

LABOUR DEVELOPMENT:
THE IMPROBABLE RECONCILIATION OF GLOBALIZATION
WITH THE RIGHTS OF WORKERS

by

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ABSTRACT

The question of linking international trade and labour standards is an issue that has taken on increased visibility with the accelerating pace of globalization. Although globalization has brought benefits to some, it has not resulted in the predicted benefits for many workers worldwide and in particular for workers in developing countries.

I have grouped the attempts to internationally regulate labour under a concept I refer to as *labour development*. Labour development is a subset of international social development policies designed to respond to the social instability caused by economic globalization. This thesis argues that the enforcing of labour standards as a form of developed world notions of workplace human rights clashes with notions of neo-liberal economic development. The purpose of this thesis is to determine the actual effects of labour development on developed and developing countries.

Chapter 1 is an introduction to the labour development concept. It provides a theoretical framework, reviews the legal history of international labour law, and outlines the methods used in my analysis. Chapter 2 focuses on the creation and operation of the ILO and also examines the debate on linkages between trade and labour in the WTO.

Chapters 3 & 4 then analyze the question of linkages in this hemisphere in the free trade and labour cooperation agreements negotiated by the United States and Canada with Latin American countries. Chapter 3 focuses on the operation of the North American Agreement on Labour Cooperation (NAALC) and examines complaints under the NAALC involving Mexican migrant workers in the U.S. Chapter 4 focuses on the development of Canadian international labour policy, from the NAALC to current free trade negotiations involving four Central American countries. It includes a case study of the Canada-Chile Agreement on Labour Cooperation.

Chapter 5 applies the data in the case studies to labour development theory and analyzes labour development's implications for both developing and developed countries. It argues that the reconciliation of labour development and neo-liberal economic globalization is extremely difficult. The chapter concludes with recommendations to detach future labour agreements from the current framework of free trade negotiations.

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LIST OF ACRONYMS AND ABBREVIATIONS

Agreement on Trade-Related Intellectual Property Rights.....	TRIPS
Canada-Chile Free Trade Agreement	CCALC
Canada-Costa Rica Free Trade Agreement.....	CCRALC
Canada-U.S. Free Trade Agreement.....	CUSFTA
Department of Foreign Affairs and International Trade	DFAIT
European Union	EU
Evaluation Committee of Experts.....	ECE
Human Resources Social Development Canada.....	HRSDC
International Court of Justice.....	ICJ
International Labor Affairs Board	ILAB
International Labor Rights Fund.....	ILRF
International Labour Organization.....	ILO
International Organization for Migration.....	IOM
International Trade Organization.....	ITO
National Administrative Office.....	NAO
North American Agreement on Labour Cooperation	NAALC
North American Free Trade Agreement	NAFTA
National Labor Relations Board (U.S.).....	NLRB
Social Development Canada	SDC
U.S. Department of Labor.....	DOL
U.S. Immigration & Naturalization Service (former).....	INS
World Trade Organization	WTO

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CHAPTER 1: LABOUR DEVELOPMENT

“Capital is reckless of the health or length of life of the laborer, unless under compulsion from society.”
– Karl Marx, *A Critique of Political Economy*

1.1 Introduction

Globalization is developing a new class of exploited¹ worker. “Economic globalization” is defined by the International Monetary Fund (IMF) as a

“historical process, the result of human innovation and technological progress. It refers to the increasing integration of economies around the world, particularly through trade and financial flows. The term sometimes also refers to the movement of people (labor) and knowledge (technology) across international borders... Global markets offer greater opportunity for people to tap into more and larger markets around the world.”²

While changing trade patterns have enriched life for many, others are being increasingly marginalized by the new economic order. Many governments have consequently begun to focus on addressing the social problems caused by this process of globalization. This is reflected by the movement towards codifying and enforcing International Labour Standards which has taken on greater momentum in the past two decades. A coalescing of groups - workers, business groups, NGOs and national governments among others - has generated much of this momentum. These groups have realized the need to develop institutional means for dealing with social problems in the

¹ I use the definition of “exploited” under both of its main meanings: “To employ to the greatest possible advantage” and “To make use of selfishly or unethically.” Source: The American Heritage Dictionary of the English Language, Fourth Edition (Boston: Houghton Mifflin Company, 2000).

² “What is Globalization?”, online: IMF <<http://www.imf.org/external/np/exr/ib/2000/041200.htm#II>>. The globalized economic system has also been defined in less reassuring terms as “the present worldwide drive toward a globalized economic system dominated by *supranational* corporate trade and banking institutions that are not accountable to democratic processes or national governments” Online: International Forum on Globalization <<http://www.ifg.org/analysis.htm>> (last accessed 3/30/2004)

area of labour and human rights caused by globalization and free trade.

Internationally, there remains no consensus on the best means to deal with these problems. Some insist that International Labour Standards remain the purview of the International Labour Organization (ILO). Others advocate a greater role for international organizations such as the World Trade Organization (WTO). Still others advocate incorporating labour provisions into regional free trade arrangements, while some economists insist that the private sector should be responsible for self-regulation of labour standards

1.1.1 Overview

I take the position that the process of globalization cannot be understood when it is considered apart from the development of the world capitalist system.³ The central contention of this thesis is that there is a fundamental conflict between this system and attempts to regulate labour standards to ameliorate its negative effects. The attempt to internationally regulate labour to offset globalization's effects is a concept I refer to as *labour development*.

Chapter 1 of this thesis is intended to provide a theoretical framework for labour development by linking the concept to existing theories of economic and social development. First, this chapter will define labour development by analyzing both the labour and development components of the concept. I will also examine previous attempts by the United States to develop "free" labour in Latin America. Second, I will link the labour development concept to theories of worker transformation and

³ Immanuel Wallerstein, "Globalization or The Age of Transition? A Long-Term View of the Trajectory of the World-System" (1999) online: Fernand Braudel Center <<http://fbc.binghamton.edu/iwtrajws.htm>> (last accessed 30 March 2006). ["Wallerstein"]

globalization. I will focus particularly on the global erosion of long-held labour values and its impact on labour development as well as the inherent inequalities in the global economic system. Third, this chapter will analyze concepts of sovereignty within the context of labour development policies. This section will tie labour development to notions of cosmopolitan law and national sovereignty. Chapter 1 will conclude with a focus on the first attempts to implement labour development. I will analyze the underlying social and legal history of International Labour Standards within Western thought and the subsequent creation of these standards following the First World War.

Within this conceptual framework, Chapter 2 begins with an analysis of the participation of non-state actors and civil society in the development of ILO policies and standards. I will examine the cooperative approach taken by the ILO in the implementation of international labour standards. Second, I trace the evolution of labour development. The original target of International Labour Standards, the industrialized world of Europe and North America, is no longer required to make major structural adjustments or policy shifts to comply with ILO Conventions. Instead, labour development's target has shifted towards the developing world of Africa, Asia and Latin America, and the function of the ILO has shifted as well. Chapter 2 concludes that although the ILO has experienced unprecedented activity and growth in the past decade, there is a movement by the developed world towards incorporating labour development policies into bilateral or multilateral regional trading arrangements.

Chapter 3 focuses on the North American Agreement on Labour Cooperation (NAALC) and Mexican Migrant workers in the United States. It ties into the broader theme of my thesis by analyzing labour development as a possible tool for correcting

labour rights abuses in developed countries, such as the United States. The NAALC was primarily created to address labour issues in Mexico but it has the capacity to address labour problems in the United States as well. I have analyzed several complaints filed against the United States regarding the treatment of Mexican migrant workers in various industries with a view to determining the effects of the NAALC in these cases.

Chapter 4 analyzes the labour development process through an examination of the Canadian policy of negotiating Labour Cooperation Accords in tandem with Free Trade Agreements. This chapter explores the underlying motivation and effectiveness of this policy through an examination of the Canada-Chile Agreement on Labour Cooperation (CCALC) which came into effect in 1997. The case study first analyzes the factors that shaped the negotiation of the CCALC in both Canada and Chile. Following this, the operation and effect of the agreement will be analyzed. A particular focus will be on the effectiveness of the methods used in the Agreement and on the process of exporting labour standards abroad to developing countries. The CCALC's analysis will help to illuminate the origins of the Canadian policy of incorporating International Labour Standards into free trade agreements as well as the practical effects of these agreements.

1.1.2 Labour Development Defined

Development is a vague term that by definition can have multiple meanings.⁴ Perhaps this is why it has been embraced by politically sensitive global policy makers. It is difficult to oppose a concept that can be seen so differently by policy makers and by those bearing the brunt of its effects. The notion of "development" as a global economic

⁴ Development is defined in no less than six entries in *The American Heritage Dictionary of the English Language, Fourth Edition*, (Boston: Houghton Mifflin, 2000). The meanings range from the vague "act of being developed" to the scientific sounding "Determination of the best techniques for applying a new device or process to production of goods or services" to simply a "significant event, occurrence, or change."

and social policy was articulated quite well by former German Chancellor Willy Brandt, acting as Chairman of the North-South Commission:

“Development will and can never be defined to the satisfaction of everyone. The concept, generally speaking, refers to desirable social and economic progress – but people will always have differing views as to what is desirable.”⁵

Using Brandt’s definition, development means “a culturally adapted increase in the quality of life.”⁶ Despite the best efforts of economists or sociologists, this definition is neither scientific nor absolute. Cultural adaptation and quality of life are measured against standards set by the developed world. It is widely accepted that developing countries cannot reach these standards on their own. The ILO justifies the need for development programmes in the labour sector on the basis of developing countries’ inability to directly implement such programmes:

“...all development programmes are “instruments” of public policy and “intermediaries” between the beneficiaries at the grassroots and national or regional governments. Traditionally, governments implemented policy directly through ministries and departments without the “intermediation” of special agencies or institutions...Development tasks, however, necessitate the creation of new instruments that can better acquire and process complex, specialized and diverse inputs to meet the needs of specific segments of the population. This is the rationale of development programmes.”⁷

The phrase "labour development" (or “free labor development”) is most popularly connected with the American Institute for Free Labor Development (AIFLD). The AIFLD, created in 1962, was an American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) organization. The AIFLD’s “free labor

⁵ “Development as desirable progress – but what is ‘desirable’?”, Online: Novartis Foundation for Sustainable Development: <http://www.novartisfoundation.com/en/articles/development/social_development.htm#desirable> (last accessed 29 May 2006).

⁶ *Ibid.*

⁷ Samuel Paul, *Strategic Management of Development Programmes*, (Geneva: ILO, 1983) at 12.

development” was touted as a means to “develop free trade unions in Latin America” but in practice it was a tool of American foreign policy designed to undermine “communist” foreign trade unions.⁸

The AIFLD received U.S. Government funding and had "close ties" to the Central Intelligence Agency.⁹ The American business community also generously funded the AIFLD. The president of the AIFLD, and also of the AFL-CIO, George Meany, admitted that the AIFLD received financial support from the

“largest corporations in the United States . . . Rockefeller, ITT, Kennecott, Standard Oil, Shell Petroleum . . . Anaconda, even Readers Digest. . . and although some of these companies have no connection whatsoever to US trade unions, they are all agreed that it was really in the US interest to help develop free trade unions in Latin America, and that's why they contributed so much money.”¹⁰

The AIFLD was not concerned that these corporations might have interests at stake that conflicted with those of Latin American workers. Instead, J. Peter Grace, Chairman of the Board of AIFLD, stated that the AIFLD’s mission was to encourage "cooperation between labor and management and an end to class struggle."¹¹ The overarching goal of free labor development was to “prevent communist infiltration” into Latin America and “where it exists . . . get rid of it.”¹² The AIFLD’s “free labor development” consisted of exporting “techniques of anti-communist and pro-

⁸ “American Institute for Free Labor Development”, online: Media SourceWatch <http://www.sourcewatch.org/index.php?title=American_Institute_for_Free_Labor_Development> (last accessed 5 June 5, 2006).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.* Grace was also Chairman of the Board of the W.R. Grace Corporation, one of the ninety five transnational companies that backed the Institute.

¹² *Ibid.*

management labor organizing” to potential Latin American labour leaders.¹³ Chile was a prime target for the AIFLD’s activities after the socialist government of Salvador Allende came to power in 1970.¹⁴

In 1997, the AIFLD was reorganized into the American Center for International Labor Solidarity, or The Solidarity Center.¹⁵ Its stated goal since the end of the Cold War is to act in concert with international “union partners [to] promote democracy, freedom, and respect for worker rights in global trade, investment, and development policies and in the lending practices of international financial institutions.”¹⁶ The Solidarity Center continues to be directly funded by the U.S. Government, although it claims that “programs implemented and the partners chosen are determined solely by the Solidarity Center and the AFL-CIO.”¹⁷ Given its past history in Latin America, the AFL-CIO itself remains a controversial partner for many unions in the developing world.¹⁸

The “labor” in the AIFLD’s version of free labor development often consisted of

¹³ Fred Hirsch, *An Analysis of Our AFL-CIO Role in Latin America or Under the Covers with the CIA* (San Jose, CA.: Emergency Committee to Defend Democracy in Chile, 1974) at 3. AIFLD trainees were given generous U.S. government stipends for themselves and their families, which continued for nine months after they returned to Latin America from the AIFLD School in Virginia.

¹⁴ *Ibid.* at 33; “Chile: The Story Behind the Coup” (1973) 7:8 NACLA Rep. on the Americas at 11. In the period immediately before and during the Socialist Allende government in Chile, 79 Chileans graduated from this school, and another 8,837 received training in seminars conducted in Chile - in a six-month span following 1972, another 29 Chileans graduated from Front Royal, an increase of almost 400 percent. The case of Chile, free trade and labour development is discussed in much more detail in Chapter 4 of my thesis.

¹⁵ “About Us”, online: The Solidarity Center <<http://www.solidaritycenter.org/content.asp?contentid=409>> (last accessed 13 June 2006).

¹⁶ *Ibid.* For example, the Solidarity Center strongly supported the World Bank’s adoption of a new performance standard incorporating Workers’ Rights and Working Conditions based on ILO Core Labour Standards. See Online: Solidarity Center <<http://www.solidaritycenter.org/files/IFC.pdf>> (Last accessed 13 June 2006)

¹⁷ *Ibid.*

¹⁸ Tamara Kay, “Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America.” (2005) 111(3) *Amer. J. of Soc.* 715 at 717. Kay notes the historical tendency of the U.S. labour movement to employ racist and nativist rhetoric as one of the factors that encouraged little transnational contact between the AFL-CIO and unofficial (not government sanctioned) Mexican unions, for example.

union leaders and members funded to promote activities against governments perceived as unfriendly to U.S. interests or policies.¹⁹ The Solidarity Center now appears to have changed its focus. Since the early 1990s, it has concentrated on opposing union activities that could undermine social stability²⁰ and free market economics in developing countries.²¹

My theory of labour development borrows from the AIFLD/Solidarity Center's free labor development policy. I view the American influence in establishing International Labour Standards and in guiding their implementation as a critical component in my labour development theory. I reject the neo-liberal economists' position that unrest in developing countries' labour sectors is a temporary side-effect of globalization, which they concede is a savage but necessary process.²² The neo-liberal position is that "far from being the greatest cause of poverty, globalization is the only feasible cure."²³ I adopt the position outlined by dependency theorists that worker and social unrest is a long-term effect of the structure of the global economy and the implementation of neo-liberal trade and development programs:

"The gap between a small, wealthy elite and the impoverished masses has grown to such astronomic proportions due to so-called development that many former "Third World" countries are in a state of endemic civil war."²⁴

¹⁹ *Supra*, note 8.

²⁰ Online: The Solidarity Center < > (Last accessed 13 June 2006). The Center admitted that IFI programs often cause social instability but then noted that "Workers blame the government, unaware that IFIs are the real adversaries."

²¹ Kim Scipes, "Free Labor from the Empire: Breaking the NED-Solidarity Center Connection" (19 July 2005) *MR Zine*, online: Monthly Review <<http://mrzine.monthlyreview.org/scipes190705.html>> (last accessed 14 June 2006).

²² John Micklethwait, Adrian Wooldridge, *A Future Perfect : The Challenge and Hidden Promise of Globalization*, (New York: Crown Business, 2000).

²³ "Globalisation and its Critics" *The Economist* (27 September 2001), online: Economist <http://www.economist.com/surveys/displayStory.cfm?story_id=795995> (last accessed 15 June 2006).

²⁴ Joke Schrijvers, *The Violence of Development* (Utrecht: International Books, 1993) at 23.

My concept of labour development is that it is a subset of international social development policies designed to respond now not to the threat of global communism but to the realities of globalization. Globalization has to some degree affected the ability of all states to control national economic and labour policies.²⁵ Globalization naturally appeals to “strong states with a large public sector that can afford education and a good social policy.”²⁶

It is the developing world with its weaker state structures that is the least able to cope with globalization's effects on labour. Labour development programs are most often directed against these developing states which do not have a large public sector or cannot afford extensive education and social policies. Unlike general social development programs which are designed to transform societies “as a whole”²⁷ with a multitude of government programs designed to bring about broad societal changes,²⁸ labour development targets one specific sector to increase globalization's appeal to developing countries.

Since labour development is now linked to globalization, which unlike the Cold War is a process seen by neo-liberal economists as positive and never-ending,²⁹ it is a long-term project linked to many other facets of the world economy. Most importantly, labour development is closely linked to economic development, a concept defined by the

²⁵ Michael Nicholson, “Globalization, Weak States, and Failed States”, online: Purdue University <http://www.ippu.purdue.edu/failed_states/1999/papers/Nicholson.html> (last accessed 16 June 2006).

²⁶ Ranveig Gissinger and Nils Petter Gleditsch, “Globalization and Citizenship” (1999) 2 J. of World Systems Res. 327 at 354.

²⁷ Paul, *supra* note 7.

²⁸ See “New Century, New Risks: Challenges for Social Development in Canada”, online: SDC <<http://www.sdc.gc.ca/asp/gateway.asp?hr=en/cs/sp/sdc/socpol/conferences/sp-624e/page10.shtml&hs=yxp>> (last accessed 29 May 2006).

²⁹ *Supra* note 22.

World Bank as

“qualitative change and restructuring in a country's economy in connection with technological and social progress. The main indicator of economic development is increasing GNP per capita (or GDP per capita), reflecting an increase in the economic productivity and average material wellbeing of a country's population. Economic development is closely linked with economic growth.”³⁰

The main indicators of successful economic development programs are sustained per capita GNP or GDP increases. Negative effects on a country's labour sector are not directly factored into calculating the success of economic development programs. Indeed, it is now widely accepted that economic development can have a negative impact on real income growth, employment availability and working conditions.³¹

1.1.3 Conflicts Between Labour and Economic Development Policies

Labour development as a policy is intended to offset the negative structural changes in national labour fields caused by economic development programs.³² It represents an attempt to restructure industrial relations to fit both within developed world concepts of international human rights and prevalent economic development theories. However, labour development in practice is a policy objective of tertiary importance, possibly because central aspects of the concept clash with the primary objective of

³⁰ Online: World Bank <<http://www.worldbank.org/depweb/beyond/global/glossary.html>> (last accessed 16 July 2006).

³¹ Werner Sengenberger, “The Role Of Labour Standards In Industrial Restructuring: Participation, Protection And Promotion” International Institute for Labour Studies Discussion Papers (1990), online: ILO <<http://www.ilo.org/public/english/bureau/inst/papers/1990/dp19/index.htm#toc>> (last accessed 1 June 2006).

³² For an example of Canadian rationale for its labour cooperation policy, see online: SDC <<http://www.hrsdc.gc.ca/en/lp/ila/Overview.shtml>> (last accessed 29 May 2006). “The International Trade and Labour Program (ITLP) is designed to help the Government of Canada meet its commitment to address the labour dimensions of international trade and economic integration. This commitment focuses on promoting good governance and the rule of law, respect for International Labour Standards, a more equitable distribution of the benefits of globalization, and participating in international efforts to improve respect for labour rights.”

economic development programs.

This clash arises because labour development emphasizes the human rights of workers, implying a political definition of development. The difficulty with this paradigm is that concepts of political development clash with the neo-liberal notion of economic development.³³ Political development is “informed by progressive social views [that] place a high priority on social justice, political equality, and (more recently) environmental justice.”³⁴ This contrasts with current neo-liberal theories of economic development which “have as their single goal the strengthening of a global capitalist market.”³⁵ As opposed to the modern notion of “political equality, neo-liberalism requires and thrives on inequality.”³⁶

Classical Marxist literature has long argued that inherently unequal systems function to support capital by lowering the cost of labour, as Wolpe observed in the early 1970s.³⁷ Expanding this analysis globally, Sklair categorized the global system as transnational practices operating within three spheres – the economic, the political and the cultural-ideological.³⁸ The global system is not synonymous with global capitalism but it is increasingly dominated by it.³⁹

Labour development has elements straddling all three spheres but resides mainly in the political sphere. Labour development operates within a functionalist framework,

³³ Ofelia Schutte, “Feminism and Globalization Processes in Latin America” from M. Saenz, ed. *Latin American Perspectives on Globalization* (Lanham, MD: Rowman and Littlefield, 2002) at 185.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Harold Wolpe, *Race, Class & the Apartheid State* (London : Currey, 1988). Wolpe analyzed the functioning of South African Bantustans to reach this conclusion. [“Wolpe”]

³⁸ Leslie Sklair, “Transnational Practices And The Analysis Of The Global System”, Seminar delivered for the Transnational Communities Programme Seminar Series, (22 May 1998) at 2.

³⁹ *Ibid.*

one where individual purpose and action is bypassed by governments, law and policy makers by explaining, on a “macro-level,” the benefits to individual actors of the global policy of development.⁴⁰ Labour development functions in this model as a cooperative adjunct facilitating the breaking down of trade barriers. I have thus adopted a functionalist critique of labour development in this thesis.

Labour development represents a departure from the neo-liberal view of economists such as Friedman, who argued that a global pool of low-wage, inexpensive labour was the key to prosperity and growth for underdeveloped countries and the continuing expansion of world trade:

“The possibility for labor and capital anywhere to cooperate with labor and capital anywhere else had dramatic effects...It meant that there was a large supply of relatively low-wage labor to cooperate with capital from the advanced countries, capital in the form of physical capital...this international linkage of labor, capital and know-how had already led to a rapid expansion in world trade, to the growth of multinational companies and to a hitherto unimaginable degree of prosperity in such formerly underdeveloped countries in East Asia as the "Four Tigers." Chile was the first to benefit from these developments in Latin America, but its example soon spread to Mexico, Argentina and other countries in the region. ...[these developments added to] the pool of low-wage, yet not necessarily unskilled labor that could be tapped for cooperation with labor and capital from the advanced countries.”⁴¹

Within this argument labour, and in particular the vanishing industrial worker, becomes a highly sought after and increasingly scarce resource. Neo-liberal globalization functions to exploit this resource. “By linking scarcity to price, the universal gospel of

⁴⁰ Johann Graaff, “Struggling with the Impasse: Has Development Theory Been Able to Re-Invent Itself?”, online: Council for the Development of Social Science Research in Africa <http://www.codesria.org/Links/conferences/general_assembly11/papers/graaff.pdf> (last accessed 2 April 2006).

⁴¹ Milton Friedman, “Public Schools: Make Them Private” Cato Institute Briefing Paper No. 23, (23 June 1995), online: Cato Institute <<http://www.cato.org/pubs/briefs/bp-023.html>>.

liberal thought teaches that exploiting scarcity is the fountain of all wealth.”⁴²

1.1.4 Globalization and Worker Transformation

Although neo-liberal globalization has not brought about the “unimaginable” prosperity Friedman spoke of to all workers, it is indisputably leading to the transformation of the worker and the type of work he or she is now engaging in. The industrial working class has “all but disappeared from view” and is being replaced by a new type of worker specializing in the process of “immaterial labour” such as communications, cooperation and reproduction of effects.⁴³ Along with this transformation has come a destruction of long-held labour values on a global scale. This has resulted in what Hardt and Negri termed a “continual instability” arising from the destruction of old values that served as reference points for international public law.⁴⁴

As the link between *civil society*⁴⁵ and labour has long been established in

⁴² Jean de Maillard, “The Dark Side of Globalization” (April 2000) *Le Monde Diplomatique*, online: *Le Monde* <<http://mondediplo.com/2000/04/06maillard>> (last accessed 16 June 2006).

⁴³ Michael Hardt and Antonio Negri, *Empire* (Cambridge, Mass.: Harvard University Press, 2000) at 53. See also online: *cyberfeminism.net* <http://www.cyberfeminism.net/biopower/bp_aboutbp.html> (last accessed 17 June 2006). “Hardt and Negri identify 3 kinds of ‘immaterial’ labour: 1. “Informatized” industrial labor that has become a service to the market; 2. Analytical and symbolic labor—knowledge work both creative and routine; 3. Production and manipulation of affect labor. Involves human contact, and includes bodily labor.”

⁴⁴ *Ibid.* at 62.

⁴⁵ “Civil society” is a multifaceted and contested term that requires a definition. Webster's *New Millennium Dictionary of English* defines “civil society” as “the aggregate of non-governmental organizations and institutions that manifest interests and will of citizens; individuals and organizations in a society which are independent of the government.” In my argument, I use the term in the context developed by Hegel as analyzed by Hardt and Negri. See *Supra* note 43 at 328. “Hegel adopted the term “civil society” from his reading of British economists, and he understood it as a mediation between the self-interested endeavors of a plurality of economic individuals and the unified interest of the state. Civil society mediates between the (immanent) Many and the (transcendent) One. The institutions that constitute civil society functioned as passageways that channel flows of social and economic forces... These non-state institutions, in other words, organized capitalist society under the order of the state and in turn spread state rule throughout society. In the terms of our conceptual framework, we might say that civil society was the terrain of the becoming-immanent of modern state sovereignty (down to capitalist society) and at the same time inversely the becoming-transcendent of capitalist society (up to the state). Hardt & Negri, *Empire* at 328.

political theory⁴⁶ the transformation of labour is resulting in profound effects for civil society. Labour development is meant to address part of what Hardt termed the “withering” of civil society due to a loss of social cohesion caused by globalization.⁴⁷ Workers positions in civil society have become more precarious, as methods of production have shifted from predicting market demand to responding to it.⁴⁸ Workers stability in civil society depends more now on market fluctuations than in the past.

