in Persons Report, Released by the State Department's Office to Monitor and Combat Trafficking in Persons, June 5, 2006, available: <http://www.state.gov/g/tip/rls/tiprpt/2006/65989.htm>.

¹³⁵ '05e, '04e.

legislation. In May 2006 the Senate Finance Committee overwhelmingly approved the Conrad amendment to draft legislation implementing the OFTA that would require the administration to suspend free trade benefits on imported merchandise from Oman made under “sweatshop conditions so egregious as to be tantamount to slave labor.”¹³⁶ But despite bipartisan support for the Conrad Amendment, the Bush Administration insisted that it was unnecessary due to the provisions within the FTA and existing U.S. laws that prohibit the import of products of slave labor, as long as there is sufficient domestic production to meet domestic demand.¹³⁷ Sen. Kent Conrad (D-ND), who introduced the amendment, argued that had U.S. laws and FTA provisions been sufficient, the violations described in the NLC report on Jordan would not have occurred and the slave labor amendment would not be necessary.¹³⁸ The disregard for House and Senatorial committee input is technically fair game for the Administration since the president’s fast-track authority only requires him to *consider* congressional recommendations. Still, the law also states that implementing bills are to include provisions that are “necessary and appropriate” for FTA implementation and Democrats argued that this “necessary and appropriate” standard has been interpreted liberally in previous administrations.¹³⁹ Right or wrong, USTR’s unwavering position on the FTA’s content pushed some Senate Democrats who had spent their “entire career” supporting free trade agreements to oppose OFTA, while others derided the Bush administration for making a “mockery” of the entire fast-track process.¹⁴⁰

In July of 2006, just days before the House vote on OFTA, substantial changes to Omani labor law unexpectedly came in the form of the so-called ‘Saturday Night Decree.’ In what the USTR described as an “extraordinary step” that “clearly demonstrated that [Oman] takes labor law reforms seriously,”¹⁴¹ the Sultan issued a decree based, in the words of the Omani ambassador, “on discussions that the Omani Government...had with Members of the U.S. Congress” and “as a demonstration of Oman’s faith and continuing efforts to improve working conditions and rights for all workers in the Sultanate.”¹⁴² As amended by the decree, which “cancels or supersedes all provisions of the labor law that contravene or contradict its provisions,”¹⁴³ Omani labor law now:

- Allows for the formation of unions and allows them to conduct their affairs with “full freedom and without interference or influence from any other party,” including the Omani government;”
- Specifically “endorses collective bargaining and acknowledges the use of strikes as a collective bargaining technique;”
- Provides enforcement tools for the prohibition against forced or coerced labor, including prohibitions on confiscation of foreign worker documentation;

¹³⁶ IUST, “USTR Cool to Finance Labor Amendment to Oman Draft FTA Bill,” May 19, 2006

¹³⁷ As long as there is sufficient domestic production to meet domestic demand USTR letter – See earlier footnote.

¹³⁸ Ibid.

¹³⁹ IUST, “Congressional Vote on Oman FTA Reflects Increasing Partisanship,” June 30, 2006.

¹⁴⁰ Ibid. Sen. Conrad said the entire process is a “sham” and a “farce” given the way the administration dismisses input from the Senate, while Sens. Lincoln and Wyden, traditionally supporters of FTAs, expressed their frustration over the administration’s handling of the amendment.

¹⁴¹ USTR Fact Sheet, “Status of Oman Labor Commitments,” July 2006.

¹⁴² Letter from Omani Ambassador Hunaina Al-Mughairy to USTR Susan Schwab, July 12, 2006.

¹⁴³ USTR Fact Sheet, “Status of Oman Labor Commitments,” July 2006.

- Provides penalties, including possible imprisonment and fines, for “an employer that might deprive a worker of his or her right to form or participate in a union or perform union activities.”

But unlike the drastic labor reforms of Morocco and Bahrain, the Omani reforms failed to sway most House Democrats. In a Democratic Ways and Means memo, House representatives dismissed the decree and said that it only fully addressed one of 10 areas in Oman’s labor laws that committee staff had identified as falling short of international standards.¹⁴⁴ Since the decree also delegated promulgation of regulations to the Omani Ministry of Manpower, specific details regarding the implementation of these reforms are still not yet known – at least not by the U.S. government.¹⁴⁵

In the end the Oman FTA passed the House by only 16 votes, revealing a degree of Congressional divisiveness surpassed only by the DR-CAFTA agreement. The Omani government’s ‘Saturday Night Decree,’ which on the surface seems to mirror similar reforms made by the Moroccan and Bahraini governments, is demonstrative of the ability of USTR and U.S. politicians to cultivate updated worker rights through ‘soft’ trade-labor linkage. But the inability of the Omani government’s last-ditch efforts at reform to gain the favor of House Democrats indicates that the adequacy of ‘soft’ trade-labor linkage is increasingly being called into question. While the Bush Administration has been able to garner the minimum level of votes to pass FTAs with only weak trade-labor linkage, this scenario will be nearly impossible in a Democratically controlled House that is likely to prioritize ‘hard’ trade-labor linkage reminiscent of the Clinton years and the Jordan FTA.