Immaterial labour poses a particular challenge to labour development programs. It reflects what Hardt and Negri describe as an entirely “new human condition”

“In an earlier era workers learned how to act like machines both inside and outside the factory...Today we increasingly think like computers, while communication technologies and their model of interaction are becoming more and more central to labouring activities...The same kind of continual interactivity characterises a wide range of contemporary productive activities, whether computer hardware is directly involved or not. The computer and communication revolution of production has transformed labouring practices in such a way that they all tend toward the model of information and communication technologies.”⁴⁹

Former U.S. Labour Secretary Robert Reich described this type of work as an essential component to achieving competitiveness in today’s globalized economy.⁵⁰ This is key to understanding why labour development programs contained in labour cooperation accords repeatedly emphasize the importance of exporting developed world models of labour and communication technologies to developing world trading partners.⁵¹

The computerization of work in many instances has led to the worker becoming

⁴⁶ See Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (Oxford: Oxford University Press, 1952).

⁴⁷ Michael Hardt, “The Withering of Civil Society” (1995) 45 *Social Text* 27.

⁴⁸ *Supra* note 43 § 3.4. Hardt and Negri contrast the example of “Fordism”, with its assurance that its product would have a market, to “Toyatism” with its need to listen to market demands in its production methods.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ See Chapter 4 in particular as the CICALC and CCRALC contain numerous programs designed to facilitate the export of Canadian labour models in the communication and technology fields.

“increasingly further removed from the object of his or her labour” while “social interaction and cooperation” is “completely inherent to the [immaterial] labour itself.”⁵² As Hardt and Negri point out, this has the potential to create a “kind of spontaneous and elementary communism” organized from within labour. Immaterial labour is “articulating itself (i.e. both joining and expressing itself) not on the model of the national-industrial-capitalist union organization but on that of the global-labour-solidarity network.”⁵³

Worker alienation⁵⁴ has not vanished. It is increasingly expressing itself through this network in opposition to neo-liberal globalization. These “new” labour and social movements are “an integral element for a progressive solution” to the social and labour dislocation caused by globalization - the so-called “Polanyi Problem.”⁵⁵

Polanyi’s review of the market’s function is a complex one, but at its basic core, his analysis determined that a self-regulating market “could not exist for any length of time without annihilating the human and natural substance of society.”⁵⁶ He argued that the unsustainable nature of these markets created a natural “protective reaction” by “a variety of social groups, including a portion of the elite” within nation-states.⁵⁷

⁵² *Supra* note 43 at § 3.4.

⁵³ Peter Waterman, “From ‘Decent Work’ to ‘The Liberation of Time from Work’: Reflections on Work, Emancipation, Utopia and the Global Justice and Solidarity Movement”, online: InterActivist <<http://info.interactivist.net/article.pl?sid=05/03/24/170247>> (last accessed 17 June 2006).

⁵⁴ Bertell Ollman, *Alienation: Marx's Conception of Man in Capitalist Society* (Cambridge, NY: Cambridge Univ. Press, 1976)

⁵⁵ Ronaldo Munck, “Globalisation, Labour And The Polanyi Problem, Or, The Issue Of Counter-Hegemony”, online: The Global Site <<http://www.theglobalsite.ac.uk/press/402munck.htm>> (last accessed 17 June 2006). “Polanyi wrote of how a self-regulating market ‘could not exist for any length of time without annihilating the human and natural substance of society.’” See Karl Polanyi, *The Great Transformation The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001) at 3.

⁵⁶ *Ibid.* See also Karl Polanyi, *The Great Transformation The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001) at 3.

⁵⁷ Peter Evans, *Counter-Hegemonic Globalization: Transnational Networks as Political Tools for Fighting Marginalization* (2000) 29:1 Contemporary Sociology 230 at 234-238.

Unfortunately, Polanyi concluded that this protective reaction could not provide a defense against international markets that, unlike national markets, were unregulated.⁵⁸ Ruggie's concept of "embedded liberalism" or the promotion of international institutionalized liberalism combined with domestic autonomy among nation-states to pursue their own independent social programs, was the response of the industrialized world to the economic and political shocks of the 1920s and 1930s.⁵⁹ Ruggie noted that following the Second World War, the industrialized states of the West struck

"a grand social bargain" whereby "all sectors [of individual states] agreed to open markets" and to "contain and share the social adjustment costs that open markets inevitably produce. That was the essence of the embedded liberalism compromise: economic liberalization was embedded in social community."⁶⁰

Embedded liberalism aided in the post-war production of unparalleled growth and prosperity in the western, developed world.⁶¹ The spread of neo-liberal globalization and economic development theories marked the beginning of the end for embedded liberalism.⁶² Blyth termed the "disembedding of liberalism" largely as a return to 1930s style economic theories, combined with "unsustainable [international] structures" such as the Bretton Woods institutions.⁶³ Embedded liberalism had depended upon the power of the nation-state to regulate and prevent social dislocations, but now social instability caused by globalization is beyond the power of national politics to resolve.⁶⁴ Blyth cites

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ John Ruggie, "Taking Embedded Liberalization Global: The Corporate Connection" in *Taming Globalization: Frontiers of Governance*, eds. David Held and Mathias Koenig-Archibugi (Cambridge: Polity Press, 2003) at 1.

⁶¹ *Supra* note 57.

⁶² *Ibid.*

⁶³ Mark Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (Cambridge: Cambridge Univ. Press, 2002) at 126-127. The Bretton Woods institutions are the World Bank and the International Monetary Fund (IMF).

⁶⁴ *Supra* note 57.

four neo-liberal economic theories – monetarism⁶⁵, rational expectations⁶⁶, supply-side⁶⁷ and public choice⁶⁸ – that essentially “disembedded liberalism” and caused a reappearance of the Polanyi problem.⁶⁹

Munck’s analysis of the contemporary Polanyi Problem includes two points relevant to labour development. First, Munck notes that a “strategy of counter-hegemony for the labour and the new social movements today” is Polanyi’s most relevant contribution to the current discourse of labour’s resistance to neo-liberal globalization.⁷⁰

“Polanyi directs us away from class essentialism and towards an understanding that counter-hegemony will be a broad social and political spectrum seeking to represent the general interest of humanity.”⁷¹

Secondly, Munck’s analysis notes the interaction within social relations between workers and organized labour movements on the one hand and civil society on the other.⁷² Organized labour is a key player in this interaction, as well as being a key

⁶⁵ Online: <<http://www.bartleby.com/59/18/monetarism.html>> (last accessed 23 June 2006). *Monetarism* generally refers to the “economic doctrine that the supply of money has a major impact on a nation’s economic growth...monetarists prefer to control inflation by restricting the growth of a nation’s money supply rather than by raising taxes.” Milton Friedman is among the most prominent of economists associated with the doctrine.

⁶⁶ Online: <<http://william-king.www.drexel.edu/top/Prin/txt/controvl/RE1.html>> (last accessed 23 June 2006). *Rational expectations* economic theory generally refers to expectations that make “efficient use of all available information, allowing for the cost of the information. Since information can be costly, expectations can be rational and nevertheless still not be very accurate.”

⁶⁷ Online: *Supply-Side* economics generally related an economic theory that “increased availability of money for investment, achieved through reduction of taxes especially in the higher tax brackets, will increase productivity, economic activity, and income throughout the economic system.”

⁶⁸ Online: *Public choice* can be broken down to be defined. “‘Choice’ is the act of selecting from among alternatives. ‘Public’ refers to people...A person makes private choices as he goes about the ordinary business of living. He makes “public choices” when he selects among alternatives for others as well as for himself. Such choices become the objects of inquiry in Public Choice. While traditional economic theory has been narrowly interpreted to include only the private choices of individuals in the market process, traditional political science has rarely analyzed individuals’ choice behavior. Public Choice is the intersection of these two disciplines; the institutions are those of political science, and the method is that of economic theory.”

⁶⁹ *Supra* note 63.

⁷⁰ *Supra* note 55.

⁷¹ *Ibid.*

⁷² *Ibid.*

component of labour development. The participation of the International Metalworkers' Federation in the 2003 World Social Forum is an example of engagement with the anti-globalization movement.⁷³ By attempting to strengthen the position of workers within civil society, labour development attempts to accommodate labour's concerns about neo-liberal globalization.

In this way, the tools of labour development – the ILO, International Labour Standards, Labour Cooperation Agreements, and the like – are meant to preserve the educative role of labour in not just providing self-seeking enjoyment but in providing a “contribution to the needs of everyone else.”⁷⁴ The ILO itself does not “simply collaborate with non-governmental organizations but actually integrates sectors of civil society into its structure” through its unique tripartite governance structure.⁷⁵

Labour development aids in what Gramsci has postulated as the ultimate goal of the “re-absorption of political society within civil society.”⁷⁶ Gramsci argued that a dominant social class maintained its domination or “hegemony” not only through violent repression but “by constantly reevaluating its goals and interests and by making strategic alliances, often through compromise.”⁷⁷ Applying Gramsci's analysis of a “passive revolution” to social movements focusing on labour issues, I posit that labour NGOs' success has confronted them with a fundamental choice – a narrow alliance with

⁷³ *Ibid.*

⁷⁴ Hegel, *supra* note 46 at paragraph 199; Hardt, *supra* note 47 at 29.

⁷⁵ Online: ILO <<http://www.ilo.org/public/english/comp/civil/ngo/relnghios.htm>> (last accessed 16 June 2006). The ILO's tripartite structure refers to the inclusion of governments, workers, employers in three governing bodies.

⁷⁶ Antonio Gramsci, *Selections from the prison notebooks of Antonio Gramsci* (New York: International Publishers, 1971) at 253 Ed. And Trans. by Quintin Hoare and Geoffrey Nowell Smith. Antonio Gramsci, Italian political thinker and anti-fascist activist, developed the Marxist concept of “hegemony” and the concept of a “passive revolution.”

⁷⁷ Online: Watson Institute <http://www.watsoninstitute.org/events_detail.cfm?id=530> (last accessed 2 July 2006).

“friendly” governments and corporations or continuance of a broad-based labour movement.⁷⁸ The alliance between developed nations and some labour NGOs helps perpetuate the process of neo-liberal globalization. In order to continue the alliance, developed states acquiesce in the political sphere to some demands made by workers through international labour conventions and labour cooperation agreements.⁷⁹ This requires a discussion of national sovereignty and international law within the context of labour cooperation agreements and international labour conventions.

1.1.5 Sovereignty and Labour Development

In general, globalization has rendered the notion of national sovereignty increasingly unclear. As Cohen notes

“The constituency of the state is no longer only or simply a population of citizens defined by territorial borders and demanding protection from forces outside of those borders. It is increasingly the global economy and its dominant actors and institutions themselves.”⁸⁰

The global economy and its institutions have only taken upon themselves certain aspects of sovereignty. The nation-state remains the “guarantor of social cohesion” and maintains “economic, industrial and labour policy at a national level.”⁸¹ Generally, relations between states continue to be maintained on the Westphalian principle that “one sovereign state should not interfere in the domestic arrangements of another.”⁸²

⁷⁸ *Ibid.* For this model, I use Simone Pulver’s ideas, which she applied in the context of “passive revolution” and environmental NGOs such as Greenpeace.

⁷⁹ *Supra* note 76.

⁸⁰ Edward Cohen, “Globalization and the Boundaries of the State: A Framework for Analyzing the Changing Practice of Sovereignty.” (2001) 14:1 *Governance* 75 at 83.

⁸¹ Noëlle Burgi and Philip S Golub, “Has Globalisation Really Made Nations Redundant? The States We Are Still In” (April 2000) *Le Monde Diplomatique*, online: *Le Monde* <<http://mondediplo.com/2000/04/07golub>> (last accessed 16 June 2006).

⁸² John Quiggin, “Symposium on Globalization: Globalization and Economic Sovereignty.” (2001) 9:1 *The J. of Pol. Phil.* 56.

Nationalism is a by-product of the 1648 Treaty of Westphalia nation-state system.⁸³ Freedman notes that nationalism “may not meet the criteria of a comprehensive ideology” but that its conceptual framework may be found in other ideologies.⁸⁴ In the contemporary era, nationalism has found its dominant expression through “nationalist discourse within liberal ideologies” although it has been present within conservatism and, of course, fascism.⁸⁵

Freedman argues that nationalism in liberal ideologies is the only acceptable outlet for human emotion in public discourse, which is commonly referred to as patriotism.⁸⁶ Though patriotism is “conceptually and historically distinct from nationalism” its actual use in liberal societies acts to moderate nationalist feelings and expressions.⁸⁷ It also acts to legitimize the use of national laws in the name of a patriotic cause or feeling. American opposition to extending protections and legal status to Mexican migrant workers in the United States is often cloaked in expressions of patriotism.⁸⁸

International law in contrast “has always been implicitly cosmopolitan in its

⁸³ There is much debate about the continued relevance of the Westphalian system in international relations. See Stephan D. Krasner and Alexander Wendt, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999). I adopt the position of most theories of nationalism that assume a European origin of the nation-state with the modern nation-state being a product of the Treaty of Westphalia. The Treaty of Westphalia brought to an end the Holy Roman Empire and mutually recognized European state sovereignty and territorial jurisdiction.

⁸⁴ Michael Freedman, “Is Nationalism a Distinct Ideology?” (1998) 748:4 *Pol. Studies* 748 at 751.

⁸⁵ *Ibid.* at 759-763.

⁸⁶ *Ibid.* at 764.

⁸⁷ *Ibid.*

⁸⁸ Right-wing, anti-immigrant groups in the United States have frequently invoked patriotism to justify nativist feelings and to President Bush’s proposals to legalize the status of some migrant workers in the United States. For example, online: American Resistance Foundation <<http://www.theamericanresistance.com/info/about.html>> (last accessed 17 June 2006). “Our intentionally unsecured borders and our government’s deliberate and unapologetic lack of enforcement of our immigration and employment laws is merely a necessary step to a much larger goal - a ‘New America’ in a ‘North American Community.’ A New America that would replace the traditional self-governing ‘Old America’ for which our founders sacrificed and our grandfathers fought to pass on.”

orientation.”⁸⁹ Ideas perceived as cosmopolitan have often clashed with nationalist or patriotic campaigns designed to rally a state’s citizens in a common purpose.⁹⁰ Cosmopolitanism, like nationalism, is not a coherent ideology but more of a framework of moral viewpoints that offers purpose of action to a community:

“The nebulous core shared by all cosmopolitan views is the idea that all human beings, regardless of their political affiliation, do (or at least can) belong to a single community, and that this community should be cultivated...The philosophical interest in cosmopolitanism lies in its challenge to commonly recognized attachments to fellow-citizens, the local state, parochially shared cultures, and the like.”⁹¹

Much as nationalism or patriotism operates through national laws, cosmopolitanism has the capacity to act through international law.⁹² Immanuel Kant has been noted as the “greatest philosopher” to argue for the existence of absolute moral law⁹³ which combines concepts of cosmopolitanism and law. While a detailed discussion of Kant’s political writings is outside the scope of this thesis, it is necessary to review Kant’s basic theories relating to cosmopolitan law and the rationale behind them.

Kant argued that the joining of humanity’s innate capacity for reason with its inherent longing for freedom could formulate a new legal order that was not based on

⁸⁹ Ruth Buchanan, “Perpetual Peace or Perpetual Process: Global Civil Society and Cosmopolitan Legality at the World Trade Organization” (2003) 16 *Leiden J. of Int’l L.* 673.

⁹⁰ For example, both Nazi Germany and the Soviet Union emphasized the rooting out of “rootless cosmopolitanism” in anti-Semitic, nationalist and patriotic campaigns.

⁹¹ Online: Stanford University <<http://plato.stanford.edu/entries/cosmopolitanism/>> (last accessed 16 June 2006).

⁹² The most successful attempts at cosmopolitanism in practice include the small advances made trans-nationally by the European Union in areas such as the elimination of environmentally destructive products. For example, the EU’s Waste Electrical and Electronic Equipment Directive forbids corporations from exporting lead-containing products to the EU. The EU’s market size essentially forces corporations to remove an environmentally damaging chemical from their product if they hope to sell it within the EU market. See EU Directive 2002/95/EC “on the restriction of the use of certain hazardous substances in electrical and electronic equipment” and 2002/96/EC “on waste electrical and electronic equipment”, online: Europa <http://ec.europa.eu/environment/waste/weee_index.htm> (last accessed 16 June 2006).

⁹³ Online: BBC <http://www.bbc.co.uk/radio4/history/inourtime/greatest_philosopher_immanuel_kant.shtml>. As advocated by Anthony Grayling, Reader in Philosophy at Birkbeck College, University of London.

social inequalities or political repression.⁹⁴ He also argued that human nature produces situations whereby states are inherently subject to threats from other states and must be constrained by international laws:

“The will to subjugate the others or to grow at their expense is always present, and the production of armaments for defence, which often makes peace more oppressive and more destructive of internal warfare than war itself, can never be relaxed. And there is no possible way of counteracting this except a state of international right, based upon enforceable public laws to which each state must submit.”⁹⁵

Kant rejected the conception of a just international order based on balance of power theory, preferring instead to opt for universal laws based on the “principle of right” in “relationships between men and states.”⁹⁶ He did not argue for a single world state, dismissing it as “contradictory” to the supreme relations between individual states and their citizens.⁹⁷ Kant’s conception of a “federation of peoples” was designed to internationally extend the protection of law to people living in groupings of nation-states.⁹⁸ He did not reject an international credit system as an instrument for international cooperation and national development.⁹⁹ He did warn of the dangers of such a system and advocated the legal prohibition of foreign debts connected to international aggression.¹⁰⁰

Kant’s conception of cosmopolitan law broke an historical “tendency to restrict

⁹⁴ Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence As the Science of Right*, trans. W. Hastie (Edinburgh: T&T Clark, 1887).

⁹⁵ Immanuel Kant, “On the Relationship of Theory to Practice in International Right” in H. Reiss, ed., *Kant: Political Writings* (Cambridge: Cambridge University, 1993) at 91-92.

⁹⁶ *Ibid.* at 92.

⁹⁷ *Ibid.* at 102.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* at 95.

¹⁰⁰ *Ibid.* Interestingly, Kant also concluded on that point with this warning to a state that essentially uses aggression as a military fund. “Other states are therefore justified in allying themselves against such a state and its pretensions.”

legal and political philosophy to the 'national' level, and responds to its concentration on single communities with a global and cosmopolitan perspective."¹⁰¹ Kant's rejection of a single world state and corresponding institutions did not prevent him from advocating for the place of law in the international order. Kant equated the absence of law with the type of freedom enjoyed by individual men living "in a state of nature" or as "savages."¹⁰² His application of cosmopolitan law to universal hospitality in the treatment of one state's citizens by another is both an anti-colonial argument and a plea for international legal regulations to bring the human race "nearer and nearer to a cosmopolitan constitution."¹⁰³

Kant's theories of cosmopolitan law addressed the injustices created by the Westphalian system. A main feature of that system is the ultimate sovereignty of the state.¹⁰⁴ The result of this is that the system tacitly sanctions "all manner of persecution occurring within state borders."¹⁰⁵ Only after the Second World War and the horrors committed by Germany and Japan were widely publicized did the international community begin to actively implement cosmopolitan legal ideas through the creation of international institutions such as the U.N. and the expansion of the ILO.¹⁰⁶

In the second half of the twentieth century, international institutions such as the UN and ILO dominated the application of cosmopolitan laws. Cosmopolitan law is not constricted by state sovereignty but it does not necessarily require a hierarchical

¹⁰¹ Otfried Hoefle, *Kant's Cosmopolitan Theory of Law and Peace* (Cambridge: Cambridge Univ. Press, 2006) at 2-3.

¹⁰² Immanuel Kant, "Perpetual Peace", *supra* note 95 at 102.

¹⁰³ *Ibid.* at 108.

¹⁰⁴ *Supra* note 91.

¹⁰⁵ Richard Wolin, "Kant at Ground Zero", online: The New Republic <<http://www.tnr.com/doc.mhtml?i=20040209&s=wolin020904&c=2>> (last accessed 17 June 2006).

¹⁰⁶ *Ibid.*

institution for its implementation.¹⁰⁷ De Sousa Santos cites the World Social Forum as an example of counter-hegemonic cosmopolitan legality.¹⁰⁸ Buchanan writes that “cosmopolitan legality” has become the force driving global civil society’s contemporary engagement with the WTO.¹⁰⁹ Both of these cases are examples of a “bottom-up approach to law and globalization.”¹¹⁰

Labour Cooperation Agreements such as the NAALC and CCALC in particular incorporate some elements of this bottom-up approach and potentially challenge the concept of Westphalian Sovereignty. The NAALC, the first agreement that established a linkage between trade and labour standards, will be discussed in greater detail in Chapter 3, but for the purposes of this section it is relevant to note that its complaints mechanism empowers non-state actors and legitimizes them within the system of international law.¹¹¹ Knox argues that the NAALC and its sister environmental agreement, the NAAEC, represent an “unprecedented deviation” from the traditional Westphalian framework of state-to-state relations.¹¹² He examines the enforcement mechanisms of the NAALC and NAAEC focusing on their “post-Westphalian” citizen submissions procedure and their effectiveness.¹¹³

Knox provides considerable empirical evidence to support his argument that in

¹⁰⁷ Pavlos Eleftheriadis, “Cosmopolitan Law” (2003) 9:2 European L. J. 241.

¹⁰⁸ Boaventura de Sousa Santos, “Beyond Neoliberal Governance: The World Social Forum As Subaltern Cosmopolitan Politics And Legality” in de Sousa Santos and César A. Rodríguez-Garavito, eds., *Law And Globalization From Below: Towards A Cosmopolitan Legality* (Cambridge: Cambridge Univ. Press, 2006) at 29.

¹⁰⁹ Ruth Buchanan, “Perpetual Peace or Perpetual Process: Global Civil Society and Cosmopolitan Legality at the World Trade Organization” (2003) 16 Leiden J. of Int’l L. 673. at 675.

¹¹⁰ *Supra* note 108 at 5.

¹¹¹ John H. Knox “Separated at Birth: The North American Agreements on Labor and the Environment” (2004) 26 Loy. L.A. Int’l & Comp. L. Rev. 359. Non-state actors empowered by the NAALC include a wide variety of groups, including trade unions, NGOs, law schools, and law firms as well as individual workers and citizens.

¹¹² *Ibid.*

¹¹³ *Ibid.* at 375.

contrast to traditional Westphalian state-to-state interaction in the international arena, post-Westphalian procedures can be more effective at promoting compliance with international environmental and labour norms.¹¹⁴ The key to fostering state compliance, as Graubart points out in a study of labour and environmental submissions procedures under the NAALC and NAAEC, is an effective political campaign to draw public attention to labour and environmental complaints.¹¹⁵ In contrast to these post-Westphalian procedures, trade sanctions used as punishment for labour violations may not induce greater state compliance with labour and environmental norms.¹¹⁶ Instead, he argues for more opportunities for non-governmental actors to participate at the international level in the creation, implementation, and enforcement of labour and environmental standards.¹¹⁷ This conclusion has been adopted by the Canadian government in its labour cooperation policy, and will be discussed in greater detail in Chapter 4.

In practice, the NAALC has not fulfilled its promise to act as an effective post-Westphalian instrument. One of the reasons for this is an element that Knox does not expand upon in his analysis - the conflict between the goals of free trade and labour development. As Sassen notes, the parties to the NAFTA and the NAALC must “reconcile the conflicting requirements of border-free economies and border controls to

¹¹⁴ *Ibid.* at 376-385.

¹¹⁵ Jonathan Graubart, “Giving Teeth to NAFTA’s Labour Side Agreement” in John Kirton and Virginia Maclaren, eds., *Linking Trade, Environment and Social Cohesion* (Aldershot: Ashgate, 2002) at 203-204.

¹¹⁶ *Supra* note 111 at 385-386. There is also the moral argument used to oppose trade sanctions against all countries, whether the country involved is China or Cuba. Some religious groups in the United States have advanced the political argument that the American government should not punish human rights violators through sanctions, but rather maintain that the “best policy for promoting freedom and human rights remains economic and moral engagement.” See online: [freetrade.org](http://www.freetrade.org) <<http://www.freetrade.org/pubs/briefs/tpb-002.html>> (last accessed 22 June 2006).

¹¹⁷ *Supra* note 115.

keep immigrants out.”¹¹⁸ Immigration is one key area where governments have been reluctant to surrender sovereignty. Sassen writes that "a fundamental framework roots all the immigration policies of the developed countries in a common set of conceptions" designed to regulate the movement of workers and protect their economies.¹¹⁹ Globalization, specifically the “formation of economic links...may invite the movement of people.”¹²⁰ Labour development – rooted in the conception of basic trans-national human rights for workers - conflicts with immigration laws and policies because "human rights are not dependent on nationality, unlike political, social, and civil rights."¹²¹

The internationalization of workers’ rights through claims brought under an agreement such as the NAALC would in theory allow a quasi-judicial body to mediate “between these agents [workers] and the international legal order.”¹²² This would support Sassen’s claim that there has been a shift to individuals’ rights “from an exclusive emphasis on the sovereignty of the people and right to self-determination.”¹²³ She writes that this shift has resulted in a devaluing of national citizenship affecting "the configuration of the international order.”¹²⁴ However, this represents a positive step for labour development in that it could allow for the defense and attribution of rights to workers in states that do not enforce internationally guaranteed labour standards.¹²⁵

¹¹⁸ Saskia Sassen, *Losing Control? : Sovereignty In An Age Of Globalization* (New York: Columbia University Press, 1996) at 93.

¹¹⁹ *Ibid.* at 64.

¹²⁰ *Ibid.* at 84.

¹²¹ *Ibid.* at 89.

¹²² *Ibid.* at 95. This is a theoretical possibility since no cases brought before the NAALC have reached the Arbitration stage.

¹²³ *Ibid.*

¹²⁴ *Ibid.* at 96-97.

¹²⁵ The expansion of legal rights to various sectors of society and the development of human rights law may also lead to an expanded analysis of moral rights and legal issues related to human rights law and international labour standards in contemporary American political discourse. See Carl Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (Boulder, Colorado: Westview Press, 1999).

Notwithstanding the growing influence of non-governmental actors as a counter-hegemonic force, national governments continue to drive forward the process of globalization. “There is much lamenting over the powerlessness of national governments...yet these very governments are contributing fully to the elaboration and implementation of the new hegemonic political economy.”¹²⁶ Officials of developing countries such as former Mexican President Ernesto Zedillo are now prominent among those who challenge the presumption of the nation-state as a powerless force being steamrolled by globalization:

“It is commonly believed that globalization is forcing nation-states to adapt. This view considers that modern globalization is mainly a result of technological progress in production methods, transport, and telecommunications. It attributes to nation-states a somewhat reactive, even passive, role in the process. I dispute the validity of this view because it does not correspond with practical experience and it can also lead to mistaken policy decisions. I believe that modern globalization has occurred not in spite of the nation-state, but really, to a significant extent, because of decisions and actions taken by nation-states.”¹²⁷

Zedillo’s statement is important because it implicitly challenges the assumption that globalization is “inevitable.”¹²⁸ As globalization unfolds, nation-states are affecting the “rate of change” but not challenging the process itself.¹²⁹ Labour development represents one approach used by national governments to lessen labour’s resistance to this process. Social development programs represent another approach to counter the

Ronald Dworkin has also argued for a society and legal system that functions with some sort of coherence within a principled framework. See Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Belknap Press, 1986).

¹²⁶ *Supra* note 81.

¹²⁷ Ernesto Zedillo, Remarks to the 2001 annual meeting of the Trilateral Commission in London., online: Trilateral Commission <<http://www.trilateral.org/annmtgs/trialog/trlgtxts/t55/zed.htm>> (last accessed 17 June 2006).

¹²⁸ Keith Porter, “Globalization is Inevitable” (10 February 2004) *Miami Herald* A4. Nobel prize winning economist Daniel McFadden spoke on globalization at a conference in Cuba.

¹²⁹ *Ibid.* The role nation-states play within this system was identified by Polanyi within the first “great transformation.”

resistance to globalization. Burgi and Golub note that “as the combined effect of the measures comes to be felt, they too are experienced as *faits accomplis*.”¹³⁰ It is now necessary to examine the legal and social backgrounds that form the basis for these measures.

1.2 Labour Development’s First Tools: International Labour Standards

Historically, attempts to internationally regulate labour have always been infused with a certain amount of idealism that often did not reflect the inherent difficulty of improving working conditions. The late U.S. Senator Daniel Patrick Moynihan, in his doctoral dissertation on the ILO, remarked that “the practicality of the idea of international labour legislation derives not so much from the fact that the assumptions on which it is based were true as that they were thought to be true.”¹³¹ The creation of the ILO and the development of International Labour Standards mirror shifting geopolitical landscapes throughout the twentieth century. In order to understand the impetus behind regulating international labour, it is first necessary to briefly review where the concept of labour development came from and how it has been subsequently implemented.

The demand for International Labour Standards originated primarily from the Communitarian movement of mid-19th century Great Britain. One of the strongest proponents from that movement was industrialist and philanthropist Robert Owen who saw the development of International Labour Standards as an altruistic duty that was also

¹³⁰ *Ibid.*

¹³¹ Daniel Patrick Moynihan, “The United States and the International Labor Organization, 1889-1934” (Ph.D. diss., Fletcher School of Law and Diplomacy, 1960) at 3.

in the self-interest of British industry.¹³² Owen's management experience and the worsening conditions prevailing for workers in Britain in the aftermath of the Napoleonic wars convinced him that the injustices of modern capitalism, especially the poverty he saw arise in 19th century British working class, could be solved through a combination of socialism and a communitarian experiment.¹³³

Owen's ideas provided an essential foundation for the development of International Labour Standards, as well as the international organization necessary to develop policies and laws regulating the international conditions of workers. There were several unsuccessful attempts in the late 19th century to transform these ideas into law, most notably a failed 1890 International Labour Standards conference in Berlin.¹³⁴ Real progress in formulating International Labour Standards would not be achieved until the creation of the ILO in 1919.

The aftermath of the First World War saw a radicalization and empowerment of labour throughout the industrialized world representing a revolutionary threat to governments and employers. Essentially, the two possible responses to this involved either repression – in the form of Fascism developing in Italy in 1922 – or some form of accommodation through the development and regulation of International Labour Standards.¹³⁵ A concerted effort was then directed by the victorious Allied powers to establish a system of international law relating to labour and employment conditions.

¹³² William B. Gould, "Labor Law for a Global Economy: The Uneasy Case for International Labor Standards" in Gould and Flanagan, eds., *International Labor Standards* (Stanford, Stanford Univ. Press, 2003) at 81, 83, 85. ["Gould"]

¹³³ Robert Owen, *The Life of Robert Owen* (London: Wilson, 1867).

¹³⁴ Gould, *supra* note 132 at 83; Denis MacShane, "Human Rights and Labor Rights: A European Perspective" in Compa and Diamond, eds., *Human Rights, Labor Rights, And International Trade* (Philadelphia, Univ. of Philadelphia Press, 1996).

¹³⁵ Bruce E. Kaufman, *The Global Evolution of Industrial Relations* (Geneva: International Labour Office, 2004) at 79. ["Kaufman"]

The ILO was thus born as a reaction to events leading up to the Versailles Peace Conference in 1919. The creation of the ILO also reflected a larger process following Versailles, the creation of a system which sought a balance between Marxism and unregulated free trade.¹³⁶

1.2.1 Implementation of International Labour Standards

The movement to implement International Labour Standards involved several industrialized (or what are now referred to as developed) countries, primarily the leading European powers and the United States. I am focusing on the particular role of the United States primarily because of the unique nature of American exceptionalism, and the leading role it played in shaping International Labour Standards, the ILO, and the evolution of labour development, even through the enactment of domestic laws. As early as 1930, the *Smoot-Hawley Tariff Act* defined forced labour in very similar terms to an ILO Convention that would be enacted two decades later.¹³⁷

There have also been attempts made to utilize American legislation in the form of the *Alien Tort Claims Act* to prosecute international labour rights violations.¹³⁸ The type of prosecutions initiated under the *Alien Tort Claims Act* would be violations as construed under American law, and thus under American norms and notions of labour development. A recent U.S. Court decision, *Sosa v. Alvarez-Machain*, placed limits on the use of the

¹³⁶ Edward C. Lorenz, *Defining Global Justice: The History of U.S. International Labor Standards Policy* (Notre Dame, Ind.: University of Notre Dame, 2001) at 14. ["Lorenz"]

¹³⁷ Kevin Bales, et al., "Hidden Slaves: Forced Labor in the United States" (2005) 23 Berkeley J. of Int. L. 47 at 73; *Smoot-Hawley Tariff Act* 19 U.S.C § 1307.

¹³⁸ Gerry Rodgers, "Taking a Fresh Look at Globalization" (2005) 48:1 Development 40 ; *Sosa v. Alvarez-Machain* 542 U.S. 287 (2004). ["*Sosa*"]

Alien Tort Claims Act to specifically enforce International Labour Standards.¹³⁹ However, the wording of the court reveals how deeply notions of labour rights development are entrenched in the American psyche. The judgment in *Sosa* stated that the labour law principle allegedly violated must be sufficiently "accepted by the **civilized world** [emphasis added] and defined with a specificity comparable to" norms actionable in the 18th century.¹⁴⁰ These norms are not restricted to use by Americans alone. The *Alien Tort Claims Act* has been used by Burmese workers to bring a suit against Unocal Corporation for its alleged use of forced labour in recent pipeline construction in the country.¹⁴¹ The U.S. has also used its own national laws in an attempt to end what it has defined as forced labour abroad, notably utilizing the "Tier" system under the *U.S. Victims Of Trafficking And Violence Protection Act Of 2000*,¹⁴² which ranks countries according to a Tier corresponding to the level of government action against trafficking, and imposes the threat of sanctions on non-compliant governments.¹⁴³

The United States, and in particular President Woodrow Wilson, played a large role in shaping the creation of the ILO at Versailles. Wilson's opposition to Marxism, seen as on the ascendancy in the 1920s and 30s, increasingly led him to support an international labour model advocated by European governments following the First World War.¹⁴⁴ This concept of labour development operated within a model of political economy designed to regulate interstate relations. It was based on a regulatory scheme

¹³⁹ *Sosa, ibid.*

¹⁴⁰ *Ibid.* Forced labor exception for ATCA – see "After *Sosa*, the prohibition of forced labor may be the only one of the four core labor standards that possesses both adequate international consensus and specificity to meet this "high bar"."

¹⁴¹ Bales, *supra* note 137 at 73. *Alien Tort Claims Act of 1789* (ATCA), 28 U.S.C. §1350.

¹⁴² 22 U.S.C. § 7107(c)-(f).

¹⁴³ Bales, *supra* note 137 at 72

¹⁴⁴ Bjorn Hettne, "Introduction: The International Political Economy of Transformation" in *International Political Economy: Understanding Global Disorder* (Halifax: Fernwood Publishing, 1995) at 8-10.

that incorporated the multiple perspectives of governments and non-governmental organizations while recognizing the ultimate sovereignty of the nation state within the emerging global trading regime.¹⁴⁵ The ILO is the oldest of the international institutions to emerge from this model. It essentially “globalized the American pluralist policy process.”¹⁴⁶ Interestingly, later American involvement with the creation of the WTO was designed to frustrate the development of a pluralist system – an indication of how far American policy had evolved since 1919 in response to changing global dynamics.¹⁴⁷

The formulation and promulgation of International Labour Standards ultimately became the purview of the ILO. The International Labour Standards movement in 1919 was heavily influenced by one of its leading interest groups, the American Association for Labor Legislation, whose leader praised the wide appeal of the ILO’s “minimum humane standards” as benefiting both worker and employer.¹⁴⁸ Yet it is important to note that this movement’s progressivism in 1919 was targeted primarily at industrializing Europe and North America and the creation of the ILO was heavily influenced by the birth and early development of industrial relations in these two continents.¹⁴⁹ In particular, the development of industrial relations in these countries pursued a path towards accommodation of labour’s interests in an attempt to ward off a socialist revolution.¹⁵⁰ The developing world, as a concept, did not yet exist. Labour development was thus meant primarily to insure social stability and economic development for the industrialized great powers.

¹⁴⁵ Larenz, *supra* note 136 at 14-15.

¹⁴⁶ *Ibid.* at 15.

¹⁴⁷ *Ibid.*

¹⁴⁸ John B. Andrews, “Labor in the Peace Treaty” in *The League of Nations: The Principle and the Practice*, ed. S. P. Duggan (Boston: Atlantic Monthly Press, 1919) at 237.

¹⁴⁹ Kaufman, *supra* note 135 at 81-216.

¹⁵⁰ *Ibid.*

The general retreat of the United States into isolationism following the U.S. Senate's failure to ratify the Versailles Treaty was due largely to a reluctance to cede social policy authority to international legal institutions, and did not spare the ILO. However, the United States did finally join the ILO in 1934. This was an important deviation from its refusal to join the other offspring of Versailles, such as the League of Nations or the World Court.¹⁵¹

As the dominant economic and military power in the post 1945 world, the United States heavily influenced the course and character of the regulation of international labour. The International Labour Standards movement became infused with general American labour history and American policy processes. The movement adopted American exceptionalism with respect to restrained social policies, in particular in comparison with industrialized Western Europe and Canada¹⁵² and the structure of the labour movement in the United States, which depended upon a diverse coalition of interest groups in order to create and implement labour policies.¹⁵³ Two of the most important of these groups were women's organizations and the legal profession.¹⁵⁴

1.2.2 Women's Organizations

Women's organizations that had fought for protections for poor working women in the United States played a significant role in the early development of the ILO through influencing policy development that led to the creation of the first international human

¹⁵¹ Larenz, *supra* note 136 at 12.

¹⁵² *Ibid.* at 8.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

rights protections for women in the workforce.¹⁵⁵ However, this early influence by women's groups in developing International Labour Standards suffered a subsequent sharp decline. Although many women staffed senior ILO positions from 1919-1945, from 1950 to 1990 there were no women in senior ILO positions.¹⁵⁶ The involvement of professional social scientists from industrialized countries followed a similar pattern in ILO policy development, going from being a dominant force in 1919 to near irrelevance in 1990s.¹⁵⁷

1.2.3 Legal Profession

The legal profession played an important role in the evolution of International Labour Standards, and several lawyers from the United States played an important role in formulating the ILO's early legal policies. Future U.S. Supreme Court figures such as Louis Brandeis and Felix Frankfurter played prominent roles in developing domestic American labour standards, and supported early U.S. involvement with the ILO, while from 1948-1970 the ILO was headed by American lawyer David Morse.¹⁵⁸ The early years largely saw the efforts of individual lawyers at the ILO in shaping policy, although the institutionalization of human rights issues within the International Labour Standards movement was reflected by the Lawyers Committee for Human Rights, which often worked with the ILO in documenting workers' rights abuses.¹⁵⁹ The director of LCHR recently noted the shift in the Committee's main concerns by noting that in the twenty-

¹⁵⁵ Kathryn Kish Sklar, "The Historical Foundations of Women's Power in the Creation of the American Welfare State, 1830-1930" in S. Koven and S. Michel, eds., "Mothers Of A New World : Maternalist Politics And The Origins Of Welfare States" (New York, N.Y.: Routledge, 1993) at 43-93. ["Sklar"]

¹⁵⁶ Carol Riegelman Lubin and Anne Winslow, *Social Justice for Women* (Durham, NC: Duke University Press, 1990) at 82, 208.

¹⁵⁷ Larenz, *supra* note 136 at 27-28.

¹⁵⁸ *Ibid.* at 33-34.

¹⁵⁹ *Ibid.*

first century “the emerging issue is: How do you hold private companies accountable for the treatment of their workers at a time when government control is ebbing all over world?”¹⁶⁰

The Americans who participated in creating the ILO truly believed in the “unmitigated good” of bringing the “beauty and wonder of American civil and political society” to the rest of the world.¹⁶¹ What they lacked was an institution to promote those values globally. The ILO promised to “bring that exceptional model to the world.”¹⁶² In the process, the originators of the ILO hoped that it would counter growing social unrest among workers.

The concept of labour development was thus created in large part as a defensive measure to save industrialized countries from “socialism and civic disorder”, and to remedy workers’ collective sense of social injustice.¹⁶³ It was an ambitious project designed to promote and protect the international interests of workers. This was to be done while preserving and promoting a global economic system emerging in the late 19th and early 20th centuries. The actual operation of the main tools of labour development in its early stages – the ILO and International Labour Standards – is detailed further in the following chapter.

¹⁶⁰ Thomas Friedman, “The New Human Rights” *The New York Times*, (30 July 1999) 19A from Larenz, *supra* note 136 at 34. [“Friedman”]

¹⁶¹ Online: History Cooperative <http://www.historycooperative.org/journals/ahr/108.3/br_80.html> (Last accessed 4 June 2006).

¹⁶² *Ibid.*

¹⁶³ Kaufman, *supra* note 135 at 80.

CHAPTER 2: CONVERGENCE AND CONTRADICTIONS - THE CONUNDRUM OF INTERNATIONAL LABOUR STANDARDS

"I have given detailed instructions to our staffs to cooperate throughout the world, particularly at the field office level, to ensure that each organization complements the other and its policies."

Michel Camdessus, Managing Director of the IMF, on the operation of the IMF and the ILO, in an address at the Sixteenth World Congress of the International Confederation of Free Trade Unions (ICFTU) Brussels, June 26, 1996

2.1 The Functioning of Labour Development Through the ILO

The ILO's creation and structure, along with its desire to export certain values, reflect the cultural dominance of the United States.¹⁶⁴ The ILO's Constitution recognizes in its Preamble the "recognition of the principle of freedom of association." In the Philadelphia Declaration, the ILO states that

"freedom of expression and of association are essential to sustained progress, and that all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity..."¹⁶⁵

In the development and implementation of its policy the ILO operates on the basis that "virtually all of its activities" are aimed at promoting the basic rights enshrined in the ILO constitution, including freedom of association and prohibitions against forced labour and discrimination.¹⁶⁶ The ILO's Governing Body attempts to set the agenda for its International Labour Conferences in a pluralist and inclusive manner. Governments,

¹⁶⁴ Henk Thomas, *Globalization and Third World Trade Unions*. (London: Zed Books, 1995) at 17-18. ["Thomas"]. For example, American governments generally cite their desire to export "global respect for collective bargaining procedures" through the ILO.

¹⁶⁵ N. Vaidyanathan, *ILO Standards: For Social Justice and Development of Labour* (New Delhi: Deep and Deep Publications, 1992) at 19. ["Vaidyanathan"]

¹⁶⁶ *Ibid.* at 19-34.

workers and employers' organizations help shape the agenda, along with NGOs and the ILO's other deliberative bodies.¹⁶⁷ This pluralist process operates within the basic ILO framework that all industrial systems are in a process of development in line with the basic goals outlined in 1919.

The ILO's creation was thus heavily influenced by interest groups from industrialized countries and a developed world analysis of industrial relations. As Munck notes, "Industrial relations are, of course, a product of a particular period (the 'compromise state') and pertained to a particular region of the global (the 'advanced' or 'developed' countries)."¹⁶⁸ Industrial systems were said to be heading towards a convergence, regardless of the "cultural background out of which they emerged" or the particular political system under which the state's citizens are governed.¹⁶⁹

The ILO's early research projects in the 1950s centered on colonial and third world countries' nascent industrial relations systems. These projects operated within the theoretical framework that such systems, despite current cultural and political differences, were moving towards convergence with developed country labour systems.¹⁷⁰ Following the Second World War, industrialization was seen by most economists as the inexorable path towards development. In May 1950, Raul Prebisch of the United Nations Economic Commission for Latin America stated that

"these countries [Latin America] no longer have an alternative between vigorous growth along these [pre-war export oriented] lines and internal expansion through industrialization. Industrialization has become the most

¹⁶⁷ *Ibid.* at 5.

¹⁶⁸ Munck, *supra* note 55.

¹⁶⁹ Clark Kerr, et al. *Industrialism and Industrial Man* (Harmondsworth: Penguin Books, 1972) at 296.

¹⁷⁰ Thomas, *supra* note 164 at 18. Also see Cox, R. et al. *Future Industrial Relations: An Interim Report* (Geneva: ILS, 1972) at iii.

important means of expansion.”¹⁷¹

Post-war economic theory stressed the importance of creating employment for any development strategy and industrialization was seen as the key source for creating employment. But despite the growth in output in some developing countries, large-scale employment growth failed to materialize.¹⁷² This is crucial to labour development since quantity of employment is often linked to quality of employment.¹⁷³ As quality of employment declines, the possibility of social instability increases.¹⁷⁴ An ILO analysis indicates that economic development strategies targeting third world countries had profound structural effects on these countries' labour force participation in the 1960s and 1970s:

“Lack of employment and the pattern of “development” followed by many non-socialist countries have not only discouraged unemployed workers from seeking work, they have affected the whole pattern of labour force participation and the distribution of income-earning opportunities, forcing some groups to work disproportionately hard and pushing others into roles that have effectively prevented them from becoming fully committed to labour force activity.”¹⁷⁵

In the 1950s and 1960s, the ILO increasingly focused on the social ramifications of potential instability arising from economic development. The ILO adopted the viewpoint that a “sound industrial relations system is a pre-requisite for industrial democracy and economic development.”¹⁷⁶ It allowed for that system to be reached through variations of labour development, taking into account differing political, cultural and economic

¹⁷¹ Joseph R. Ramos, *Labor and Development in Latin America* (New York: Columbia University Press, 1970) at 1.

¹⁷² *Ibid.* at 2-3.

¹⁷³ *Ibid.* at 5.

¹⁷⁴ See, for example, a convocation address by Indian President A.P.J. Abdul Kalam, “President Fears Social Instability” (6 August 2005) *The Hindu*, online: The Hindu <<http://www.hindu.com/2005/08/06/stories/2005080615970500.htm>> (last accessed 19 June 2006).

¹⁷⁵ Guy Standing, *Labour Force Participation and Development* (Geneva: ILO, 1978) at 1.

¹⁷⁶ Vaidyanathan, *supra* note 165 at 51.

contexts.¹⁷⁷ The ILO acknowledged that “relatively backward economies do not simply follow the same stages the dominant regions experience, but evolve through alternative and mixed patterns.”¹⁷⁸ The ILO thus allowed for many roads to converge, although the goal of a sound industrial relations system and economic development remained the same for all countries.

This goal proved a difficult one for developing countries to achieve, particularly since other economic development programs stressed goals that seemed contradictory to those espoused by the ILO. The IMF and the World Bank often promoted economic development strategies focusing on “growth oriented” policies that resulted in development of industries on a vast scale.¹⁷⁹ Among other effects this resulted in the “severe exploitation” of local labour at low wages amounting to sweatshop conditions.¹⁸⁰ In the following section I will address these contradictions between growth oriented economic policies and labour development.

2.1.1 Inherent Contradictions between the Global Political Economy Model and Labour Development

Most traditional criticisms of the ILO focus on the structural problems or operational difficulties in the Organization. A general criticism of the ILO is the problem of compliance by states with federal systems.¹⁸¹ These problems can be addressed through inter-governmental agreements, combined with increased roles for interest

¹⁷⁷ *Ibid.*

¹⁷⁸ *Supra* note 43 at § 3.4. Hardt and Negri spoke here of the transformation of the Italian economy following the Second World War.

¹⁷⁹ Thomas, *supra* note 164 at 51.

¹⁸⁰ *Ibid.* Thomas uses the example of South Korean structural adjustments aiding large-scale industrialization.

¹⁸¹ For example, in Canada and the United States, provinces and states have jurisdiction over most labour law matters, not the federal government, which is the signatory to an ILO Convention.

groups who can pressure these governments into compliance with internationally signed treaties.¹⁸² A deeper problem lies in the contradictions between neo-liberal economic development and labour development.

Sklair has noted that the industrialized world has convinced developing countries of the link between successful industrialization and direct foreign investment.¹⁸³ The resulting plethora of economic development strategies and investment incentives to multinational corporations has had a detrimental impact upon indigenous labour sectors.¹⁸⁴ The unplanned nature of direct foreign investment and corruption and tax evasion schemes are undertaken by some multi-national companies in efforts to boost profitability.¹⁸⁵ Companies generally locate in states and make investment decisions based principally on projections of profitability.¹⁸⁶ Considerations such as these, which incorporate tax law considerations but often ignore labour and environmental issues, often direct which countries receive direct foreign investment.¹⁸⁷

Although investment does have a positive correlation to a reduction in unemployment rates this is rarely the deciding factor in a company's decision on where

¹⁸² See "Canadian Intergovernmental Agreement", online: HRSDC <http://www.hrsdc.gc.ca/en/lp/spila/ialc/nao/02canadian_intergovernmental_agreement.shtml> (last accessed 16 March 2006).

¹⁸³ Leslie Sklair, "Free Zones, Development, and the New International Division of Labour" (1986) 22:4 J. of Dev. Stud. 753 at 758. ["Sklair"]

¹⁸⁴ For the Foreign Direct Investment's Impact on Africa, see Eric Gichira, "Don't Rely on FDI" (31 March 2003) *Accra Mail*, online: GPF <<http://www.globalpolicy.org/soecon/ffd/2003/0331dontrely.htm>> (last accessed 23 June 2006). ["Gichira"]

¹⁸⁵ Gichira, *Ibid.*

¹⁸⁶ Gustavo J. Bobonis and Howard J. Shatz, "Foreign Direct Investment in the United States", online: University of Toronto <http://www.chass.utoronto.ca/~bobonis/BSagglom_apr06.pdf> (last accessed 19 June 19, 2006).

¹⁸⁷ *Supra* note 184. Gichira notes that these considerations have "resulted to investors opting for the better performing Asian economies / markets, compared to Africa's volatile ones."

and how much to invest.¹⁸⁸ In addition, the IMF and World Bank in their economic development strategies take a distinct approach toward labour markets. Typically, considerations regarding labour issues are reduced to questions of production and resources.¹⁸⁹ Labour standards are regarded as separate categories that do not fit into this formula:

“A generally acknowledged rule of economic development, irrespective of the socioeconomic system, is that the national objective should be to derive maximum economic welfare from the disposition of the scarce resources available.”¹⁹⁰

This paradigm has little use for government measures such as minimum wages, price controls or interest rate subsidies as they hinder the neo-liberal economic policies seen as necessary for economic development.¹⁹¹ Discouraging such options hinders the ability of developing countries to institute national policies designed to aid national labour sectors during economic restructuring.¹⁹² Neo-liberal economic development concedes that the “market mechanism” alone is an “inadequate framework” for addressing social and labour problems caused by such programs.¹⁹³ The labour standards

¹⁸⁸ *Supra* note 186. For example, as might be expected the corporate tax rate is a factor with a heavy correlation to direct foreign investment.

¹⁸⁹ Orville John McDiarmid, *Unskilled Labor for Development* (New York: World Bank, 1977) at 6.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.* at 7.

¹⁹² Online: ILO <<http://www.ilo.org/public/english/employment/strat/publ/ep01-13.htm#5>> (last accessed 19 June 2006). The ILO itself seems to acknowledge a lack of information in the area of minimum wage policies and corporations' use of their labour force: “In conclusion, the data analysis gives strong support to the idea that the minimum wage may bring positive results in poverty alleviation by improving the living conditions of workers and their families while having no negative results in terms of employment. No evidence of the effect of the size of the minimum relative to the average wage on the size of the informal economy in Latin America was found either. Yet the consequences of setting a minimum wage are manifold and go beyond the impact on the level of employment and poverty. Raising the minimum wage may have an effect on incentives to provide training and productivity, as well as on working conditions and prices. Yet, effects other than on poverty and employment levels have received little attention even within the context of the more industrialized developing countries. The idea that a decent minimum wage may force firms of these countries to use more efficiently their labour force has yet been little explored.”