VI. Concluding Remarks

Trade-labor linkage is all too often derided as either an ill-conceived brainchild of well-intentioned humanitarians, a convenient cover for protectionist minded anti-free traders, or a political tool used by populists to satisfy important lobbies and supporters. Neoclassically-trained economists often argue any enforcement of labor standards –through provisions in free trade agreements, international treaties, or any other medium – will make little headway in furthering workers’ rights abroad. The greatest path to improved workplace conditions and overall living standards, the story goes, is through sustained economic growth and increased and more liberalized trade. On the opposite end of the spectrum, labor rights activists, unions, the International Labor Organization, and many NGOs consider certain internationally recognized labor standards to be the fundamental rights of all citizens – regardless of the country of origin or the particular level of economic growth or development. This paper has taken the importance and usefulness of certain core labor standards as a given, and examined the effectiveness of U.S. efforts to propound those standards – namely, the rights to free association, collective bargaining, freedom from forced labor, freedom from child labor, and acceptable conditions of work – by linking trade and labor issues during bilateral FTA negotiations and through labor provisions

¹⁴⁴ For a summary of the grievances, see: IUST, “USTR Cites Oman Labor Rights Move in Advance of House Vote on FTA.” July 14, 2006.

¹⁴⁵ Page 16 of “CRS Report for Congress: U.S. Oman Free Trade Agreement”, Mary Jane Bolle, Updated October 10, 2006, available: <http://fpc.state.gov/documents/organization/75249.pdf>.

contained within the bodies of the FTAs themselves. The chief arguments developed throughout the paper were as follows:

1. Concerns with linking trade and labor at the multilateral level do not carry much weight at the bilateral level, where the negotiating partners can better collaborate and tailor the provisions to the particular circumstances;
2. The extent to which bilateral trade-labor linkage is successful depends largely on how appropriately and adequately labor provisions are designed to reflect the particular characteristics of a given trade partner and to ensure enforceability and compliance;
3. The adequacy and effectiveness of the labor provisions is in turn mostly dependent on the political will of the negotiators to demand appropriate labor concessions during negotiations and create useful provisions within the agreements.

An interim assessment of U.S. bilateral FTAs with Jordan, Morocco, Bahrain, and Oman reveals that trade-labor linkage at the bilateral level can lead to incremental improvements in foreign labor legislation and practice. The importance of political will in determining the efficacy of these agreements cannot be understated. The Jordan FTA was negotiated under an administration that prioritized labor and environmental issues in its negotiating objectives and, as a result, had the political will to sign an agreement with ‘hard’ trade-labor linkage enforcement mechanisms. When reports of widespread violations of the FTA’s labor provisions surfaced early this year, the Jordanian government was quick to respond without being threatened by any formal dispute process. This suggests that the ‘teeth’ characteristic of the FTA’s ‘hard’ trade-labor linkage may never necessarily need to be used if the mere prospect of sanctions can combine with the efforts of unions, NGOs, the ILO, and an already accommodating government to create an “effective confluence of forces” in support of improved labor legislation and practice. The Bush Administration has abandoned the ‘hard’ trade-labor linkage approach and instead chosen to adhere to a relatively loose interpretation of TPA’s labor negotiating objectives. Since 2002 USTR has pursued agreements whose only enforceable provision is the requirement to effectively enforce one’s own laws, regardless of whether or not such laws adequately reflect international standards. Although the Administration has abandoned the stringent enforcement provisions of the Jordan FTA, House Democrats and USTR have successfully used ‘soft’ trade-labor linkage during the negotiating processes to encourage reformed labor legislation in the lead-up to the vote on most FTAs. But as the administration has dogmatically adhered to its relatively weak treatment of labor provisions and the choices of trading partners have become more and more controversial, House Democrats have become increasingly frustrated and less accommodating to the Administration’s approach. With the Democrats now in control of the House and Senate, showing support for ‘hard’ trade-labor linkage is more a matter of political strategy than political will. The Administration can either demonstrate its commitment to the ‘hard’ trade-labor linkage approach desired by House Democrats, or it can risk losing the renewal of fast-track authority and jeopardizing the future passage of *any* bilateral U.S. free trade agreements.

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