¹⁹³ *Ibid.*

created to address this problem often conflict with economic development programs designed to “generate economic outcomes (measurable and immeasurable) consistent with development goals such as income growth.”¹⁹⁴

In the early 1970s, the ILO began a program of analyzing population growth in developing countries with a view to determining how that affected social conditions in the labour sector.¹⁹⁵ The program was subsequently expanded to include analysis of the effects of internal and external labour migration and the effects of globalization on socio-economic conditions in developing countries.¹⁹⁶ A survey of ILO Rural Development programs in place from 1979-1983 reveals that the organization was engaged in a variety of conferences and sponsored programs in the fields of rural employment policies, rural technologies, migration, refugees, skill training and management development.¹⁹⁷ Rural development strategies were designed to carry out objectives announced at the 1979 World Conference on Agrarian Reform and Rural Development in Rome:

“Participation by the people in their institutions and systems which govern their lives is a basic human right and also essential for realignment of political power in favour of disadvantaged groups and for social and economic development.”¹⁹⁸

Despite the seeming contradictions in some of their objectives, ILO and World Bank personnel often work in conjunction on development projects. An example of this would be their participation in *Women in Informal Employment Globalizing and Organizing* (WIEGO). WIEGO’s mission is to “improve the status of the working poor,

¹⁹⁴ Paul, *supra* note 7 at 15.

¹⁹⁵ ILO, *World Employment Programme: Population and Development* (Geneva: ILO, 1977).

¹⁹⁶ *Ibid.* at 1.

¹⁹⁷ ILO Advisory Committee on Rural Development, *Review of Development Activities Since 1979* (Geneva: ILO, 1983)

¹⁹⁸ *Ibid.* at 2.

especially women, in the informal economy through better statistics, research, programs, and policies and through increased organization and representation of informal workers.”¹⁹⁹ An examination of WIEGO’s board indicates participation by ILO and World Bank personnel, along with academic and researchers, trade union specialists and NGO activists.²⁰⁰ The ILO participates in WIEGO typically through its Bureau for Gender Equality, which, among other goals, promotes respect for the basic rights of women in the workplace and manages problems in the “informal economies” found in many developing countries.²⁰¹ The World Bank generally focuses its efforts in WIEGO on integrating gender into its general framework to reduce poverty and promote economic development through expansion of certain sectors.²⁰²

Former World Bank President James Wolfensohn hinted at a possible contradiction between labour and economic development policies when he outlined the Bank’s task to create a “modern market economy” that included socially responsible institutions promoting social stability.²⁰³ Wolfensohn stressed that social and political instability would likely result from the elimination of “social safety nets that are in place for times of crisis.”²⁰⁴ He also lamented the “growing imbalances in global spending” between developed nations support of militaries and farmers and their assistance for the poor in

¹⁹⁹ “About WIEGO: Origins and Mission”, online: WIEGO <<http://www.wiego.org/about/>> (last accessed 26 February 2006).

²⁰⁰ David Spooner, “Trade Unions and NGOs: The Need for Cooperation” (February 2004) 14:1-2 Development in Practice 19 at 29. [“Spooner”]

²⁰¹ See “ILO Gender Equality in the World of Work” newsletter, online: WIEGO <www.wiego.org/main/newsletter-1.doc> (last accessed 27 February 2006).

²⁰² See “Disparities Between Men And Women In Transition Countries Of Europe And Central Asia Merit Special Attention”, online: WIEGO <www.wiego.org/papers/world_bank_gender.html> (last accessed 27 February 2006).

²⁰³ “World Bank Chief Sounds Alarm”, online: World Socialist Forum <<http://www.wsws.org/articles/1999/mar1999/bank-m23.shtml>>. (Last accessed 2 April 2006).

²⁰⁴ *Ibid.*

developing countries.²⁰⁵ However, Wolfensohn fails to note the connection between the globalization, the informal economy and the loss of social programs:

“In critiquing Globalization, it is important to step back and consider the institutional background against which this process is being played out. In connection with the South at the end of the 20th Century, the relevant context is contained in the phenomena of the informal economy and the loss of nation-state as an institutional resource.”²⁰⁶

Gyawali notes that the informal economy “dominates the South” with a large majority of those in the developing world working outside a “formalized national economy.”²⁰⁷ Globalization for these workers has meant two things:

“First, it is the entry of heavyweight market (or urban) players which further marginalize those in this already fringe-area; and second, it serves to sever the moral need for the resource users to carefully husband the resource base through long-term, intergenerational custodianship.”²⁰⁸

Globalization and free trade policies have not resulted in the disappearance of informal economies, which have grown in recent decades.²⁰⁹ The ILO has been frustrated in defining an area such as the “informal economy” and in universally providing labour protections.²¹⁰ Labour development programs would face difficulties in this environment, where “alienation of the state from the masses” has been cited as one of the

²⁰⁵ Online: Migration News <http://migration.ucdavis.edu/mn/more.php?id=3038_0_5_0> (last accessed 10 June 2006). Wolfensohn noted that \$900 billion is spent annually by developed countries on military supplies, support and equipment and \$300 billion on support for the world's richest farmers, but only \$58 billion is spent on official development assistance for the poor.

²⁰⁶ Online: <<http://www.globenet.org/archives/web/2006/www.globenet.org/horizon-local/cultures/igri.html>> (last accessed 11 June 2006). Dipak Gyawali is currently Pragma (Academician) of the Royal Nepal Academy of Science and Technology in Nepal. He was a recent minister of the Chand caretaker government

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ Marilyn Carr and Martha A. Chen, “Globalization And The Informal Economy: How Global Trade And Investment Impact On The Working Poor”, online: WIEGO <<http://www.wiego.org/papers/carrchenglobalization.pdf>> (Last accessed 2 April 2006).

²¹⁰ Edgar L. Feige, “Defining and Estimating Underground and Informal Economies: The New Institutional Economics Approach” (1990) 18:7 *World Development* 989.

primary reasons for the failure of past development programs.²¹¹ It is difficult to see how any new ILO Conventions or initiatives will deal with the problem, although it may be possible to modify existing ILO Conventions to extend protections to workers in the informal economy.²¹²

The contradictions between the ILO and other international economic institutions such as the IMF can be seen in a range of developing countries. One such case occurred in the Indian State of Kerala in the early 1990s. In Kerala, the state government faced conflicting policy choices in following ILO and IMF directives and in practice eventually adopted the economic policy favoured by the IMF.²¹³ The link between economic development, growth and jobs has been widely promoted by neo-liberal economic theory.²¹⁴ Policies favoring neo-liberal economic development remain the driving force in most of the developing world.²¹⁵ Another contradiction between neo-liberal economic

²¹¹ *Supra* note 206. Gyawali also notes that “After four decades of development aid, the net flow of resources is from the South to the North and not the other way around, it being the bottom-line indicator of its failure. While development doctors diagnose ills in Southern societies for this failure (conjuring up such terms as ‘low absorptive capacity’, ‘weak institutional base’, etc. and essentially blaming the victims of Development), foreign aid has become addictive to the state structures of the South even when there are signs of increasing aid fatigue in the North. The gap between the intended and actual beneficiaries, between intent and performance, is too wide to be ignored.”

²¹² Spooner, *supra* note 200 at 32.

²¹³ Patrick Heller, *The Labor of Development: Workers and the Transformation of Capitalism in Kerala, India* (New York: Cornell University Press, 1999) at 107-110. [“Heller”]. As Heller writes, in 1991, a minimum wage committee appointed by a newly elected leftist state government recommended a minimum wage hike in conformity with trade union pressure and ILO standards, which met fierce opposition from farmers’ groups and the farmers’ union. Part of the reason for the fierce opposition from these groups was the rise in prices of seeds, fertilizers and pesticides as a result of pressure from the IMF for the state government to enact “massive cuts” in state subsidies to farmers for many of these products. The IMF advice to the state government resulted in a 300% price hike for farmers, at a time when the ILO was advising the State government to pressure farmers to increase the minimum wage by 20-50%. Heller notes that the crisis was eventually diffused when the state bureaucracy, “acting independently of the government’s politics, took no actions to actually implement the minimum wage.” Local unions, despite public pronouncements, realized the “impracticality” of the wage increases and desired to build a strong “corporatist alliance” so they took no strong action to push for the wage increases.

²¹⁴ And promoted by organizations such as the World Bank and the EU. See online: European Commission <http://ec.europa.eu/growthandjobs/index_en.htm> (last accessed 19 June 2006).

²¹⁵ In the case of India, see Murali Kallummal and Smitha Francis, “Sub-Federal Governance and Global Harmonisation of Policies: Some Issues for Consideration”, online: International Development Economics

development and labour standards can also be seen in the failures of economic development theories to benefit workers in bilateral trading arrangements such as the Maquila economic zones.²¹⁶

The ILO has recognized growing inequalities in the global economy and the need for greater operational cooperation with the Bretton Woods Institutions, while still maintaining there is no inherent conflict between the ILO and these institutions.²¹⁷ In 1999, the ILO elected a new Director-General, Juan Somavia of Chile, the first person elected outside of Europe and North America to head the organization. Somavia took the ILO's implementation of its core labour strategy in a more aggressive direction in addressing the problems raised by globalization through the implementation of the *Decent Work Agenda* and the establishment of the *World Commission on the Social Dimension of Globalization* in 2002, producing a report in early 2004 titled "A Fair Globalization: Creating Opportunities for All."²¹⁸ The ILO's response to globalization's challenges will be discussed in the following section.

Associates <http://www.networkideas.org/focus/feb2005/Global_Harmonisation.pdf> (last accessed 19 June 2006). "Neo-liberal economic policies supporting liberalisation and export-led growth have been the driving force in India over the last decade and more."

²¹⁶ Leslie Sklair, *Assembling for Development: The Maquila Industry in Mexico and the United States* (London: Unwin Hyman, 1989) at 18-19, 230; Joseph Stiglitz, *Globalization and its Discontents* (New York: W.W. Norton, 2002). A pre-NAFTA study of the Maquila economic zones revealed that economic growth failed to spur social development, with the criteria for this analysis based on the "successful transition of an economic zone to a status where it begins to have genuine developmental effects for the region." Again, the contradictions inherent in differing aspects of economic and labour development policies are apparent in the Mexican context as well. Maquila managers claimed anti-inflationary policies initiated by the Mexican government were responsible for the low wages in the Maquila industries. Anti-inflationary policies, of course, are a main prescription of the IMF and seen particularly after the 1980s as a prerequisite for economic development. The economic zones have largely failed "to transform economic growth into development" for Mexico.

²¹⁷ Online: ILO Relations With Bretton Woods Institutions <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/esp-1.pdf>> (last accessed 19 June 2006).

²¹⁸ Kaufman, *supra* note 135 at 556.

2.2 Decent Work Agenda and the Social Dimensions of Globalization

In response to the trade liberalization of the last two decades, the ILO developed the *Decent Work Agenda* to provide a legal framework for “governing globalization, promoting sustainable development, eradicating poverty, and ensuring that people can work in dignity and safety.”²¹⁹ The *Decent Work Agenda* was designed to refocus the ILO onto a series of core objectives linked to the general theme of decent work:

“The overarching objective of the ILO has been re-phrased as the promotion of opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity. Decent work is the converging focus of the four strategic objectives, namely rights at work, employment, social protection and social dialogue. Decent work is an organizing concept for the ILO in order to provide an overall framework for action in economic and social development.”²²⁰

In the *Decent Work Agenda*, the ILO stresses the need to pursue “closer collaboration” with regional bodies in the Americas.²²¹ Although it was designed to provide a legal framework for developing International Labour Standards, the ILO still lacks real enforcement mechanisms to ensure state parties’ compliance.²²²

The *Decent Work Agenda* does attempt to develop the idea of “decent work” into

²¹⁹ “The Need for Social Justice”, online: International Labour Organization <<http://www.ilo.org/public/english/standards/norm/introduction/need.htm>> (last accessed 1 April 2006).

²²⁰ Online: ILO <<http://www.ilo.org/public/english/bureau/integration/decent/index.htm>> (last accessed 1 June 2006).

²²¹ *Ibid.*

²²² In theory, under Articles 29-34 of its Constitution, several categories of unresolved ILO complaints may be referred to the International Court of Justice for a final decision, and that decision could be referred to the UN Security Council for enforcement. In practice, no ILO disputes have ever been referred to the ICJ. The reason for this may lie in the ICJ historically being relegated to “marginal” or symbolic disputes between states. It may also reflect states’ general reluctance to submit international labour disputes to a conflictive process. Although this may change with the ICJ’s recent assertion of jurisdiction over international human rights disputes, there have been no indications that any ILO disputes are headed for the Court. Enforcement of ILO labour standards is instead left to national governments to enforce through domestic legislation or through regional arrangements that incorporate domestic enforcement through international agreement.

“realizable programs and activities.”²²³ The *Decent Work Agenda*’s legalistic value lies in its potential to “extend the ILO’s sphere of influence” to workers in the informal economy with the “goal of advancing the ‘decent work’ platform in this area.”²²⁴ In a broader sense:

“Decent Work reflects the evolving hegemonic order in the ILO under globalization, which continues to be influenced by the corporate/state centric version of corporatism characterizing it for decades. Still, various facets of this platform, and struggles flowing from it, reveal a growing counter-hegemonic presence inside the ILO and especially at its margins, where transnational coalitions between organized labour, emerging labour organizations in the informal sector and NGOs are growing.”²²⁵

This analysis takes the position advocated by Cox that the ILO, despite its origins, operates in a hegemonic manner much like any other post-war international institution. Cox’s objective in his analysis was to use the ILO as a case study to probe both the “hegemony of US capitalism on an international scale” and the “larger bureaucratic problems plaguing international organizations.”²²⁶ Cox’s main contention in this analysis was that the ILO did possess an initial reformist spirit reflected in its creation, but that it maintained “hegemonic power relations” through its post-war policies and American influenced ideology.²²⁷

The *Decent Work Agenda* has the potential to transform the ILO’s operation. Vosko draws on the potential of the *Decent Work Agenda* to enable “trade unions, emerging labour organizations in the informal sector, women’s organizations and other

²²³ Online: Globalism and Social Policy Programme <<http://www.stakes.fi/gaspp/journal/digest/2.1.htm>> (last accessed 2 June 2006).

²²⁴ *Ibid.*

²²⁵ Leah F. Vosko, “Decent Work: The Shifting Struggle of the ILO and the Struggle for Global Justice” (2002) 2:1 Glob. Soc. Pol. 19 at 20.

²²⁶ *Ibid.*

²²⁷ Robert Cox, “Labour and Hegemony” (1977) 31:1 Int’l Organization 385. Robert Cox’s seminal piece was written 2 years after the U.S.’s withdrawal from the ILO in 1975.

NGOs”²²⁸ to move beyond Cox’s conception of “labour and hegemony.”²²⁹ In this view the *Decent Work Agenda* has the potential to create “greater controls on global capital and to cultivate meaningful supranational commitments aimed at improving the situation of marginalized workers worldwide.”²³⁰

The possibility that the *Decent Work Agenda* could transform the ILO’s operation may also open the door to a genuine dialogue on the relevance and practicality of imposing labour standards originating from the West onto the developing world. The historical absence of such dialogue between cultures within the framework of the ILO and international labour standards reveals a form of “cultural imperialism.”²³¹ Cultural imperialism within the ILO framework has historically meant defining and imposing an ostensibly universal conception of human rights without a true dialogue between cultures.

As Esteva and Prakesh note:

“Imposing universal definitions of torture or evil upon different cultures is tantamount to the abuse of power, legitimized today under the umbrella of human rights.”²³²

The decent work concept requires the initiation of a cultural dialogue and the exploration of traditional cultures’ interpretations of the “good life” and work’s value within those cultures.²³³ Through the *Decent Work Agenda*, the ILO hopes to further a “culture of dialogue” that it acknowledges has been historically “unevenly spread.”²³⁴

²²⁸ *Ibid.* at 21

²²⁹ Cox, *supra* note 227.

²³⁰ Vosko, *supra* note 225.

²³¹ Gustavo Esteva and Madhu Suri Prakesh, *Grassroots Post-Modernism: Remaking the Soil of Cultures* (London: Zed Books, 1998) at 145.

²³² *Ibid.* at 142.

²³³ Konrad Reiser, “Conflicting Values: Dialogue of Cultures on Decent Work”, online: YMCA <<http://www.ymca.int/index.php?id=61#132>>

²³⁴ Online: ILO <<http://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-i-a.htm>> (last accessed 22 June 2006).

As part of this process, the ILO identified several “decent work deficits” and outlined a broad, policy based agenda for their solution:

“What do these deficits tell us? In this age of economic and technological breakthroughs, progress in the different dimensions of the ILO agenda is uneven and unsatisfactory. Left to themselves, economic systems generate opportunities for some countries and not for others – as well as inequalities in access and in benefits within countries. Expanding the opportunities for decent work requires deliberate policies to overcome these constraints and make markets work for everybody. We must take advantage of market dynamism in ways that deliver social justice as well as economic benefits.”²³⁵

Despite its potential, the *Decent Work Agenda's* program remains largely unfulfilled. The ILO has acknowledged that a great deal of “outreach and alliance building” amongst the civil society and NGO groups, labour and the private sector must occur before the *Agenda's* goals are fulfilled.²³⁶ ILO Director-General Somavia described the outreach and alliance building that need to take place in order to fully realize the *Agenda's* goals, as a priority action item for the organization.²³⁷

A general criticism of the *Decent Work Agenda* is that it has not been included in national Poverty Reduction Strategy Papers (PRSPs).²³⁸ There are two possible explanations for this. The first is that PRSPs are “country-driven” and that countries experiencing severe economic downturns or “life-threatening constraints” may not view

²³⁵ *Ibid.*

²³⁶ *Supra* note 230.

²³⁷ Online: ILO <<http://www.ilo.org/public/english/region/asro/bangkok/newsroom/pr0108.htm>> (last accessed 21 June 2006).

²³⁸ Online: International Institute for Sustainable Development <<http://www.iisd.ca/download/asc/sd/ymbvol122num1e.txt>> (last accessed 1 June 2006). PRSP's describe, generally, “a country's macroeconomic, structural and social policies and programs to promote growth and reduce poverty, as well as associated external financing needs. PRSPs are prepared by governments through a participatory process involving civil society and development partners, including the World Bank and the International Monetary Fund (IMF).” Italy, for example, questioned why elements of the Decent Work Agenda not being included in PRSPs.

the *Decent Work Agenda* as a priority.²³⁹ The second possible reason for the exclusion of the *Decent Work Agenda* from PRSPs involves the World Bank and the IMF. PRSPs generally operate through the IMF and World Bank which “may not have manifest agendas” on the need to implement the *Decent Work Agenda* as a poverty reduction strategy.²⁴⁰

The *Decent Work Agenda* was incorporated into the ILO’s subsequent project, the *World Commission on the Social Dimension of Globalization*, which proposed that “decent work for all should become a global goal for all international, regional, national and local public and private actors.”²⁴¹ The *World Commission on the Social Dimension of Globalization* produced its report in 2004 titled “A Fair Globalization: Creating Opportunities for All” in February 2004 which attempted to address growing inequalities resulting from globalization:

“The dominant perspective on globalization must shift more from a narrow preoccupation with markets to a broader preoccupation with people. Globalization must be brought from the high pedestal of corporate board rooms and cabinet meetings to meet the needs of people in the communities in which they live.”²⁴²

The Commission’s recommendations were premised on political and economic reforms on a national level to accomplish a positive shift in the effects of globalization.

²³⁹ *Ibid.* Gemma Adaba of the ICFTU, stressed that the key to promoting decent work is to prioritize employment-intensive approaches. To overcome constraints to poverty reduction and employment creation, she recommended integrating employment policies into existing development frameworks and incorporating decent work into the MDGs. She also highlighted that small and medium-sized enterprises have a large role in employment creation.

²⁴⁰ *Ibid.* Part of a solution to this problem may be the compiling of examples linking poverty reduction to increased workers’ rights.

²⁴¹ *Report of the World Commission on the Social Dimension of Globalization*, (Geneva, ILO: 2004) at 280, 492-493, 502-510.

²⁴² “A Fair Globalization: Creating Opportunities for All”, online: ILO <http://www.ilo.org/public/english/region/ampro/cinterfor/news/soc_dim.htm> (last accessed 1 March 2006).

Democratic reforms encouraging respect for human rights and the rule of law were seen as essential pre-conditions for this shift, along with creation of local employment and educational opportunities in line with local cultures and aspirations.²⁴³ More just frameworks were required for international investment and the migration of workers but the Commission recognized that developing countries could not achieve this in isolation, and recommended, somewhat paradoxically, continuing regional integration of economies as a means to strengthen social policies.²⁴⁴

ILO coordination with both the UN and the Bretton Woods institutions was seen as desirable in implementing new policies on growth, investment and how they affect employment and labour conditions.²⁴⁵ Country-level dialogue with the Bretton Woods institutions has therefore continued to be stressed. This is “by definition a highly decentralized activity, where a significant effort is required to maintain momentum.”²⁴⁶ The ILO claims continued improvement in coordination with the IMF since the executive heads of the IMF and ILO each issued instructions on mutual institutional cooperation to their respective staffs in early 1996.²⁴⁷ Discussions cover social dialogue, employment, labour market, wage and social security issues. Coordination between the ILO and World Bank has not been as

“consistent with the degree of cooperation varying more substantially from place to place. This is in part attributable to the different function of the World Bank as compared to the IMF...the Bank's mandate is to provide financing for economic and social development...The nature of the development agenda in each country should greatly influence where

²⁴³ Gerry Rodgers, “Taking a Fresh Look at Globalization” (2005) 48:1 Development 40 at 41.

²⁴⁴ *Ibid.* at 42.

²⁴⁵ *Ibid.* at 43.

²⁴⁶ Online: ILO <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/esp-6.htm>> (last accessed 2 June 2006).

²⁴⁷ *Ibid.*

cooperation is most essential, and a proactive effort by both the ILO field staff and ILO constituents continues to be important with respect to both the Bank and the Fund, but with particular emphasis in the field on development initiatives involving the Bank.”²⁴⁸

Coordination between the ILO, the IMF and World Bank would seem unlikely to alter the basic direction of the Bretton Woods institutions. Any involvement of the ILO in development programs promoted by the World Bank, for example, is still based on a “proactive” effort by the ILO.²⁴⁹

“Experience has demonstrated that when [World Bank] lending has significant implications for employment or involves the design and implementation of reforms in areas such as employment and labour market systems, labour codes, labour administration, social security and pensions, the involvement the ILO cannot be taken for granted, even on the key issue of labour code reform.”²⁵⁰

The ILO World Commission’s tools for implementing development reforms were policy and rules based. There were no recommendations for structural reforms to international institutions such as the World Bank or IMF or questioning of the general goals of economic development. The difficulty with the ILO Commission’s recommendations is that they leave in place the institutions and system that promote policies that often reward low-wage labour production and labour rights violations.²⁵¹ Instead, the Commission’s report recommended greater policy collaboration between the ILO and the Bretton Woods institutions.

This resulted in several follow-up meetings in May and November 2004 between the ILO, WTO, World Bank and IMF concerning a “Policy Coherence Initiative (PCI)

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ Christien van den Anker, “Cosmopolitan Justice and the Globalization of Capitalism: The UNDP and ILO Proposals” (September 2005) 2:2 *Globalizations* 254.

addressing the question of growth, investment and employment in the global economy.”²⁵² A November 2005 update on the PCI indicates that three meetings have been held to date between various international institutions resulting in several points of “convergence and divergence of views” on the impact of development programs, and the drafting of several policy papers available on the ILO’s Policy Integration Department website.²⁵³ The three organizations stated a need for need for “complementarity of policies at national and international levels”²⁵⁴ - yet this has not gone beyond issuing of declarations and reports to active ILO involvement in the decision-making process of the international development agenda. A key point resulting from the meetings is that all participants in the PCI stressed that the initiative “in no way constituted a new institutional entity, that the participation of the organizations would be from within the respective mandates of each, and that participation itself was voluntary and self-financed.”²⁵⁵

There is clearly no contemplation in the PCI for a supranational entity that could combine the functions of organizations such as the IMF, World Bank and ILO. Instead, future meetings of the PCI will examine the feasibility of conducting “joint research projects” in areas of mutual concern.²⁵⁶ The PCI may become a convenient tool for multilateral institutions such as the WTO, which has already indicated the desire to offload contentious issues such as the relationship between trade and core labour

²⁵² Online: ILO <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb292/pdf/gb-6.pdf>> (last accessed 3 June 2006).

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

standards onto it.²⁵⁷ The PCI is too new an initiative to pass judgment upon. However, its failure thus far to incorporate NGOs and other civil society groups into its process casts doubts upon the inclusiveness of the process.

2.2.1 Participation Of Non-State Actors & Civil Society in the ILO Process

NGOs in the international labour field are heavily involved in attempting to address the imbalance created by economic development but their efforts are contradicted by the system of competition of sovereign states based on a global capitalist system, and models of development based on maximizing economic growth. The Trade Union International Research and Education Group (TUIREG) for example has worked closely with the ILO in providing educational materials for projects designed to assist unions in developing countries.²⁵⁸

Many efforts by trade unions to promote labour development are undercut by a “conceptual difference” between their interests and those of NGOs with respect to development issues affecting the human rights of workers.²⁵⁹ This arises particularly within the context of the creation and enforcement of Corporate Codes of Conduct. Some NGOs, in opposition to international trade unions’ stance, see Corporate Codes as an

²⁵⁷ WTO Public Symposium, “Multilateralism at a Crossroads” (25 May 2004), nline: <http://www.wto.org/english/tratop_e/dda_e/summaryworkshop2_e.doc> (last accessed 3 June 2006). “[Panelist] John Evans gave some broader recommendations on how globalization could be more inclusive, for example the adoption of core labour standards as key issues; compliance with core labour standards by the WTO; a modernization of art. XX of GATT on prison labour to include all core labour rights; the coordination of approaches in the case of severe abuses, for example in the case of Burma; including core labour standards in the Doha Development Agenda. Adjustment policies were important and should receive attention in the WTO, such as retraining, and social safety nets... This should be addressed in the proposed ILO policy coherence initiative on investment, trade and employment.”

²⁵⁸ Deborah Eade and Alan Leather, *Development NGOs and Labor Unions* (Bloomfield, CT: Kumarian Press, 2005) at 6.

²⁵⁹ *Ibid.* at 204.

acceptable private sector alternative to International Labour Standards.²⁶⁰

There are also a large number of unions in industrialized countries that are involved in international development activities through financial or organizational support provided by international trade union federations, or undertaken by specialized organizations affiliated with trade unions.²⁶¹ For ideological and operational reasons, trade unions in developing countries have traditionally been acutely sensitive to violations of human rights laws.²⁶² International trade unions have consequently adopted basic workers' rights as outlined in the core ILO labour standards as a central "line in the sand" from which "no retreat is possible."²⁶³

The ILO encouraged and indeed hoped for the development of unionism and civil society organizations to counter the negative effects of economic development strategies. Trade unions in developing countries are still seen by the ILO as an important tool for labour development. However, many trade unions in developing countries have acted as weak counterparts to trade unions in developed countries and have also been responsible for obstructing change, such as the collapse of the African "development decade" of the 1960s.²⁶⁴ The trade union movements in Venezuela are deeply polarized along political and social classes, with both sides accusing the other of being anti-democratic and obstructing change.²⁶⁵

In addition, trade unions in developed countries are not immune to becoming instruments, willing or otherwise, of government policy. The AFL-CIO is an interesting

²⁶⁰ *Ibid.*

²⁶¹ Spooner, *supra* note 200 at 20.

²⁶² *Ibid.* at 21.

²⁶³ *Ibid.*

²⁶⁴ Paul S. Gray, *Unions and Leaders in Ghana: A Model of Labour and Development* (London: Conch Magazine Ltd., 1981) at 5-6.

²⁶⁵

case, in that it is very active in promoting American labour policy both domestically and abroad. The union has filed a complaint to the ILO regarding the U.S. Supreme Court's *Hoffman* decision, which denied immigrant workers' basic labour rights.²⁶⁶ Yet the union has also been strongly critical of governments abroad that take anti-American positions. The American AFL-CIO representative to the ILO, for example, would only support a long-standing demand by Columbian trade unionists for an ILO Commission of Inquiry to Columbia, run by the pro-U.S. Uribe government, in exchange for a Commission of Inquiry being sent to Venezuela.²⁶⁷ Unlike other most other European trade unions, the AFL-CIO has also not opposed the U.S. economic embargo against Cuba.²⁶⁸ This highlights the contradictions that the ILO faces – on the one hand, it is tasked with promoting an ostensibly global project of international human rights in the workplace. On the other hand, it is subject to the political and economic considerations of developed countries – in particular the United States - in its operation.

2.2.2 Bright Lights and Insects - The WTO and Labour Development

The contradictions between labour development and economic development arise in the repeatedly unsuccessful attempts to incorporate labour standards into global trading arrangements. In 1948, an effort was made to include labour rights commitments in the International Trade Organization (ITO) which would have required its members to

²⁶⁶ *Hoffman Plastic Compounds, Inc. v. NLRB*. 535 US 137 (2002).

²⁶⁷ Venezuela being headed by the anti-American Hugo Chavez. See online: LaborNet <<http://www.labornet.org/news/0705/hndsoff.htm>> (last accessed 2 June 2006).

²⁶⁸ Online: Peoples Weekly World <<http://www.pww.org/article/view/1772/1/103/>> (last accessed 1 June 2006).

prevent “unfair labour conditions.”²⁶⁹ The ITO failed for a number of reasons but principally due to the failure of the United States to ratify the ITO’s Havana Charter.²⁷⁰ Since the early 1990s, there have been several efforts to incorporate labour provisions into the WTO through a social clause, which have thus far failed for several reasons that tie into the primary contradictions between the goals of the world economic system promoted by the WTO and labour development.

Initially, many economists questioned the potential usefulness of a social clause for an organization that in their view had neither “the expertise nor experience to deal with labor standards issues” and argued that they should be relegated to the ILO.²⁷¹ The ILO abetted this view since it proved reluctant to cede its authority to other bodies such as the WTO.²⁷² The lack of any formal legal guidelines for cooperation between the WTO and the ILO further complicated this issue. It contributed to a parochial attitude on the part of the ILO which was concerned with any “encroachment” onto its jurisdiction by a body with which it has little legal linkages.²⁷³ The WTO has been reluctant to engage with global civil society other than to initiate “proceduralist reforms” that may

“transform the WTO into an even more powerful institution of global economic governance without significantly affecting the current system of global economic inequality over which it presides.”²⁷⁴

²⁶⁹ Havana Charter for an International Trade Organization, United Nations Conference on Trade & Development, Final Act and Related Documents, arts. 7, 71, U.N. Doc. E/CONF. 2/78 (1948).

²⁷⁰ Luke L. Arnold, “Labour and the World Trade Organization: Toward a Reconstruction of the Linkage Discourse” (2005) 10:1 *Deakin L. Rev.* 83 at 84. [“Arnold”]

²⁷¹ Chris Manning, “Does Globalization Undermine Labour Standards? Lessons from East Asia” (1998) 52:2 *Aust. J. of Int’l Aff.* 133 at 144. [“Manning”]

²⁷² Roy J. Adams, “A Brief Introduction to International Labour Law and its Implications for Canadian Policy and Practice” (2001) 4:4 *Workplace Gazette* at p. 83, online: Human Resources and Skills Development Canada (HRSDC) <http://www110.hrdc-drhc.gc.ca/millieudetravail_workplace/gazette/pdf/en/A%20Brief%20Introduction%20to%20International%20Labour%20Law%20and%20its%20Implications%20DA4.pdf> (last accessed 23 October 2005).

²⁷³ Roden Wilkinson, and Steve Hughes, “Labor Standards and Global Governance: Examining the Dimensions of Institutional Engagement” (2000) 6:2 *Global Governance* 259 at 266. [“Wilkenson”]

²⁷⁴ *Supra* note 89 at 675.

The WTO's main response to pressure from labour and labour affiliated groups – the “development of channels of communication with civil society” – nominally committed the WTO to engaging with the issue while ultimately leaving it to be dealt with separately by the ILO.²⁷⁵ As Munck notes, this process has rendered “the ILO and its philosophy...largely marginalized in a world order dominated by the free market philosophy of the WTO.”²⁷⁶

The general argument expressed by the developing world in opposition to any labour and trade linkage is that, while the aspirations may or may not be universal, there is no real consensus or willingness to bear the cost for implementing ILO conventions, despite the desire to see structural adjustments necessary to implement labour development.²⁷⁷ Most significantly, these opponents of linkage claim that developed countries only provide financial support for labour development policies deemed important for economic development strategies.²⁷⁸ The European Union, for example, has been warned by employment analysts about the potential illegitimacy of the EUs actions if it sought to introduce elements of its internal labour policies into its external relations:

“Any attempt to impose internal Community laws through binding external measures, such as positive or negative conditionality in trade agreements, would be inappropriate. The Community would be opening itself to charges of imperialism, of imposing inappropriate Western laws

²⁷⁵ *Ibid.* at 264.

²⁷⁶ Munck, *supra* note 55. Munck notes that this is “a bit like fighting with yesterday’s weapons on today’s terrain.”

²⁷⁷ See in general Arvind Panagariya, “Trade and Labor Standards: A Trade Economist’s View” paper presented at the fourth and final meeting of the IADB/FLACSO/LATN Labor Standards Discussion Group, Rio de Janeiro, Brazil on June 23-24, 2005.

²⁷⁸ *Ibid.* at 29. Panagariya uses the example of the successful enactment of the Convention on the Worst Forms of Child Labor to suggest that “on the standards on which countries are in agreement, ILO is able to help initiate action successfully.”

on the developing world.”²⁷⁹

This position is also reflected by certain countries opposition to the use of trade sanctions to punish violations of the rights of migrant workers, rather than provide adequate funding to developing countries to improve their own working conditions, and thus eliminate the need for their workers to migrate elsewhere for work.²⁸⁰ A similar critique has been made that a push by the developed world to confer rights on migrant workers internationally is a reflection of the “purely selfish viewpoint” of these countries, who would otherwise fear the “great competition” that would result from weaker labour standards in certain developing countries.²⁸¹

Labour development is often described by critics of linkage as a “contamination” of “trade with non-trade issues” that would only serve as a protectionist instrument for use by developed countries.²⁸² A corollary to this argument is that the inclusion of labour development in a non-transparent body such as the WTO would only serve to weaken the ILO, which is seen as a more democratic, pluralist and transparent organization better suited to represent workers’ interests globally.²⁸³ Organizations such as the ILO would be made to feel “less important than the WTO” because the enforcement prerogative for labour violations would be delegated to the WTO.²⁸⁴ The labour and human rights’ activists attempt to intrude onto the main mission of the WTO -

²⁷⁹ Jill Murray, “External Powers and the Role of the EU in Labour Matters” Working Paper 6, online: Oxford <<http://www.competition-law.ox.ac.uk/iecl/pdfs/working6murray.pdf>> (last accessed 3 June 2006).

²⁸⁰ *Supra* note 132 at 15.

²⁸¹ *Ibid.* at 16. In this case, Honduras is the country used as an example.

²⁸² Deepmala Mahla, “Labor Standards in the WTO: Protecting Workers’ Rights or Protecting Privileges in the North?” Excerpts of debate between Deepmala Mahla of Consumer Unity and Trust Society (CUTS), and James Howard of ICFTU, in 5th International Business Forum, Hanover, Germany, October, 2000, online: CUTS <<http://www.cuts-international.org/linkages-debat.htm>>.

²⁸³ *Ibid.*

²⁸⁴ Steve Charnovitz, “Rethinking WTO Trade Sanctions” (2001) 95 Am. J. of Int’l L. 792 at 832. [“Charnovitz”]

the promotion of trade – prompted this response:

“Like the bright light that attracts insects on a warm night, the lure of WTO sanctions has enticed numerous activists to the WTO to try to add their issues for trade enforcement. This influx is harming the WTO by distracting from the task of economic liberalization.”²⁸⁵

There is also the argument advanced by some groups in the United States that labour standards are meant less to enforce human rights and more as a tactic in trade negotiations. Policies integral to labour development have been called a “bargaining chip” on the part of developed countries rather than a sincere effort to protect the rights of workers.²⁸⁶ Developed world economists have also argued that labour development is motivated by fears about the impact of Third World competition, and is in reality “protectionism in the guise of humanitarian concern” with the policy actually having an adverse effect on the living standards of third world workers.²⁸⁷ There are several flaws in this argument.

First, enforcement of labour provisions at their strongest are subject to the same constraints applied to enforcement of other rights within trade agreements, and are quite often much weaker. Labour standards cannot be used simply as a form of protectionism unless there was a genuine infringement upon guaranteed labour rights by a party to the agreement.²⁸⁸ Second, the active promotion of labour development on the scale feared by some economists in the developing world would require a redefinition of economic

²⁸⁵ *Ibid.*

²⁸⁶ “Developments – Jobs and Borders” (2005) 118 Harv. L. R. 2171 at 2212. [“Developments”]

²⁸⁷ Paul Krugman, “Does Third World Growth Hurt First World Prosperity?” (July-August 1994) 72: 4 Harvard Business Review 113 at 121; Manning, Chris. “Does Globalisation Undermine Labour Standards? Lessons from East Asia.” (1998) 52:2 Australian Journal of International Affairs 133. [“Krugman”]

²⁸⁸ Sandra Polaski, “Protecting Labor Rights Through Trade Agreements: An Analytical Guide” (2004) 10:13 J. of Int’l L. and Pol. 13 at 19. [“Polaski”] Polaski notes that the key to preventing the use of labour provisions as a form of protectionism is a neutral determination of any violations of the labour provisions of an agreement. The neutral determination also helps to maintain a sense of “symmetry” between parties to a trade agreement that may otherwise be perceived to be unequal partners.

theory. Economic development as a concept would have to be redefined to state that poverty can not be solely defined through economic analysis.²⁸⁹ This would acknowledge that developing rights in the workplace is a form of development no less legitimate than developing rights in the marketplace.²⁹⁰

However, the ILO continues to define labour development policies within the framework of facilitating economic development strategies:

“There is no evidence of a country where compliance with the fundamental rights at work has hampered long-term economic development and condemned the country to underdevelopment. Even Southeast Asian countries with their historically low level of labour regulation saw how, once macroeconomic balance was restored after the 1997 crisis, investment returned...This would indicate the low relevance of such regulation on short-term investment decisions.”²⁹¹

The ILO’s use of the word *underdevelopment* is particularly relevant. The ILO is stating that core labour standards are on the one hand “fundamental human rights” protected under international law and on the other hand underdevelopment is a condition that is condemnable and must be prevented at all costs.²⁹² Economic development is seen as an evolutionary process, while labour development is seen as a temporary process designed to offset the effects of economic development programs.

2.2.3 Trade Agreements and Minimalist Labour Protections

The only labour provisions incorporated into global trading arrangements tend to have been minimalist in nature. The GATT arguably incorporates some minimal human rights standards through its provision for exceptions related to products of prison labour

²⁸⁹ Arnold, *supra* note 270 at 102.

²⁹⁰ *Ibid.*

²⁹¹ International Labour Organization. *Regional Integration Agreements in the Americas: The Labour Dimension*. (Geneva: International Labour Office, 2003) at 28. [“Regional Integration Agreements”]

²⁹² Developments, *supra* note 286 at 2206.

in Article 20(e), but there have been doubts about its effective enforcement.²⁹³ Other provisions of the GATT have been found to be consistent with European Union Labour and Environmental provisions and this could be interpreted to imply linkage of some labour standards to trade.²⁹⁴ The Generalized System of Preferences, established by the U.S. and the EU in line with GATT rules, allows for suspension of trade rights in the event of violations of core labour standards.²⁹⁵ A large problem with this system is that it has been inconsistently applied based on geopolitical and foreign policy considerations, which are heavily influenced by the interests of American and European multilateral corporations.²⁹⁶ Provisions incorporated into regional trading arrangements apply varying labour standards, but are subject to bilateral and multilateral political pressures, often between unequal trading partners. Labour development is subsumed within the political sphere of considerations.

It is not helpful that both sides in the debate over trade/labour linkage rarely interact with one another other than to simply restate their own positions.²⁹⁷ There is a consequential refusal to acknowledge existing linkages and the existence of an overlap in the space of labour and trade.²⁹⁸ American and Canadian trade legislation already incorporates labour standards into trade agreements, and multilateral measures such as the U.S. *African Growth and Opportunity Act* incorporate general human rights standards

²⁹³ Arnold, *supra* note 270 at 90.

²⁹⁴ Robert Howse, "Back to Court After Shrimp/Turtle? Almost But Not Quite Yet: India's Short-Lived Challenge to Labour and Environmental Exceptions in the European Union's Generalized System of Preferences" (2003) 18 Am. U. Int'l L. Rev. 1333 at 1365. ["Howse"]

²⁹⁵ Arnold, *supra* note 270 at 90.

²⁹⁶ Lance Compa and Jeffrey Vogt, "Labor Rights in the Generalized System of Preferences" (2001) 22 Comp. Lab. L. & Pol'y. J. 199 at 237. ["Compa & Vogt"]

²⁹⁷ Sunhya Pahuja, "Trading Spaces: Locating Sites for Challenge Within International Trade Law" (2000) 14 Aust. Fem. L. J. 38 at 40.

²⁹⁸ *Ibid.* at 40.

as criteria for receiving U.S. trade and aid benefits.²⁹⁹

International trade law has already expanded to include other criteria from other legal fields such as intellectual property law. The TRIPS agreement, which prohibits WTO members from liberally acquiring technology, reflects the evolution of the trade concept to include other concepts outside a narrow definition of trade, such as intellectual property rights.³⁰⁰ Intellectual property law is now seen by Western governments as an “an integral part of international trade.”³⁰¹

A more intractable problem with labour development is that, unlike intellectual property rights, it is not seen as part of the model of economic development promoted by the WTO, World Bank and IMF. The place of labour development within this paradigm is seen primarily in the domestic realm.³⁰² The WTO’s reluctance to engage with labour issues and its lack of transparency on the issue were the primary reasons for the Clinton administration to embrace the ILO more fully by pushing for the 1998 ILO Declaration of Fundamental Principles that is now the central tenet of labour development strategy.³⁰³

The WTO’s unwillingness to incorporate labour rights into its mandate led organized labour to direct its efforts increasingly towards the ILO and to “regional

²⁹⁹ Online: AGOA <<http://www.agoa.gov/>> (last accessed 22 June 2006). Although the human rights organizations allege the U.S. ignores human rights criteria in its application. See online: Human Rights Watch <<http://www.hrea.org/lists/hr-headlines/markup/msg00076.html>> (last accessed 22 June 2006).

³⁰⁰ Adelle Blackett, “Mapping the Equilibrium Line: Fundamental Principles and Rights at Work and the Interpretative Universe of the World Trade Organization” (2002) 65 Sask. L. Rev. 369 at 371.

³⁰¹ Online: Foreign Ministry of Australia <<http://www.dfat.gov.au/ip/>> (last accessed 22 June 2006). The Australian government noted that “its importance is increasing as the effective use of knowledge contributes ever more to national economic prosperity.”

³⁰² Deepmala Mahla, “Labor Standards in the WTO: Protecting Workers' Rights or Protecting Privileges in the North?” Excerpts of debate between Deepmala Mahla of Consumer Unity and Trust Society (CUTS), and James Howard of ICFTU, in 5th International Business Forum, Hanover, Germany, October, 2000, online: CUTS <http://www.cuts-international.org/linkages-debat.htm>.

³⁰³ Edward C. Lorenz, *Defining Global Justice* (Notre Dame, Ind.: University of Notre Dame, 2001) at 207.

forums for a more effective regulation and enforcement of worker rights.”³⁰⁴ There has also been a renewed push within these forums for cooperative approaches to implementing labour development policies. Positive incentives have been cited by the ILO as promoting increased compliance with minimal labour standards, through the use of mechanisms such as trade or investment quotas tied to improvements in labour conditions, which have increasingly been tied to regional trading agreements in the form of labour cooperation agreements.³⁰⁵

Labour development is proceeding through regional mechanisms even if these labour agreements do not explicitly incorporate International Labour Standards into their text. The labour cooperation agreements negotiated within the framework of free trade negotiations continues to be the primary method for developed countries such as the United States and Canada to export labour development. The effects of these labour cooperation agreements on both developed and developing countries will be analyzed further in Chapters 3 and 4 with a study of the NAALC’s impact on United States policy towards Mexican Migrant Workers and an analysis of Canada’s Labour Cooperation Agreement policy with Chile and other Latin American countries.

³⁰⁴ Van den Anker, *supra* note 251 at 271.

³⁰⁵ Polaski, *supra* note 288 at 21. Polaski cites the example of the U.S.-Cambodia which “sets quotas for textile and apparel exports from Cambodia to the United States, the quotas can be increased if Cambodia meets obligations it undertook to improve enforcement of its own labor laws and to protect internationally recognized worker rights in the textile and apparel sector.” This approach has had some success in prompting Cambodian compliance with its own labour laws.

CHAPTER 3: THE NAALC AND MEXICAN MIGRANT WORKERS IN THE UNITED STATES

“It is U.S. policy that all workers are entitled to full and fair compensation for their labor, regardless of their status.”

– Remarks Prepared for Delivery by U.S. Secretary of Labor Elaine L. Chao, NAALC Trafficking in Persons Conference, Washington, D.C. Monday, December 6, 2004

As outlined in Chapter 2, the development and implementation of International Labour Standards has historically been a global exercise, but recent events at the WTO have shifted labour development negotiations onto regional forums. What have been the practical effects of this regional labour regulation on the rights of workers? In the absence of an enforceable global regime of labour regulation, Chapters 3 & 4 will examine the operation of agreements that attempt to regulate labour on a regional basis.

This chapter will analyze the structure and operation of the first trade agreement to incorporate labour provisions into its negotiations, the North American Agreement on Labour Cooperation (NAALC), popularly known as the labour side accord to the North American Free Trade Agreement (NAFTA). Also examined in this section will be the National Administrative Office (NAO) established by each of the NAALC parties to review and respond to complaints about alleged violations of the NAALC. The NAOs will be analyzed to determine their effectiveness in fulfilling the mandate of the NAALC.

The operation of the NAALC will then be analyzed in two sections through examination of a key issue that lies on the intersection of international human rights law, international trade law and international labour law: the employment conditions of migrant workers in the United States. This section of the chapter deals with the nature of

complaints lodged by individuals and NGOs under the Public Communications process of the NAALC. Several complaints made by migrant workers and NGOs to the Mexican NAO regarding the rights of migrant workers in the United States will be analyzed.

I will outline the cooperative approach taken in resolving these complaints as well as cooperative processes utilized by the NAALC to address the related problems of human trafficking and child labour. This chapter will focus primarily on the effects of this cooperative process upon one of the two developed countries that are a party to the NAALC, the United States. Although this chapter includes considerations of Canadian policy in this area, it largely excludes Canada due to the relatively small number of Mexican migrant workers in Canada and the Canadian government's view that migrant workers do not represent a separate category for legal classification purposes.

The case studies in this chapter illustrate that a reciprocal and cooperative process of developing and maintaining transnational Labour Standards requires the presence and active involvement of local communities directly affected by labour rights violations. This process would also include third party interveners such as NGOs and other elements of global civil society as described in Chapter 1. The involvement of these individuals and groups in both developed and developing countries is essential to a truly cooperative effort in enforcing transnational labour standards.

The policy of cooperative engagement for the regulation of labour standards is one that is being followed in subsequent agreements negotiated by all three NAFTA countries. The chapter will conclude by turning to future prospects for using the NAALC as an instrument to promote human rights and labour standards within each of the NAFTA parties, as well as its potential to act as a model for future regional agreements

incorporating labour and human rights standards into future trade agreements under negotiation by the Canadian government.

3.1 Linking Labour Standards to Regional Trade

The 1988 Canada-U.S. Free Trade Agreement (CUSFTA) heralded a process of free trade negotiations in the Western Hemisphere that continues to this day. The CUSFTA did not contain any labour or environmental standards provisions relating to the enforcement of labour standards through international or domestic laws. The involvement of Mexico in the NAFTA negotiations was cause of great concern for U.S. labour organizations. They demanded greater protections for American workers from competition with much lower paid Mexican workers working in transplanted companies not complying with more rigorously enforced labour standards in the United States and Canada.³⁰⁶

This pressure resulted in a May 1991 Memorandum of Understanding signed by American and Mexican Secretaries of Labour that outlined cooperative measures on issues of concern to workers in both countries.³⁰⁷ A similar Memorandum was signed by Canada a year later.³⁰⁸ The Memorandums were non-binding agreements that failed to satisfy growing pressure within the United States during a Presidential Election year for more protection for American workers.³⁰⁹

The Canadian position on the labour standards issue began its shift during the

³⁰⁶ Canadian Labour Congress, "NAFTA: Social Dimension of North American Economic Integration: Impacts on Working People and Emerging Responses" (1996) at 53, online: Canadian Labour Congress <http://canadianlabour.ca/updir/nafta_dimensions.pdf> (last accessed 30 October 2005).

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

latter stages of the NAFTA negotiations in response to the outcome of the 1992 U.S. Presidential elections. In 1993, the newly elected Clinton Administration feared that due to growing civil society pressure affecting both Republican and Democratic Congressmen, it would be unable to pass the NAFTA through the Congress without some substantial concessions respecting labour and environmental concerns.³¹⁰ Although more receptive to organized labour, the Clinton administration voiced no support for renegotiating the NAFTA to include labour provisions into the text of the agreement and there was, in any event, no support from either Canada or Mexico for such a move. Instead, Clinton promised unions that had supported the Democratic Party a labour side agreement “with real teeth.”³¹¹ The talks on incorporating labour issues into the NAFTA framework resulted in the signing of the NAALC on September 13, 1993.

The NAALC incorporated the principle of effective enforcement of domestic labour law as an objective parallel to, but not part of, the NAFTA. Rather than truly enforcing labour standards through incorporation into the NAFTA, the NAALC’s main function was seen by many analysts as an instrument designed to protect the political viability of the NAFTA in the United States Congress.³¹² Exporting minimal labour standards to a developing country such as Mexico was also a response to many human rights organizations’ demands to improve the labour conditions of Mexican workers through imposing labour provisions as part of any free trade agreement. Since the dispute resolution process involved international actors, the NAALC essentially

³¹⁰ Lance Compa, “NAFTA’s Labour Side Agreement Five Years On: Progress and Prospects for the NAALC” (1999) 7 Cdn Lab. and Emp. L. J. 1

³¹¹ “Labor Leaders Denounce Side Agreements to NAFTA” (Aug 16, 1993) 156 Daily Lab. Rep. D-4.

³¹² Constance Phelps, “Social Work and Labor: A Look at the North American Agreement on Labor Cooperation” (2001) 28:1 J. of Sociology and Social Welfare 23 at 37.

“internationalized” domestic labor standards.³¹³

3.1.1 Defining Rights Within a Region

Protection of labour rights through trade agreements requires defining what types of labour rights will be protected, and whether those rights will be based on national definitions or International Labour Standards.³¹⁴ As noted above, the NAALC does not reference International Labour Standards. Instead, all three countries that are a party to the NAALC undertake to provide and effectively enforce their own labour laws.

Labour laws in all three countries must incorporate the eleven principles outlined in the NAALC, including the protection of migrant workers and related issues, such as the rights to strike and bargain collectively, prohibition on forced labour, non-discrimination in employment, and child labour protections.³¹⁵ Despite its lack of reference to international ILO labour standards, the importance of the NAALC should not be underestimated. It was an unprecedented agreement, one that Human Rights Watch termed as the most “ambitious link between labor rights and trade ever implemented.”³¹⁶

3.1.2 The Issue of Enforceability

One of the most contentious issues relating to the incorporation of labour standards into trade negotiations is the issue of enforceability. There is a wide spectrum of enforceability of labour standards:

³¹³ Thomas J. Manley and Luis Laredo, “International Labor Standards in Free Trade Agreement of Americas” 18 *Emory Int'l L. Rev.* 85 at 104. [“Manley”]

³¹⁴ Polaski, *supra* note 288.

³¹⁵ Online: United Farm Workers <<http://www.ufw.org/NAALCbg.htm>> (last accessed 16 December 2005).

³¹⁶ “Trading Away Rights: The Unfulfilled Promise of NAFTA’s Labor Side Agreement” (2001), online: Human Rights Watch <www.hrw.org/reports/2001/nafta/nafta0401-01.htm#p183_13604> (last accessed 30 October 2005).

- Strongest - Fully Enforceable Labour Obligations
- Intermediate - Binding Commitments, Less Intrusive Punitive Measures
- Weakest - Simple Pronouncements By Parties With No Enforcement Mechanisms³¹⁷

Article 42 of the NAALC clearly states that nothing in the Agreement empowers a Party's authorities to undertake any activities relating to labour law enforcement in the territory of another Party to the Agreement. Other regional agreements within Latin America illustrate this wide variance in enforceability. For example, the South American MERCOSUR agreement requires that violations of labour rights may be reviewed by a “regional, supranational Commission on Social and Labor Matters, but no trade or other penalties may be imposed.”³¹⁸

None of the labour cooperation agreements negotiated by the United States or Canada create opportunity for extraterritorial enforcement by one state with another state's territory. However, there is opportunity for “supranational enforcement” of labour standards under the NAALC through the use of dispute resolution and penalties for failure of a state to carry out its obligations under the agreement.³¹⁹ In cases where parties to an agreement fail to fulfill their obligations, the NAALC contains provisions for the use of trade sanctions and fines.

Several institutional mechanisms were created by the three NAALC parties to deal with investigation and enforcement of complaints. Any complaints made by a government, organization or individual under the auspices of the NAALC are handled through a National Administrative Office (NAO) that each state party has created within

³¹⁷ Polaski, *supra* note 288 at 19.

³¹⁸ *Ibid.* at 18. MERCOSUR is a trading zone between Brazil, Argentina, Uruguay, and Paraguay founded in 1991. In 2005, Venezuela was invited to join MERCOSUR as well.

³¹⁹ *Ibid.* at 17.

its own labour department. A complaint against one NAALC party can be made in the NAO office of either (or both) of the other parties. The NAO's may handle three levels of complaints:

3.1.3 Review/consultation

Individuals may lodge complaints, termed "public communications," with the NAO of any of the other NAALC parties that is not the object of the complaint. Following a review of the complaint, the NAO may recommend that the labour ministers of the parties involved discuss the issue ("ministerial consultations").³²⁰

3.1.4 Evaluation Committee of Experts (ECE)

Any dispute over the non-enforcement of labour laws may be dealt with by the forming of an ECE that may then analyze and report recommendations on any complaints regarding a NAALC party's failure to effectively enforce its labour laws. Issues that may be dealt with by an ECE report include "prohibition of forced labor, compensation in cases of occupational injuries and illnesses, protection of migrant labor, elimination of employment discrimination, equal pay for men and women, labor protections for children and young persons, minimum employment standards, and prevention of occupational injuries and illnesses."³²¹ The role of the ILO is also contemplated when forming ECE's, as Articles 24 and 45 of the NAALC state that the ILO may be consulted in their formation.

³²⁰ United Farm Workers, *supra* note 315.

³²¹ *Ibid.*

3.1.5 Arbitration

The arbitration procedure of the NAALC is the most innovative feature of the agreement, as it potentially allows for international involvement in labour disputes. An expert panel composed of individuals outside the NAALC parties may further pursue any disputes regarding failures to effectively enforce labour laws that are not resolved by an ECE. An arbitration panel's decision may recommend courses of action and, if action is not forthcoming to deal with the problem, fines or trade sanctions may be applied against the non-compliant party.

However, an important caveat to the NAALC outlined in Article 27.1 is that the only labour principles subject to arbitration are "minimum wage, child labor, and occupational safety and health cases" and that there must be a "persistent pattern of failure" to enforce standards relating to these principles.³²² Article 49 of the NAALC also provides an escape clause from this as well, stating that a Party has not failed to

"effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards or comply with Article 3(1) in a particular case where the action or inaction by agencies or officials of that Party

1. reflects a reasonable exercise of the agency's or the official's discretion with respect to investigatory, prosecutorial, regulatory or compliance matters; or
2. results from bona fide decisions to allocate resources to enforcement in respect of other labour matters determined to have higher priorities."³²³

The fact that arbitration was restricted in the NAALC to these three principles, the provision of an escape clause in Article 49, and the inclusion of other important labour

³²² *Ibid.*

³²³ Online: NAALC <<http://www.naalc.org/english/agreement7.shtml>>.

principles such as prohibition of forced labor in an *Annex* to the Agreement, as opposed to being in the text itself, all point to a deliberate decision by the NAALC's architects to make coercive enforcement of even the three principles in Article 27 extremely difficult, time-consuming, and highly improbable.³²⁴

The establishment and functioning of the NAOs illustrate the inequality inherent among the parties in the NAALC arrangement. In theory, they are equal national bodies. In practice, the select definition of labour rights combined with the disproportionate influence enjoyed by the United States over Mexico in their trading relationship reflects the general imbalance in the relationship.

3.1.6 A Hierarchy of Rights

In effect, by using a selective process to determine what remedies are available for different violations of labour standards, the NAALC created a "hierarchy among rights and obligations" that reduced the ability to "promote, to the maximum extent possible, the [NAALC Labor Principles]; . . . [and] promote compliance with, and effective enforcement by each Party of, its labour law."³²⁵ To date, no fines or trade sanctions have ever been applied with respect to complaints made under the NAALC. The overwhelming number of public communications has resulted in either outright dismissal or ministerial consultations, and human rights organizations have criticized the reluctance of the NAFTA parties to invoke sanctions as a punishment for violations of the

³²⁴ William E. Sheuerman, "False Humanitarianism? U.S. Advocacy of Transnational Labor Protections" (2001) 8:3 Rev. of Int'l Pol. Econ. 359 at 374

³²⁵ "Labor Rights and Trade: Guidance for the United States in Trade Accord Negotiations" online: Human Rights Watch < <http://hrw.org/press/2002/10/laborrights-bck.htm> > (last accessed 17 December 2005).

NAALC's labour principles.³²⁶

Instead, the three NAALC parties have emphasized the cooperative nature of the Agreement, and complaints regarding Mexican migrant workers within the United States have been dealt with in this manner. This cooperative process has the practical effect of furthering the interests of the United States (and Canada) in regulating the labour standards of a developing country such as Mexico, while maintaining the veneer of an equal relationship through consultation and cooperative activities although such activities rarely result in modifications to labour laws that affect developed countries.

3.2 North American Labour Standards and Migrant Workers

The application of labour standards has a direct impact on the lives of millions of migrant workers. In addition, the proliferation of international labour migration has led to increased abuse of child labour and an explosion of human trafficking designed to facilitate the movement and exploitation of persons. Although the NAALC contains numerous references to migrant workers it does not include a specific definition for them in the agreement and it is necessary to turn to other sources for a definition. A migrant worker is defined under international law as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national."³²⁷ The ILO estimates there to be approximately 93 million migrant workers

³²⁶ "NAFTA Labor Accord Ineffective" online: Human Rights Watch http://hrw.org/english/docs/2001/04/16/global179_txt.htm (last accessed 19 March 2006).

³²⁷ *International Convention On The Protection Of The Rights Of All Migrant Workers And Members Of Their Families*, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, entered into force 1 July 2003.

globally.³²⁸

The reasons behind the movement of migrant workers include typical ones, such as a desire to travel or reunite with family. But for many, the dark side of globalization has resulted in societal inequity and a complete loss of opportunities and human rights protection. An increasing number of workers in developing countries migrate because they feel they have been left with no alternative.³²⁹ International labour migration has generally been seen both as a source of “growth and prosperity to both host and source countries” and a positive outcome of regional economic integration.³³⁰ This regional economic integration has led to increasing concerns regarding the exploitation of migrant workers, as well as problems arising from the loss of highly skilled workers emigrating from developing countries.³³¹ The resistance by developed countries to international intrusion on this issue is in conflict with attempts made through instruments such as the NAALC to enforce migrant workers’ rights. It has also frustrated international efforts through the ILO to deal with the issue.

3.2.1 Applicability of Labour Standards to Migrant Workers

Most complaints to the NAALC deal with the target countries’ lack of

³²⁸ “Current Dynamics Of International Labour Migration: Globalisation And Regional Integration”, online: ILO <<http://www.ilo.org/public/english/protection/migrant/about/index.htm>> (last accessed 12 December 2005). By region, the ILO estimates that there are roughly 20 million migrant workers, immigrants and members of their families across Africa, 18 million in North America, 12 million in Central and South America, 7 million in South and East Asia, 9 million in the Middle East and 30 million across all of Europe. Western Europe alone counts approximately 9 million economically active foreigners along with 13 million dependents.

³²⁹ Kathy Richards, “The Trafficking of Migrant Workers: What are the Links Between Labour Trafficking and Corruption?” (2004) 42:5 Int’l Migration 147 at 151. [“Richards”]

³³⁰ “Current Dynamics Of International Labour Migration: Globalisation And Regional Integration”, online: ILO <<http://www.ilo.org/public/english/protection/migrant/about/index.htm>> (last accessed 12 December 2005).

³³¹ *Ibid.*

enforcement of labour laws applicable to their own citizens. However, the NAALC states in its 11th principle of Annex 1 that the Parties must provide “migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions.” The NAALC thus makes no clear distinction between legal or illegal migrant workers, only referring to migrant workers “in a Party's territory.” The situation for illegal migrant workers in the United States has been affected by a recent U.S. Supreme Court decision. In 2002, a 5-4 majority in the U.S. Supreme Court in *Hoffman Plastic Compounds v. National Labor Relations Board* held that undocumented workers who had been fired for union organizing activities were violating provisions of the 1986 *Immigration Reform and Control Act*, (IRCA) and not legally entitled to all protections available to legally documented workers under the *National Labor Relations Act*.³³²

In September 2003, the Inter-American Court of Human Rights held in an Advisory Opinion, meant in part to respond to the *Hoffman* decision, that the rights to equality and non-discriminatory treatment are *jus cogens* and applicable to any resident of a state regardless of that resident's immigration status.³³³ The ILO's Committee on Freedom of Association also stated in 2003 that *Hoffman* allows only “remedial measures

³³² *Hoffman Plastic Compounds, Inc. v. NLRB*. 535 US 137 (2002); *Immigration Reform and Control Act of 1986*, 8 U.S.C. §§ 1101 [“*Hoffman*”]; *National Labor Relations Act* 29 U.S.C. §§ 151; “Supreme Court Bars Undocumented Worker From Receiving Back Pay Remedy For Unlawful Firing” (April 12, 2002) 16:2 Immigrants' Rights Update, online: Legal Aid Society <<http://www.las-elc.org/arch-020407-immigrants.html>> (last accessed 15 February 2006). In his dissent, Justice Stephen Breyer noted that the legislative history of the IRCA indicated that the Congress, in 1986, had clearly not intended to strip illegal aliens of all protections available under federal employment statutes.

³³³ “Juridical Condition and Rights of the Undocumented Migrants” Inter-American Court of Human Rights, Advisory Opinion Oc-18/03 (September 17, 2003). The opinion was requested by Mexico. The Court stated that “In the area of labor law, the United States does not treat irregular migrants with equality before the law... This discriminatory treatment of irregular migrants is contrary to international law. Using cheap labor without ensuring workers their basic human rights is not a legitimate immigration policy.”; *Towards A Fair Deal For Migrant Workers In The Global Economy* (Geneva: International Labour Office, 2004) at 79 [“Towards a Fair Deal”]. The ILO stated that the ruling “clearly reinforces the application of International Labour Standards to non-national workers, particularly those of irregular status.”

left to the NLRB in cases of illegal dismissals of undocumented workers [which] are inadequate to ensure effective protection against acts of anti-union discrimination.”³³⁴ The ILO also stated that the U.S. Supreme Court noted that Congress possessed the prerogative to pass legislation “into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the Hoffman decision.”³³⁵ Although the NAALC does not reference International Labour Standards, the issue of undocumented migrant workers has arisen in one NAALC Public Communication to the Mexican NAO (numbered 98-04), which is discussed in greater detail in the case analyses below. All other complaints to the NAALC regarding migrant workers in the United States discussed below refer to legally admitted migrant workers.

3.2.2 The Functioning of the Economy: Circumventing Security Concerns

The methods governments have used to deal with increased labour migration stand in stark contrast to the general pattern of globalization as it affects trade and finance. Instead of deregulation, governments of destination countries have become increasingly “selective and restrictive” in admitting migrant workers, with the result being an increase in the pressure to resort to irregular migration in order to bypass these restrictions.³³⁶ North American borders are opening for trade while being closed for workers, stemming in part from a sharp rise in concern over border security seen in the

³³⁴ Online: Human Rights Watch <<http://hrw.org/reports/2005/usa0105/8.htm>>; See ILO Committee on Freedom of Association, Complaints against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), Case No. 2227: Report in which the committee requests to be kept informed of developments (November 20, 2003). (last accessed 21 April 2006).

³³⁵ *Ibid.*

³³⁶ Richards, *supra* note 329 at 151.

United States since the 2001 September 11th terrorist attacks.³³⁷

There is a political movement gathering strength in many developed countries and seen prominently in both the United States and Canada to rapidly deport smuggled persons or illegal entrants into their countries without proper investigation into their case histories that may reveal them as victims of trafficking.³³⁸ Again, while part of this policy results from a desire on the part of these developed countries to protect domestic employment levels, those same countries require the services of migrant workers to further economic goals encouraged through the framework of free trade agreements. This potentially creates a large group of migrant workers subject to international protection through an instrument such as the NAALC but also highlights the contradictions between labour regulation and free trade.

3.2.3 Forced Labour in North America

Most of the NAALC complaints relating to migrant workers in the United States involve the denial of basic human rights amounting to forced labour. In theory, the NAALC has the potential to be used as a tool to prod the American government to address these concerns. Although the NAALC does not define the conditions that would constitute forced labour, Labour Principle 4 of Annex 1 to the NAALC does outline a guiding principle for the Parties to follow:

“The prohibition and suppression of all forms of forced or compulsory labor, except for types of compulsory work generally considered acceptable by the Parties, such as compulsory military service, certain civic obligations, prison labor not for private purposes and work exacted

³³⁷ See online: Congressional Immigration Reform Caucus <<http://tancredo.house.gov/irc/welcome.htm>>. The Chairman, Rep. Ton Cancredo (R-CO), has differed sharply from President George W. Bush on the administration's immigration reform and amnesty proposals.

³³⁸ Richards, *supra* note 329 at 153.

in cases of emergency.”

ILO Convention Concerning Forced Labor 29 (ILO Convention 29) defines forced labour, with exceptions, as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."³³⁹ ILO Convention 29 was a response to the growing imposition of “mass forced labour” by colonial powers on subject populations, which itself arose out of the disappearance of world slave trade.³⁴⁰ The ILO later expanded on this and adopted the *Abolition of Forced Labor Convention (No. 105) of 1957* with state parties also undertaking to eliminate and penalize the practice of forced labour, including all persons who are trafficked.³⁴¹ ILO Convention 105 has been ratified by all three NAALC governments.³⁴²

Forced labour is not a problem that is restricted to developing countries. Within the North American context, forced labour exists due to the existence of an informal economy that arises primarily due to poor government regulation. The ILO defines an informal economy as "all remunerative work—both self-employment and wage employment—that is not recognized, regulated, or protected by existing legal or regulatory frameworks and non-remunerative work undertaken in an income-producing enterprise."³⁴³ A survey of three hundred published newspaper articles reporting incidents of forced labor in the United States between January 1998 and December 2003

³³⁹ *ILO Convention 29 Concerning Forced Labour* 39 U.N.T.S. 55 (28 June 1930). [“ILO Convention 29”]. The Convention entered into force 28 May 1947.

³⁴⁰ Bales, *supra* note 137.

³⁴¹ *ILO Convention 105 Concerning the Abolition of Forced Labour* 320 U.N.T.S. 291 (25 June 1957) [“ILO Convention 105”]. The Convention entered into force 17 January 1959.

³⁴² Online: ILO <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C105>> (last accessed 2 January 2006).

³⁴³ “Women And Men In The Informal Economy; A Statistical Picture” (2002), online: ILO <www.ilo.org/public/english/employment/gems/download/women.pdf> (last accessed 19 March 2006).

revealed a total of 131 cases of forced labour that met the criteria outlined in ILO Convention 29.³⁴⁴ The existence of forced labour in countries such as the United States is due to a combination of economic and immigration policy and poor regulation and enforcement of domestic labour laws.³⁴⁵ The NAALC's application to this issue has thus been focused on ensuring the enforcement of existing national laws implemented to deal with conditions of work amounting to forced labour.

3.2.4 National Legislation to Protect Migrant Workers

One of the basic principles with respect to labour standards developed for migrant workers is that of equal treatment for all migrant workers and application of the same standards as those "applied to nationals of the State of employment."³⁴⁶ As stated above, this is a principle that is incorporated into the NAALC. Although there has not been much progress made in ratifying ILO Conventions relating to migrant workers, national legislation has been passed in the United States in recent years to address concerns raised

³⁴⁴ Bales, *supra* note 137 at 53. The methodology for the survey: "More than 300 published news reports for the period of January 1998 through December 2003 were reviewed for the survey. Cases that seemed to meet the criteria set out in ILO Convention 29 on forced labor were then coded into an SPSS format for analysis. When a case of forced labor was covered in more than one news report, the information from the multiple reports was combined into a single computer record. A total of 131 individual cases of forced labor were identified, each case having from one to thousands of victims. The following variables were recorded for each case: location of violation; city of violation; country of origin (victim); number in forced labor; whether a minor was involved; economic sector of exploitation; type of visa held by victim, if any; country of origin of perpetrator; story title and author; report citation; and contact name for story, if any."

³⁴⁵ *Ibid.* at 56.

³⁴⁶ Towards A Fair Deal, *supra* note 333 at 42; *ILO Convention 143 Concerning Migrant Workers (Supplementary Provisions) Convention, 1975*. See specifically Article 12 - "guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment."; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Commission on Human Rights Resolution 2000/49. See specifically Article 25(1) - "Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment" in respect of remuneration and other conditions of work and terms of employment."

by the ILO.³⁴⁷

U.S. legislation to protect migrant workers exists in the form of the *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*³⁴⁸ and the *Fair Labor Standards Act (FLSA)*.³⁴⁹ Minimum wages and workers' deductions are covered under this legislation to insure that regardless of their legal immigrant status in the U.S., the workers are not paid below the federal minimum wage.³⁵⁰ The problem however is not with the lack of any legal mechanism. Problems arise largely due to a lack of resources committed to the issue by the American government, as the U.S. Department of Labor simply cannot adequately investigate or prosecute allegations of abuse in markets as large and diverse as the domestic workers and agricultural fields.³⁵¹

Exclusions of migrant workers under national legislation designed to protect domestic workers in NAALC parties is also a persistent problem. An analysis of forced labour conditions existing for migrant workers in the Florida citrus industry indicated the prevalence of coercive measures taken against primarily immigrant agricultural workers from Mexico and Guatemala, who often worked for no pay or for wages far below minimum wage.³⁵² In addition, illegal migrant workers in the U.S. have had their ability to recover damages in lost wages severely limited by the U.S. Supreme Court.³⁵³

Another difficulty with the use of national legislation to regulate the rights of migrant workers involves prosecutors' reluctance to take on cases involving violations of migrant workers' rights. Civil society groups' involvement is often necessary to instigate

³⁴⁷ Richards, *supra* note 329 at 149.

³⁴⁸ 29 U.S.C. § 1801 *et seq* (2003).

³⁴⁹ 29 U.S.C. § 201 *et seq* (2003).

³⁵⁰ Bales, *supra* note 137 at 63.

³⁵¹ *Ibid.* at 64.

³⁵² *Ibid.* at 64-65.

³⁵³ Hoffman, *supra* note 332.

investigations, as what happened in May 2000 when a Florida-based NGO called the Coalition of Immokalee Workers (CIW), began investigating the employment conditions of migrant workers employed by a company called R&A Harvesting after receiving information about migrant farm worker abuse by the company. CIW urged the U.S. Justice Department to investigate what seemed to be a clear case of forced labour in Florida's citrus groves however federal investigators "initially declined to pursue the case because, without adequate resources to investigate, they felt they could not prove involuntary servitude without victims who would be willing to testify."³⁵⁴

The failure to devote sufficient resources to deal with this problem continues despite much evidence pointing to large scale labour rights violations of migrant workers within the United States. An important dilemma can be seen here as well with respect to enforcing such rights within developing countries subject to an accord such as the NAALC. If a wealthy, developed country such as the United States relies on the defense of insufficient resources to deal with violations of internationally agreed to labour standards, how can developing countries be expected to devote sufficient resources to deal with similar problems?

3.3 The NAALC and Migrant Workers

The central problem then is not a lack of laws designed to protect migrant workers in North America but rather the misinterpretation of those laws by the U.S. Supreme Court, combined with the political will and economic means to properly enforce them. International human rights conventions, as outlined in Chapter 2, can raise awareness of

³⁵⁴ Bales, *supra* note 137 at 81. It took additional work performed by CIW, and more than a year of subsequent investigations before charges were laid against R & W.

rights abuses and shame countries into action, but they are not designed to coerce states into enforcement of existing national labour laws, particularly when the targeted country is the United States. Human Rights Conventions are also designed on a state-to-state basis – there is no mechanism in ILO or UN conventions for NGOs or individuals to launch complaints.

The issue of poor enforcement of labour laws is one that an agreement such as the NAALC is meant to directly address. With respect to the NAALC's complaints process, NGOs and individual workers have played an important role in raising complaints with respect to migrant workers against all three parties. Specifically, NGOs raised the treatment of migrant workers in several complaints that led to public hearings and seminars involving, employers, workers, and governments on the general topic of migrant workers' rights. The following case studies illustrate the methods with which the NAALC deals with these complaints regarding Mexican migrant workers rights' in the United States. They reveal a similar pattern of inaction on the part of a developed country such as the United States when faced with unexpected complaints regarding labour rights violations arising from a developing country's concerns.

3.3.1 Mexican NAO 9802 – Washington State Apple Pickers Complaint

In May 1998, several NGOs and unions submitted a public communication to the Mexican NAO complaining of the treatment of migrant workers in the Washington State apple picking and packing industry. The complaint specifically alleged violations of a number of the NAALC principles, including failures of state labour laws to cover agricultural workers, ensure the right to organize collectively; effectively enforce

occupational health and safety laws and minimum wage laws; adopt occupational health and safety standards relating to hazards prevalent in agricultural work and provide equal protection to migrant workers.³⁵⁵

The complaint was accepted for review six months later by the Mexican NAO on November 28, 1998 and in August 1999 it issued a report recommending Ministerial Consultations between the U.S. and Mexican Secretaries of Labor on these issues.³⁵⁶ The ministerial consultations resulted in a Joint Declaration on May 18, 2000 that addressed a number of complaints raised by the NGOs.

The Joint Declaration was deemed to apply to situations possibly existing in Canada as well, and was subsequently signed by Canada's Minister of Labour on July 6, 2000.³⁵⁷ The Joint Declaration called for several meetings of Mexican and U.S. government officials to discuss the issues raised by the Migrant Workers' complaints. Among the specific recommendations were several "public outreach sessions" for migrant workers in the United States to inform them of their workplace rights; public forums specifically targeting migrant farm workers' issues in Washington State and Maine; and an "Action Plan" to provide a tri-national guide on migrant workers.³⁵⁸

The Washington State apple pickers/packers case was a particularly important

³⁵⁵ Online: NAALC <http://www.naalc.org/english/summary_mexico.shtml> (last accessed 14 December 2005). ("NAALC Mexico") The communication was submitted on May 27, 1998, by the Unión Nacional de Trabajadores (UNT), Frente Auténtico del Trabajo (FAT), Frente Democrático Campesino (FDC), and the Sindicato de Trabajadores de la Industria Metálica, Acero, Hierro, Conexos y Similares (STIMACHS), assisted by the International Labor Rights Fund.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.* The other complaints, numbers Mexican NAO-9801 and 9803, also dealt with similar issues regarding Mexican migrant workers in the United States and Canada.

³⁵⁸ *Ibid.* There was a meeting of the U.S. and Mexican NAO's in Washington, D.C. on May 23 and 24, 2001, with a follow-up session in Mexico City the week after, to deal with the issues raised in this complaint. The U.S. NAO also organized public forums in Yakima, Washington, on August 8, 2001, and in Augusta, Maine on June 5, 2002.

milestone for the NAALC for two reasons. First, there was the unusually broad nature of the complaint and of the issues involved, specifically the alleged violations of occupational safety and health laws, which could trigger arbitration and sanctions under the NAALC. Secondly, this complaint, along with two others filed in the same year, represented the first instance in which a developed country had its labour laws and enforcement policies subject to examination under the NAALC process. The Executive Director of the International Labor Rights Fund (ILRF) based in Washington D.C. referred to the case as “an important step for scrutinizing labour law enforcement in the United States, where there are severe problems of discrimination against workers who try to form unions and where migrant workers face widespread labor and human rights violations.”³⁵⁹

The significance of the Washington State apple pickers case is that it at least raised the possibility of international investigations of alleged violations of migrant workers’ rights in the United States, even if options for enforcing any decision were limited by the scope of the NAALC.³⁶⁰ An independent Mexican labour union stated that the issue deserved international exposure because of the nature of the problem, a “veritable ‘social dumping’ of apples exported to Mexico, with companies tripling their profits by violating workers’ rights.”³⁶¹ Prior to this case, the U.S. had not publicly even acknowledged the existence of the problem.

The public forums in this case were thus regarded as a particularly important

³⁵⁹ “Faulting U.S. Labor Laws, Mexican Unions File Broadest Nafta Labor Complaint On Washington State Apple Industry” (27 May 1998), online: Laboris <<http://laboris.uqam.ca/anact/applepress.htm>> (last accessed 19 December 2005).

³⁶⁰ “Apple Pickers Rights” online: American University <<http://www.american.edu/projects/mandala/TED/picker.htm>> (last accessed 17 December 2005).

³⁶¹ Ibid, from International Labor Rights Fund. Press Release, May 27, 1998. Washington: International Labor Rights Fund, 1998.

event since this was the first time that a “broad, industry-wide complaint under the NAALC has come to public forum in the United States” with workers being able to voice their concerns regarding violations of their international labour rights, as well as lack of enforcement of U.S. labour laws.³⁶² In particular, the farmworkers’ concerns, in addition to occupational safety and health issues, involved broad human rights concerns such as racial discrimination, freedom to organize, and bare subsistence wages in a particularly dangerous occupation.³⁶³ These were issues that that U.S. government had previously been reluctant to discuss in an international forum. It is important to note also that only three labour principles included in the NAALC - minimum wage, child labor, and occupational health and safety - are subject to arbitration. If the issue is not related to trade matters as defined by the NAALC (that is, it deals with freedom of association, collective bargaining, or the right to strike) the NAO can only recommend that the Ministers of Labor hold a consultation to the subject.³⁶⁴

However, hopes that this case would result in the first use of the NAALC’s more coercive measures of enforcing labour standards would remain unfulfilled. The International Labour Relations Fund optimistically stated that the Mexican NAO was only a “first stage” in the NAALC complaint process and that the NAO review could “lead to fines or loss of NAFTA tariff benefits for Washington State apple exports to Mexico.”³⁶⁵ Even among labour unions, however, there was no unanimous consensus on the need to utilize the NAALC’s stronger enforcement measures. In particular a large

³⁶² United Farm Workers, *supra* note 315.

³⁶³ *Ibid.*

³⁶⁴ “Levels of Treatment Under the NAALC”, online: NAALC

<<http://www.naalc.org/english/infocentre/whatis/whatis8.htm>> (last accessed 29 June 2006).

³⁶⁵ “Mexico Announces Review of Washington State Apple Workers Complaint Under NAFTA Labor Side Agreement” (15 July 1998), online: International Labor Rights Fund <<http://www.laborrights.org/press/apple071598.htm>> (last accessed 22 December 2005).

American union, remarking on the potential harm a trade war would have on both migrant and American workers, expressed the hope that the case “never reaches the stage of economic sanctions.”³⁶⁶ The lack of consensus among labour groups may have made it easier to avoid the punitive route in this case, which was doubtful from the beginning as even the Mexican government never took steps to push for stronger measures against the United States.

Despite the lack of any coercive measures to ensure U.S. compliance in this case, the recommendations outlined in the Joint Declaration did result in the production of material meant to address the central issues in the complaint. In 2001 the NAALC did publish what was to be the first comprehensive guide to North American laws affecting migrant workers, the *Guide to Labor and Employment Laws for Migrant Workers in North America* (“*Migrant Worker’s Guide*”).³⁶⁷ The *Migrant Worker’s Guide* addressed issues faced by Mexican migrant workers in the U.S., including racial discrimination and denial of fundamental rights guaranteed by U.S. law including the right to collective bargaining, freedom of association, and the right to a workplace that met minimum standards with respect to occupational health and safety.³⁶⁸

3.3.2 Mexican NAO 9804 – U.S. Department of Labor Case

This complaint alleged that procedures followed by different departments of the

³⁶⁶ “U.S., Mexican Officials to Hear Workers’ Claims in Trade, Labor Rights Dispute under NAFTA; Sanctions Could Result”, online: United Farmworkers of America <<http://www.ufw.org/NAALCpr.htm>> (last accessed 19 December 2005). Guadalupe Gamboa, Regional Director of the United Farm Workers of America union, remarked “Migrant workers in Washington State care about the health of their communities and their industry. We hope to work cooperatively with the state and federal governments to reach a model of labor relations in which fair returns to growers are coupled with fair protection of workers’ collective bargaining rights, rights with respect to labor standards, and their health and safety.”

³⁶⁷ *Guide to Labor and Employment Laws for Migrant Workers in North America* (2001), online: NAALC <http://www.naalc.org/migrant/english/mgtab_en.shtml> (last accessed December 19, 2005).

³⁶⁸ *Ibid.*

U.S. government violated the rights of Mexican migrant workers in the country. At issue was a Memorandum of Understanding between the U.S. Department of Labor (DOL) and the U.S. Immigration and Naturalization Service (INS) that required DOL inspectors investigating migrant workers' complaints to inspect employer records on the immigration status of employees, and report back any information concerning unauthorized workers to the INS.³⁶⁹ The complaint alleged that this obviously made migrant workers reluctant to complain to the DOL about their working conditions for fear of being subject to reprisals by the INS.

A public communication on the matter was submitted on September 22, 1998 and it took nearly four years before ministerial consultations on the matter resulted in a commitment by the U.S. Secretary of Labor to increase collaboration between Mexico and the United States in "educating migrant workers about their labor rights" and to "develop educational materials in Spanish that will be distributed in areas where there is a high concentration of migrant workers."³⁷⁰ Prior materials on the subject had been available only in English. The DOL and INS also produced a new Memorandum of Understanding in which DOL agreed not to share information on the immigration status of *migrant workers who initiate complaints* relating to wages or overtime payments - however information obtained through investigations *initiated by the DOL* could still be shared between departments.³⁷¹ Once again, the Mexican government failed to push for stronger measures to deal with the issues listed in the complaint, and did not dispute the

³⁶⁹ *Ibid.* The communication was submitted by the Yale Law School Workers' Rights Project, the American Civil Liberties Union Foundation Immigrants' Rights Project, and a number of other civil rights organizations and trade unions.

³⁷⁰ *Ibid.*

³⁷¹ "NAALC Case Summaries", online: Human Rights Watch
<<http://www.hrw.org/reports/2001/nafta/nafta0401-05.htm>> (last accessed 20 December 2005).

small modifications in bureaucratic process and policy that ultimately resulted.

The handling of this case demonstrated some serious flaws with the NAALC and revealed further limitations on its ability to effect serious policy changes on a developed state party to the agreement. First, migrant workers' fears regarding possible deportation resulting from complaints regarding working conditions remained largely unaddressed, since information between U.S. government departments could still be shared. Secondly, the commitment to produce Spanish language editions of materials already partially available in English, while a welcome development, was hardly enough to address the concerns raised in the complaint. Third, the fact that the United States (and Canada) often viewed their governmental processes in the labour sector as models to be exported to developing countries made it even more difficult to address Mexican complaints related to those governmental procedures. Finally, the fact this case took nearly four years to result in such a limited course of action reveals the procedural problems of the NAALC.

Without a neutral body to investigate the complaint, the process was subject to U.S. and Mexican political considerations. This made it more likely that any resolution would not be reached quickly. The fact that only serious policy changes among a resistant bureaucracy would have fully addressed the issues in the complaint made a true solution to the issues raised in the complaint even more unlikely.

3.3.3 Mexican NAO 2001-1 – Complaints regarding New York State Labor Law Enforcement

In October 2001, a number of individual workers and several workers' rights groups filed a public communication to the Mexican NAO alleging that the State of New

York had failed to enforce workers' compensation and occupational safety and health laws with respect to migrant workers.³⁷² The Mexican NAO accepted the public communication on November 15, 2001 and in December of that year the Mexican NAO requested cooperative consultations with the U.S. NAO. Specifically, in addition to violating NAALC labour principles, the complainants alleged that administrative hearings in the state of New York (which do not provide for non-English translation and sometimes last as long as 10 or even 20 years) violated NAALC Article 5(1)(d), which states that administrative proceedings relating to labour issues should not be "unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays."³⁷³

The Mexican NAO issued a report in November 2002 which did not comment on the compensation issue or on the alleged violations of occupational health and safety issues, and also declined to comment on the alleged procedural violations, stating the opinion that this did not relate to the "implementation and enforcement of labor laws" under the NAALC.³⁷⁴ Requests for wider public dissemination of migrant workers' rights were repeated, as well as further requests for increased cooperation with the U.S. Department of Labour and the State of New York on this issue. This case demonstrated the narrow scope with which the NAOs interpret the NAALC provisions. The Mexican NAO was unwilling to consider alleged procedural violations, even if those procedures resulted in a violation of NAALC principles. Instead, this case demonstrated that the NAOs largely restrict themselves only to considering allegations of direct violations of

³⁷² NAALC Mexico, *supra* note 355.

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

enforcement of labour laws by any of the NAALC parties. The assertiveness of the Mexican NAO in rejecting aspects of the complaint likely to displease the United States may have revealed policy shifts resulting from a change of government in Mexico City. Political influence on NAOs, ostensibly not a factor in the complaints process, does in fact exist and will be discussed further below.

3.3.4 Mexican NAO 2003-1 – Migrant Workers complaint against U.S. and North Carolina employers

The U.S. H-2A Non-Immigrant Visa Program became the subject of a public communication filed in February 2003 by two farm workers' advocacy groups, who alleged that the H-2A program was discriminatory, and that North Carolina employers exploited migrant workers by not "not paying overtime, blacklisting, and denying migrants access to workers' compensation benefits."³⁷⁵ The complainants also alleged that rights covered under the NAALC are violated in part because of H-2A workers' lack of access to legal representation. The complaint states that a class action lawsuit "would often be the best way for H-2A workers to seek legal remedies, since every class member is not required to participate as an active party in a class action lawsuit."³⁷⁶ Even when H-2A workers are able to access legal representation, the complainants charged, they are often unable to access a variety legal options, since typically H-2A workers are

³⁷⁵ NAALC Mexico, *supra* note 355. The two farmworkers' advocacy groups who filed the complaint were the Washington, D.C.-based Farmworker Justice Fund and the Mexico-based farmworker advocacy group *Central Independiente de Obreros Agrícolas y Campesinos*.

³⁷⁶ Petition to the National Administrative Office of Mexico Under the North American Agreement on Labor Cooperation (Submitted by Central Independiente de Obreros Agrícolas y Campesinos & Farmworker Justice Fund) (Feb. 11, 2003), online: Brennan Centre <http://www.brennancenter.org/programs/lse/pages/view_elerts.php?elert_id=&s_date=&e_date=&category_id=30&end_date=&page=17&search_text=> (last accessed 5 July 2006).

represented by LSC-funded attorneys prohibited from participating in class action lawsuits.³⁷⁷

The complaint is unusual in that it charges North Carolina employers with deliberately discouraging migrant workers from learning their legal rights and contacting lawyers. Specifically, it alleges that the North Carolina Growers Association (NCGA)

“ordered H-2A workers to discard the “Know Your Rights” handbooks that are prepared by civil legal aid programs to educate workers about their employment rights and distributed to the workers prior to their arrival in North Carolina...NCGA has posted signs such as “Don’t be a puppet of legal services,” in the area where the orientation is held, and that the NCGA has announced at the orientation that legal services lawyers are “the enemy of the H-2A program” and has warned workers “to avoid any contact with such individuals.” After workers discard their “Know Your Rights” handbooks, they are allegedly handed a booklet titled, “Understanding Your Work Contract,” which allegedly discourages workers from communicating with Farmworker Legal Services (FLS), and which allegedly says, “FLS discourages the growers with excessive suits which are for the most part without merit. The history of FLS shows that the workers who have talked with them have harmed themselves. Don’t be fooled and allow them to take away your jobs.”³⁷⁸

The complaint urged the Mexican government to investigate the issues, to consult with the U.S. government regarding its alleged NAALC violations, and to develop a plan to ensure legal protection of workers in the H-2A program.³⁷⁹

In September 2003, the Mexican NAO accepted the public communication for review and two weeks later requested cooperative consultations with the U.S. NAO.³⁸⁰

The U.S. DOL concluded in its own investigation in 2004 and found that North Carolina

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid.*

³⁸⁰ *Ibid.*

had been enforcing its laws properly.³⁸¹ No further action has been taken on the case by the Mexican NAO as of December 2005.

Both this case and the New York state case above were seen by some American trade organizations as an attempt by Mexico to impose its views on immigration issues relating to its citizens working in the United States through the NAALC. This view apparently extends even to the U.S. DOL and the U.S. National Advisory Committee on the NAALC. The Advisory Committee heard from the DOL Director in May 2004 and in turn Committee members “cautioned that Mexico has a separate agenda in its investigations of the treatment of migrant workers. Rather than just the enforcement of current laws, Mexico wants to see changes in those laws.”³⁸² The DOL Director agreed with the Committee stating that the complaint went “went way beyond the objectives in the NAFTA accord” and that cooperative programs are in place to deal with workers’ complaints.³⁸³ Both departments avoided any discussion of punitive measures, or of changes to any U.S. labour laws to comply with NAALC rulings.

3.3.5 Mexican NAO – 2005-1 – Rights of Migrant Workers under H-2B visa program in Idaho

In April 2005, the U.S. H-2B Visa program became the subject of a NAALC public communication. This complaint was submitted by three attorneys acting for various migrant workers and migrant worker associations in the United States.³⁸⁴ The

³⁸¹ “Mexico Seen Using NAFTA Labor Deal to Press Immigration Issues” (2004) 24:19 Washington Tariff and Trade Letter 1 at 2-3 [“Mexico Seen Using NAFTA”]. The article states that workers’ representatives in the complaint alleged that the number of H2-A workers has increased 700-800% in the last decade.

³⁸² *Ibid.*

³⁸³ *Ibid.*

³⁸⁴ D. Michael Dale for the Northwest Justice Project, Maria Andrade, local Idaho lawyer, Laura K. Abel and David S. Udell from the Brenann Centre for Justice, NY University School of Law.

Brennan Centre of the NY University School of Law and the Northwest Justice project coordinated the national aspects of the complaint, while lawyer Maria Andrade coordinated the local needs.

The H-2B Visa facilitates the entry of seasonal Mexican workers into the United States. The complaint alleged that migrant workers under the H-2B Visa program in Idaho were denied protection against forced labour and minimum employment standards; had suffered employment discrimination including inequality in pay for women and men; and who had been exposed to occupational injuries and offered inadequate compensation for these injuries.³⁸⁵ In March 2006, four additional Mexicans brought to the United States as temporary workers by an American company filed an addendum to the original petition alleging employment contract, wage and housing violations during their work at a corn packing operation in Olathe, Colorado, as well as denial of access to legal services.³⁸⁶

A major aspect of this complaint deals with the inability of the migrant workers to secure legal assistance to enforce their rights under U.S. labour laws. In Idaho, legal aid lawyers receive federal funding from the Legal Services Corporation (LSC) and lawyers receiving LSC funding are barred by federal law from representing several categories of

³⁸⁵ NAALC Mexico, *supra* note 355. Lawyers working for the following groups filed the complaint: the Northwest Workers' Justice Project, the Brennan Center for Justice at New York University School of Law, and Andrade Law Office. Sixteen migrant workers from Panama, Mexico and Guatemala were joined by nine U.S. and Mexican organizations in filing the complaint, including Centro de Investigacion Laboral y Asesoría Sindical, A.C.; Frente Auténtico del Trabajo; National Union of Workers (UNT); Red Mexicana de Acción Frente al Libre Comercio; Sin Fronteras, I.A.P.; Idaho Migrant Council; National Immigration Law Center; Oregon Law Center; and Pineros y Campesinos del Noroeste.

³⁸⁶ "Latin American Temporary Workers File Complaint Regarding U.S. Noncompliance with International Law Regarding Access to Labor Rights Lawyers", online: Brennan Center <http://www.brennancenter.org/programs/pov/immigrant_rights_immigrant_access.html> (last accessed 17 May 2006). The Mexican Human Rights organization El Centro de Derechos Humanos de la Montaña "Tlachinollan" A.C., and the International Labor Rights Fund joined the case in the Addendum. The addendum lists similar difficulties to the original petition in obtaining legal assistance by migrant workers in Colorado.

immigrants, including those who are in the U.S. on H-2B Visas.³⁸⁷ This case tested a specific principle of the NAALC, which states in Article 4(d) that the United States must

“enforce its laws in connection with NAALC labor principles requiring:

d) providing migrant workers in [the United States’] territory with the same legal protection as [United States] nationals in respect of working conditions.”³⁸⁸

The Legal Memorandum in support of this NAALC petition directly addresses the United States’ denial of appropriate access for migrant workers to enforce their labour related rights. The petition frames “appropriate access” as access to legal help, stating that

- “The United States denies many immigrant workers access to lawyers receiving any LSC funding;
- Workers who obtain assistance from legal service lawyers are more likely to enforce their labour rights;
- It is unlikely that immigrant workers can enforce their rights without to lawyers receiving some LSC funding.”³⁸⁹

This case illustrated the difficulty migrant workers have in obtaining legal representation in the United States and the importance of lawyers in the complaints process. The memorandum quotes Idaho Dept. of Labor Officials as stating that the US DOL is ill-equipped to deal with migrant workers legal concerns and that legal

³⁸⁷ “Fact Sheet: Complaint to Mexican Government Regarding Access to Labor Rights Lawyers for Temporary Workers in the U.S.” (13 April 2005), online: Brennan Center http://www.brennancenter.org/programs/pov/immigrant%20rights/immigrantrights_latintempworkers_factsheet.pdf (last accessed 12 December 2005). [“Brennan Center”]

³⁸⁸ “North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States” (13 September 1993), online: Commission for Labor Cooperation <<http://www.naalc.org/english/agreement.shtml>> (last accessed 30 October 2005). (“NAALC”)

³⁸⁹ Memorandum in Support of Petition, “Labor Law Matters Arising in the United States” submitted to the Mexican NAO, 13 April 2005, online: Brennan Centre <<http://www.brennancenter.org/programs/downloads/final%20memo.pdf>> (last accessed 6 July 2006) [“Brennan Memo”].

representation is essential to resolving complaints.³⁹⁰ The role of lawyer Maria Andrade was critical in this case, as she was able to obtain grant funding to represent the workers through the Oregon Law Center only on condition that a NAALC complaint would be filed.³⁹¹

Access to legal services for migrant workers is particularly difficult in remote areas of states such as Idaho, where for a variety of factors including language and economic reasons qualified private legal assistance is not readily available.³⁹² The Memorandum outlines numerous other instances of essential legal service either being expensively obtained or denied to the migrant workers.³⁹³ Nevertheless, the need for migrant workers to have access to proper legal representation is necessary to secure a variety of rights related to their status.

Access to the legal process is essential for migrant workers in the U.S. obtain a remedy under federal legislation such as the *Migrant and Seasonal Agricultural Worker Protection Act*.³⁹⁴ Litigation is much more likely to be successful when migrant workers, often unfamiliar with the U.S. legal system and the English language, are represented by

³⁹⁰ Brennan Memo, *supra* note 389 at 6.

³⁹¹ *Ibid.* at 13. Andrade's critical role is illustrated by the following excerpt from the memorandum: "Because its financial resources are extremely limited, and could only be used to assist workers with legal claims in Oregon, the OLC agreed to accept the men's cases only if it could find additional funding to do so and only if the men would agree to allow the OLC to withdraw from the case if no such funding were found. Through spring, 2001, the OLC sought funding. However, in June of 2001, Maria Andrade, the only OLC attorney licensed to practice law in Idaho, decided to leave the OLC. Consequently, OLC would no longer represent the men. With some reluctance, since cases like this are often expensive and difficult to litigate, and with the hope that she would be able to obtain an outside source of funding to cover her costs, Ms. Andrade agreed to take the case with her into private practice. In September, 2002, the Idaho Migrant Council agreed to pay \$5,000 in costs to litigate the claim, in large part in recognition of the severity of the issue and the fact that this NAALC complaint would be filed as a companion to the federal court complaint."

³⁹² Brennan Center, *supra* note 387.

³⁹³ Brennan Memo, *supra* note 389 at 18-21. The Memorandum outlines several outrageous situations that the migrant workers were allegedly exposed to by unethical or incompetent legal personnel.

³⁹⁴ *Ibid.*

legal counsel.³⁹⁵ As of April 2006, the Idaho state government has not addressed the lack of legal representation issue raised by the complaint, nor have any modifications been made to state laws to address the issue. The Mexican NAO, as of June 2006, has yet to respond further to the complaint.

The period from 2001-2006 thus saw increasing use of the NAALC to highlight the lack of access to legal services for migrant workers in the United States. The two most recent complaints filed in the Mexican NAO, 2003-1 and 2005-1, both deal with the importance of lawyers' in assisting migrant workers' complaints and denial of access to legal services to migrant workers in the U.S. contrary to NAALC principles. Legal aid lawyers, law school clinics and Access to Justice Centres became the central figures in these complaints.

3.3.6 Engaged Actors, Deflected Complaints

All of these NAALC complaints relating to migrant workers in the United States illustrate several key features of the agreement, and of its operating process. First, it functions to engage civil society within international legal processes and to publicly reveal problems in national programs designed to deal with migrant workers. Secondly, the complaints are subject to bureaucratic delays and political considerations resulting in very long delays. Finally, the result of these processes has not resulted in any punitive actions but instead has in every instance reflected the NAALC's consultative approach to enforcing labour standards.

The limitations of this approach are illustrative of the unwillingness of a

³⁹⁵ *Ibid.*

developed country such as the United States to subject itself to measures that could result in legislative or policy changes originating from complaints initiated from Mexico. The United States consistently opposes what it viewed as coercive action from a developing country meant to alter its labour legislation or policies. Politically, American officials could not be seen to be altering American laws to comply with Mexican demands.

American compliance with Mexican demands under the NAALC would have entailed a reversal of over fifty years of labour development policy. Because this would result in an industrialized country actually adopting labour law reforms originating from a developing nation's demands, the United States and Canada have avoided engaging certain aspects of the NAALC that would have the potential to produce this effect. Instead, the cooperative approach utilized by the NAALC allows the Mexican government to domestically save face politically while allowing it to escape potential conflicts with its partners in the NAFTA.

3.4 Difficulties in Regulating Labour Rights by Regional Agreement

The analysis of the violations of rights of migrant workers in the United States reveals inherent difficulties in enforcing labour standards through trade accords. The inequalities inherent between the developed and developing countries can be exacerbated by linking labour to trade, such that it becomes extremely difficult for Mexico to favorably resolve a dispute with the United States or Canada under the NAALC. In such a context, the Mexican government has appeared reluctant to resolve complaints and pursue labour disputes under the NAALC.

In addition to the involvement of knowledgeable lawyers, a successful complaint

process under the NAALC would seem to require a sustained effort by civil society groups with the knowledge, experience and resources to see such a complaint forth successfully. The principle extends beyond the NAALC. Labour standards incorporated into or alongside trade agreements are only effective when, in addition to the parties to the agreement, NGOs, labour unions, business interests, and interested individuals, “can submit allegations of non-compliance to an independent, non-political oversight body with authority to levy adequate penalties to ensure compliance.”³⁹⁶

The problem with the design of the NAOs is that they are not independent bodies and do not see themselves as establishing quasi-judicial precedents with respect to labour standards within North America. An indication of the role the U.S. NAO sees for itself is seen in previous public communications regarding freedom of association and collective organizing rights at Honeywell and General Electric subsidiaries in Mexico:

“...the NAO is not an appellate body, nor is it a substitute for pursuing domestic remedies. Rather, the purpose of the NAO review process, including the public hearing, is to gather as much information as possible to allow the NAO to better understand and publicly report on the Government of Mexico's promotion of compliance with, and effective enforcement of, its labor law through appropriate government action, as set out in Article 3 of the NAALC.”³⁹⁷

Because of a lack of independence of some of the agreement's institutions, many aspects of the NAALC are also vulnerable to political changes that occur within the three

³⁹⁶ “Labor Rights and Trade: Guidance for the United States in Trade Accord Negotiations”, online: Human Rights Watch <<http://hrw.org/press/2002/10/laborrights-bck.htm>> (Last accessed 21 December 2005).

³⁹⁷ “Public communications submitted to the United States NAO”, online: NAALC http://www.naalc.org/english/summary_usa.shtml (last accessed 29 December 2005). U.S. NAO 940001 was filed by the International Brotherhood of Teamsters, AFL-CIO. It concerned allegations relating to the freedom of association and the right to organize of workers at the Honeywell Manufacturas de Chihuahua, S.A., in the City of Chihuahua, State of Chihuahua, Mexico. U.S. NAO 940002 was filed by the United Electrical, Radio, and Machine Workers of America. It, too, concerned allegations relating to freedom of association and the right to organize, specifically at a General Electric subsidiary, Compañía Armadora, S.A., in Ciudad Juarez, State of Chihuahua, Mexico.

countries. It is a political necessity for developed countries such as the United States and Canada to be seen by their electorates as having maintained systems of labour that function as a model for the developing world and thus justify rebuffing any complaints originating from the developing world.

The fact that that pressure in the migrant workers' cases above originated from Mexico makes it politically difficult for any American administration to effectively address the issues raised. The U.S. NAALC Advisory Committee has also seen decreased activity since the Bush administration took power in January 2001, with its first meeting since then taking place in May 2004.³⁹⁸ The Bush Administration's Deputy Assistant Secretary for Labor has since told the committee that the DOL may ask it to "broaden its role and serve as advisors on the labor provisions of all FTAs."³⁹⁹ The American government clearly sees its domestic policies as a model for future labour provisions of FTAs. As such it cannot allow for modifications or punitive actions originating from that world.

The majority of the criticisms directed against the NAALC have focused on the lack of punitive actions taken in the last 10 years of the Agreement's operation. The usual recommendation is that penalties designed as deterrents be used in order to promote compliance with labour provisions.⁴⁰⁰ The use of penalties in a labour cooperation agreement should not, however, be seen as a measure of its effectiveness in achieving

³⁹⁸ Mexico Seen Using NAFTA, *supra* note 381. The Committee's Charter states that it is expected to meet twice yearly, at the call of the Secretary of Labor.

³⁹⁹ *Ibid.* The Committee has since been renamed the "Bureau of International Labor Affairs Advisory Committee." The Committee's Charter as of March 2006 now states that its mission is to "provide advice to the Secretary of Labor through the Bureau of International Labor Affairs concerning the implementation of the NAALC and the labor provisions of the U.S. - Singapore, U.S. - Chile, and U.S. - Australia free trade agreements. The committee also may provide advice on the implementation of labor provisions of other free trade agreements to which the United States may be a party or become a party."

⁴⁰⁰ Polaski, *supra* note 288 at 20.

certain structural changes.

By allowing for complaints to originate from developing to developed country, the NAALC has opened the door to a reversal of historical labour-rights relationships between developed countries such as the United States, Canada and a developing country like Mexico. Cooperative engagement within the NAALC framework has seen issues such as violations of basic labour and legal rights publicly raised for the first time in developed countries as a result of external international pressure originating from a developing state. The exporting of the labour development model and related policies continues, however, and has been facilitated through an ostensibly cooperative process which in practical terms means an export of American and Canadian labour development models to Mexico.

3.4.1 Cooperative Engagement and Exporting Labour Development

The NAALC's main purpose, as reflected by its very name, is to encourage cooperative efforts to remedy problems with enforcing labour standards among the three parties to the agreement. The activities produced by the NAALC – seminars, workshops, educational conferences - have resulted in several outcomes. The distribution of information to both interested individuals and the general public has the effect of increasing public awareness and understanding of each other's labour legislation and enforcement practices, and allowed international investigation into domestic labour practices in all three countries. International labour and human rights law has been fundamentally affected in North America by the ceding of at least some sovereignty in these areas through the enactment of the NAALC. The NAALC is no longer the

exception in this area – all three countries have recognized the need to incorporate labour standards into subsequent trade negotiations.

Canada sees the cooperative element of the NAALC as a means of achieving its objectives dealing with labour law and related human rights issues. The Canadian government's policy has built on the NAALC and expanded to address many problems resulting from the "social dimension of economic integration" and the violation of international labour rights in the workplace.⁴⁰¹ This process operates most effectively when dealing with cooperation and network building linked to real and existing problems of law enforcement, such as the problems faced by migrant workers in the United States, rather than facilitating discussions that revolve around theoretical issues and "purely informative" activities.⁴⁰² Nevertheless, informative activities and cooperative programs continue to be the main focus of both the U.S. and Canadian governments, with the priority being the export of some aspects of the labour development model over the enforcement of labour standards. The Canadian Government instead addresses the issue of "enforceability" within the context of what it terms as capacity-building strategies designed to promote compliance:

"In the final analysis, "enforceability" is not an end, but is one means among many to achieve compliance with international obligations. Creative solutions might better look to effectiveness than stringency, as experience has shown that noncoercive means to encourage compliance are more effective in achieving overall human development objectives."⁴⁰³

The U.S. has similarly emphasized the cooperative activities under the NAALC

⁴⁰¹ "First Annual Report: Canada-Chile Agreement On Labour Cooperation (July 1997-June 1998)" (1998), online: HRSDC <<http://www110.hrdc-drhc.gc.ca/doc/ialc-cidt/eng/e/backen.htm#annual>> (last accessed 8 December 2005).

⁴⁰² Polaski, *supra* note 288 at 24.

⁴⁰³ "It's Your Turn" (2003), online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/IYT/scfait-en.asp>> (last accessed 12 December 2005).

with respect to addressing issues concerning migrant workers. In particular, there have been several seminars intended to “familiarize Mexican Consulates in the U.S. about relevant U.S. labor laws and regulations with regard to migrant workers and to discuss cooperative activities designed to promote awareness of these rights.”⁴⁰⁴ The U.S. H1 and H2 visa programs for migrant workers were the subject of workshops in Mexico City held in August 2003, as a follow-up to the U.S.-Mexico Joint Ministerial Statement Regarding Labor Rights of Immigrant Workers issued in April 2002.⁴⁰⁵

The problems faced by migrant workers in the State of Maine were addressed in a June 2002 forum which included a broad representation from “Government officials, employer representatives, educators, legal counselors, advocates and other service providers in Maine” who “discussed working conditions and treatment of migrant and agricultural workers in the state of Maine.”⁴⁰⁶ Several other public forums and conferences held between 2000 and 2002 also focused on issues relating migrant agricultural workers in the western and southern United States.⁴⁰⁷ These conferences allowed for a public examination and analysis of the governments’ national programs affecting migrant workers and, for the first time within the context of the NAALC, provided for an “exchange of views among government representatives, union leaders,

⁴⁰⁴ “NAO Cooperative Activities 1994-2005” online: US DOL
<<http://www.dol.gov/ilab/programs/coopact/sectcoopact.htm#iii>> (last accessed 12 December 2005).

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.* See specifically “A Public Forum: Promoting Dialogue among Migrant Agricultural Workers, Growers and Government Officials” (8 August 2001) Yakima, Washington; “The Application of U.S. Labor Law to Migrant Agricultural Worker Issues” (23-24 May 2001) Washington, DC.; and “Conference on Agricultural Migrant Labor in North America” (7-9 February 2000) Los Angeles, California.

patrons and organizations from civil society interested in migration.”⁴⁰⁸

3.4.2 Engaging Civil Society and Network-Building

Perhaps the most important long-term benefit of this cooperative process has been the integration of non-governmental actors within international processes involving labour and human rights. The NAALC complaints process “at least offers a very accessible, legalized transnational political opportunity structure.”⁴⁰⁹ This has allowed for an expansion of the traditional international scrutiny of developing countries’ labour standards to include violations in developed countries as well. The wide variety of conference participants often include figures from the respective governments but also including corporate, academic institutions, labour unions, human rights groups and interested individuals.⁴¹⁰ For example, under the auspices of the NAALC, Canada hosted a major conference organized under the topic of “The Future Culture of Mining Safety and Health in North America” in September 1999, which “encouraged the exchange of

⁴⁰⁸ “Implementing the Summit of the Americas (SOA) Migrant Workers Initiative” (7 April 2000), online: Summit of the Americas <<http://www.summit-americas.org/SIRG/XVIIIISIRG/USA-MigrantWorkers-XVIIIISIRG.htm>> (last accessed 14 December 2005). [“Summit of the Americas”]

⁴⁰⁹ Jonathan Graubart, “Politicizing” a New Breed of “Legalized” Transnational Political Opportunity Structures: Labor Activists Uses of NAFTA’s Citizen-Petition Mechanism” (2005) 26 Berkeley J. Emp. & Lab. L. 97 at 141.

⁴¹⁰ “Seminar On Labour Legislation In Chile, Canada-Chile Agreement On Labour Cooperation” (30 April 1998), online: Social Development Canada (SDC) <http://www.sdc.gc.ca/en/lp/spila/ialc/09seminar_labour_legislation_chile.shtml> (Last accessed 20 November 2005). participants included Oscar Ermida, Senior Technical Specialist at the ILO; Jorge Rosenbaum, Secretary of the Institute of Labour Law at the Universidad de la República in Uruguay; Mario Pasco, senior professor of Labour Law at the Universidad Católica de Perú; Leoncio Lara, Legal Advisor to the Secretariat of the North American Commission for Labour Cooperation; Alfredo Conte-Grand, official in charge of the ILO Multidisciplinary Technical Team in Chile; Lucie Lamarche, professor at the Université du Québec à Montréal; Warren Allmand, President of the International Centre for Human Rights and Democratic Development in Montreal; Craig Forcese, Canadian legal expert on codes of conduct for multinational companies; and René Roy, Vice-President of the Fonds de Solidarité du Québec (Quebec Solidarity Fund) and the Quebec Federation of Labour. Legal representatives from outside the two CCALC parties included delegates from Argentina, Brazil, Mexico, Peru, the United States and Uruguay.

best practices and effective strategies for safety and health.”⁴¹¹

The NAALC process also has the capacity to engage previously marginalized organizations such as unofficial Mexican labour unions into international processes. The Washington State apple pickers public communication process involved the *Union Nacional de Trabajadores* (National Workers' Union or UNT), a labour union that was formed in 1997 by dissident (i.e. not government sanctioned) Mexican unions representing over 1 million Mexican workers.⁴¹² Along with the UNT, another dissident Mexican union representing farmworkers, the *Frente Democrático Campesino* (Democratic Farmworkers Front or FDC) also signed on to the public communication.⁴¹³ The involvement of these unions within the NAALC process not only lends legitimacy to the NAALC, it leads to greater legitimacy for non-governmental Mexican labour unions by allowing for a measure of international recognition for their concerns.⁴¹⁴

3.4.3 Developing A Legal Framework for the Hemisphere

Regional agreements, such as the NAALC, are seen by the three governments as expanding the “legal framework for affirming the human rights and employment opportunities of migrant workers in the Hemisphere.”⁴¹⁵ The NAALC has led to a regional dialogue and grouping of governments that has allowed a collective effort to be made in addressing problems relating to migrant workers, as well as developing regional

⁴¹¹ “Human Resources Investment”, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/rma/dpr/99-00/hrdc-drhc/hrdc9900dpr03_e.asp> (last accessed 14 December 2005).

⁴¹² “Faulting U.S. Labor Laws, Mexican Unions File Broadest Nafta Labor Complaint On Washington State Apple Industry” (27 May 1998), online: Laboris <<http://laboris.uqam.ca/anact/applepress.htm>> (last accessed 19 December 2005).

⁴¹³ *Ibid.*

⁴¹⁴ Julie Watts, “Mexico-U.S. Migration and Labor Unions: Obstacles to Building Cross-Border Solidarity”, online: Center for Comparative Immigration Studies <<http://www.ccis-ucsd.org/PUBLICATIONS/wrkg79.pdf>>.

⁴¹⁵ Summit of the Americas, *supra* note 408.

initiatives that have had a large impact on the Summit of the Americas Migrant Worker Initiative.⁴¹⁶ The parties to the NAALC were also signatories to an agreement signed in March 2000 under the auspices of the Inter-American Commission on Human Rights and the IOM, which pledged them to work “on joint endeavors to promote respect for and effective promotion of migrant's rights in the Americas.”⁴¹⁷

The U.S. DOL, in partnership with municipal government and community organizations, collaborated with Mexican Consulates in the United States in late 2003 to create a program in Dallas, Texas, called the "Justice and Equality in the Workplace Program" which the U.S. government claims informed migrant workers about their “rights and responsibilities, as well as providing avenues for non-English speakers to report violations” of U.S. labour laws.⁴¹⁸ Other Latin American countries may use this model in other local communities if it succeeds in generating a positive response from migrant workers and non-governmental organizations.

A comprehensive strategy for addressing migrant workers' problems requires specific labour standards relating to “labour inspection and administration, employment and social policy, fair remuneration, discrimination and harassment in the workplace, freedom of association, [and] rights of unionization.”⁴¹⁹ Such a strategy would also entail ensuring access to education for migrant workers. Unfortunately, international law provides few requirements for the education of migrant workers, beyond limited

⁴¹⁶ *Ibid.*

⁴¹⁷ “Second Summit of the Americas: Migrant Workers”, online: Summit of the Americas <<http://www.summit-americas.org/Migrant%20Workers/Migrant-workers.htm>> (last accessed 14 December 2005).

⁴¹⁸ “U.S. - Mexico Binational Commission Labor Working Group Report” (12 November 2003), online: U.S. State Department <<http://www.state.gov/p/wha/rls/rpt/26212.htm>> (last accessed 15 December 2005).

⁴¹⁹ Richards, *supra* note 329 at 160.

vocational training, which may not be in the mother tongue of the migrants.⁴²⁰ The Labour Cooperation Accords negotiated by Canada may provide an opportunity to enable access to proper education for migrant workers, although the terms negotiated in the agreements thus far do not provide for mandatory education or training.

Such education would also have to be developed in such a manner as to provide for a true exchange of information between the parties to the Agreement, rather than simply exporting a certain model of labour development. As this chapter has illustrated, developed countries are witnessing increasing problems in guaranteeing the rights of a growing presence of migrant workers on their territory. The Supreme Court of Canada issued a series of rulings in the late 1980s which stated that the country's Constitutional guarantees do not give unions the right to strike or bargain collectively.⁴²¹

As of December 2005, the Government of Canada has thus far failed to ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.⁴²² On this issue, Canada has been subjected to criticism from human rights groups, who question the government's true commitment to a "global

⁴²⁰ Marianne Van Den Bosch and Willem Van Genugten, *International Legal Protection of Migrant Workers, National Minorities and Indigenous Peoples – Comparing Underlying Concepts* (2002) 9 Int'l J. on Minority and Group Rights 195 at 214-216. The authors primarily cite European legal instruments, such as The European Charter for Regional or Minority Languages and the 1994 Framework Convention for the Protection of National Minorities. UN legal instruments include the International Covenant on Civil and Political Rights and the UNESCO Convention Against Discrimination in Education.

⁴²¹ A series of labour appeals decided in 1987 by the Supreme Court of Canada held that Section 2(d) of the *Canadian Charter of Rights and Freedoms* does not give Canadian unions the right to strike or bargain collectively, nor does it prevent Canadian governments from imposing "back-to-work" legislation. See *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313; *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424; *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460. See also "Regional Integration Agreements" *supra* note 291. Regional Integration Agreements, *supra* note 291.

⁴²² *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* U.N.G.A. 45/158 (18 December 1990), online: United Nations <http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm> (last accessed 12 December 2005). ["Convention on Migrant Workers"]

human rights system.”⁴²³ The government’s response when asked why the Convention on Migrant Workers has yet to be ratified by Canada is revealing:

“Canada does not have a class of Migrant workers per se. Any non-Canadian who is authorized to work in Canada is protected by the same employment standards legislation as Canadian workers, and has the same access to government programs and services for workers. As such, we have no immigration policies in this regard that are inconsistent with international human rights instruments and have no discriminatory policies and practices against migrants in our laws for us to remove.”⁴²⁴

The lack of a legal definition for a class of migrant workers in Canada also means there are no special protections available apart from effective enforcement of existing domestic labour laws and international agreements. Canada’s failure to ratify the Convention on Migrant Workers is only part of the problem. An examination of a list of countries that have ratified the Convention on Migrant Workers as of December 2005 reveals that they are all “source” countries – not a single country that is regarded as the destination of migrant workers is represented among states that have ratified it.⁴²⁵ This severely limits the application of the Convention on Migrant Workers as many developed states that are “largely responsible for the mistreatment of migrant workers” have expressed little political will to ratify it, a situation that has also arisen in ratification of ILO Conventions 97 and 143 related to the rights of migrant workers.⁴²⁶

⁴²³ “A Human Rights Agenda for Canada: Critical Recommendations”, online: Amnesty International <http://www.amnesty.ca/canada/critical_recommendations.php> (Last accessed 20 December 2005).

⁴²⁴ “Responses to Specific Questions”, online: Canadian Heritage http://www.pch.gc.ca/progs/pdp-hrp/docs/questionnaire/question07_e.cfm (last accessed 9 December 2005).

⁴²⁵ Convention on Migrant Workers, *supra* note 422.

⁴²⁶ Richards, *supra* note 329. In addition, several countries that have signed the Convention on Migrant Workers have attached important reservations to their signature. Despite the provisions of the Convention, the Republic of Uganda, for example, states that it “cannot guarantee at all times to provide free legal assistance” to migrant workers, while Turkey expressed its reservation that “the Turkish Law on Trade Unions allows only Turkish citizens to form trade unions in Turkey.”

3.4.4 Pursuing the model of Labour Cooperation Agreements

The parties to the NAALC clearly intend to use its existing administrative mechanisms for future labour agreements and broaden their mandates accordingly. For example, the U.S. National Administrative Office was recently renamed the “Office of Trade Agreement Implementation” with a corresponding mandate to administer the labour provisions of free trade agreements with Chile and Singapore “as well as labor provisions of other free trade agreements to which the United States may become a party.”⁴²⁷ All three NAALC parties have in recent years created government offices dedicated to administering international labour affairs, a development that built upon the government mechanisms and institutions that were created for the NAALC in 1994.⁴²⁸ These institutions, originating from a NAALC process almost completely driven by the United States, are expanding within a legal framework being developed throughout the hemisphere.

The United States, Canada and Mexico have separately negotiated several trade agreements since the conclusion of the NAFTA in 1994. The NAALC established the precedent for its parties to at least consider the issue of labour standards during future trade negotiations. While subsequent agreements negotiated by the NAALC parties have incorporated differing labour standards and structures of enforcement, the cooperative approach is one that all three NAFTA parties, including the Canadian government, have

⁴²⁷ “ILAB's National Administrative Office renamed as Office of Trade Agreement Implementation” (17 December 2004), online: U.S. Bureau of International Labor Affairs <http://www.dol.gov/ilab/> (last accessed 14 December 2005).

⁴²⁸ The United States has its “International Labor Affairs Bureau” located within its Department of Labour; Canada has its “International Labour Affairs Office” located within Human Resources Social Development Canada; Mexico has its section called *Cooperación laboral internacional* located within the *Secretaría del Trabajo y Previsión Social*.

adopted as a model for future labour cooperation agreements signed during free trade negotiations. In particular, the NAALC served as a model for the Canada-Chile Agreement on Labour Cooperation (CCALC) signed by Canada and Chile in 1998, to which I will now turn to in Chapter 4.

Table 1 - NAALC Complaints 1994-1997⁴²⁹

Year	United States	Mexico	Canada
1997	U.S. NAO Submission No. 9701 (Gender Discrimination) U.S. NAO Submission No. 9702 (Han Young) U.S. NAO Submission No. 9703 (ITAPSA)	→	
1996	U.S. NAO Submission No. 9601 (SUTSP) U.S. NAO Submission No. 9602 (Maxi-Switch)	→	
1995	←	Mexico NAO Submission No. 9501 (Sprint)	
1994	U.S. NAO Submission Nos. 940001 and 940002 (Honeywell & General Electric) U.S. NAO Submission No. 940003 (SONY) U.S. NAO Submission No. 940004 (General Electric)	→	

⁴²⁹ Source: online: U.S. Department of Labor <<http://www.dol.gov/ILAB/programs/nao/submissions.htm>> (last accessed 6 July 2006). The NAALC's usage has evolved since its inception. By analyzing the patterns of the complaints in Table 3.3.1 at one can detect that the NAALC was initially used in the U.S. NAO as an instrument by organized labour against Mexico, with no Canadian involvement. Complaints in this period generally fell into categories. First, there were unions in the United States, principally the Teamsters and the AFL-CIO, and independent unions in Mexico who utilized the NAALC process to carry forward disputes that pre-dated the NAFTA (i.e. collective organizing in Mexico, freedom of association, etc.) American unions were very much engaged at this point in network-building with their independent Mexican union counterparts. The second type of complaint in this period involved the participation of lawyers and human rights organizations, such as the National Association of Democratic Lawyers of Mexico (Asociación Nacional de Abogados Democráticos and Human Rights Watch.

Table 2 - NAALC Complaints 1998-2000⁴³⁰

Year	United States	Mexico	Canada
2000	U.S. NAO Submission No. 2000-01 (Auto Trim/Custom Trim)	→	
1999	← U.S. NAO Submission No. 9901 (TAESA)		Canadian NAO Submission No. CAN 99-1 (LPA)
1998	U.S. NAO Submission No. 9801 (Flight Att.)	Mexico NAO Submission No. 9801 (Solec)	← Canadian NAO Submission No. CAN 98-1 (ITAPSA)
	→ U.S. NAO Submission No. 9802 (/Child Labor)	← Mexico NAO Submission No. 9802 (Apple Growers)	Canadian NAO Submission No. CAN 98-2 (Yale/INS)
	U.S. NAO Submission No. 9803 (McDonald's)		
	U.S. NAO Submission No. 9804 (Rural Mail Couriers)	Mexico NAO Submission No. 9803 (Decoster Egg)	→
	←	Mexico NAO Submission No. 9804 (Yale/INS)	

⁴³⁰ *Ibid.* The Washington State apple case, and related cases illustrated in Table 3.3.2, seemed to herald a period of intense activity in the NAALC, with complaints originating from all three countries and directed against all parties.. This period involved heavy interaction between U.S., Canadian and Mexican unions. American lawyers/law schools were involved in 2 of the 4 complaints launched in the Mexican NAO against the United States. They were involved in either a technical capacity (lawyers from the International Labor Rights Fund helped draft Complaint 980002) or as direct complainants (Yale Law School Workers' Rights Project, the American Civil Liberties Union Foundation Immigrants' Rights Project were the main complainants listed on 980004). The other two cases, Solec Int'l case 980001 and the Washington State case 980003, were formally submitted by a variety of Mexican unions, including the Confederación de Trabajadores de México (CTM), but were formally supported by the Mexican government. This may explain the comparatively small involvement of American legal and union officials in this complaint. Reports prepared by American lawyers working for organizations such as HRW, CJT provided background information used in all of the complaints directed against the United States.

Table 3 - NAALC Complaints 2001-2005⁴³¹

Year	United States	Mexico	Canada
2005	U.S. NAO Submission No. 2005-01 (Labor Law Reform)	Mexico NAO Submission 2005-1 (H-2B Visa Workers)	Canadian NAO Submission No. 2005-1
	U.S. NAO Submission No. 2005-02 (Mexican Pilots - ASPA)		
	U.S. Submission No. 2005-03 (Hidalgo)		
2004	U.S. NAO Submission No. 2004-01 (YUCATAN)		
2003	U.S. NAO Submission No. 2003-01 (PUEBLA)	Mexico NAO Submission No. 2003-1 (North Carolina)	Canadian NAO Submission No. 2003-1
2002			
2001	U.S. NAO Submission No. 2001-01 (DURO BAG)	Mexico NAO Submission No. 2001-01 (New York State)	

⁴³¹ *Ibid.* Since 2001, the NAALC has been used more as a general human rights instrument primarily against Mexico and the United States. Table 3.3.3 indicates that complaints against Mexico continue to originate from the U.S. and Canadian NAOs, but the Mexican NAO has received recent complaints regarding the status of Mexican migrant workers in the U.S. This period saw increasing use of the NAALC through the Mexican NAO to insure access to legal services for migrant workers in the United States as well as continued use to enforce Mexican labour laws through the Canadian and U.S. NAOs. The two most recent complaints filed in the Mexican NAO both deal with the importance of lawyers' roles in assisting migrant workers' complaints, denial of access to legal services to migrant workers in the U.S. contrary to the NAALC, etc. Legal aid lawyers, law school clinics and Access to Justice Centres became the central figures in these complaints. Complaints filed in the Canadian NAOs in some cases were duplicates of complaints filed in the U.S. NAO.

CHAPTER 4: LABOUR COOPERATION AS LABOUR DEVELOPMENT – EXPORTING CANADIAN LABOUR MODELS TO CHILE

*“If globalization is going to be here to stay - and it is going to be here to stay –
then we need some kind of rules in today's world otherwise rules are
going to be established by the most powerful.”
– Ricardo Lagos, Former President of Chile⁴³²*

As detailed in Chapter 3, Canada was not a driving force in establishing the NAFTA precedent of introducing labour standards into free trade negotiations. The NAALC was largely the result of a new American administration coming to power that saw the need to placate labour and environmental interests. Nevertheless, the NAALC and the accompanying environmental side agreement to the NAFTA, the North American Agreement on Environmental Cooperation (NAAEC) were seen by the newly elected Canadian government of Jean Chretien’s Liberals as instruments that addressed their original criticisms of the NAFTA, and thus justified Canada’s signing of the agreement.⁴³³ Yet the period following the implementation of the NAALC raised some questions as to the commitment of the Canadian government to pursue trade and labour linkage. During the negotiations for the proposed Multilateral Agreement on Investment (MAI) in the mid-1990s, Canada did not support the Clinton Administration’s efforts to include labour and environmental rules in the MAI.⁴³⁴ In addition, the Canada-Israel

⁴³² “Top Quotes from Ricardo Lagos” online: BBC
<http://www.bbc.co.uk/worldservice/programmes/newshour/news/story/2005/10/051012_president_quote.shtml> (last accessed 16 March 2006).

⁴³³ “NAFTA: Social Dimension of North American Economic Integration: Impacts on Working People and Emerging Responses” (1996) at 53, online: Canadian Labour Congress
<http://canadianlabour.ca/updir/nafta_dimensions.pdf> (last accessed 30 October 2005)

⁴³⁴ “Labor Standards at Risk” 44 (3 November 1997) Macleans at 57. The article reports that the Clinton Administration wanted to “stop countries from using lax standards to lure investors. But the minutes of a July negotiating session show Ottawa declined to endorse the effort.”

Free Trade Agreement (CIFTA) implemented on January 1, 1997 contained no labour or environmental provisions or side-agreements.⁴³⁵ Official policy coming from Ottawa eschewed what it viewed as a confrontational or “interventionist” approach to the issue of incorporating labour standards into free trade negotiations, preferring instead to develop what has been termed a “co-operative” approach.⁴³⁶

Following the NAFTA negotiations and the failed MAI talks, the Canadian government did adopt an official position acknowledging the shortcomings of free trade agreements without some sort of accompanying labour standards provisions. Canadian policy now states that a free trade agreement cannot “by itself, ensure that all individuals benefit from the ensuing economic growth” and has acknowledged the international trend towards ensuring “social cohesion” through “long term development and good governance.”⁴³⁷ With respect to labour standards, this policy stresses “human resources development, job opportunities, social security policies and core labour standards.”⁴³⁸

The Canadian government has also acknowledged the empirical evidence indicating that globalization has resulted in a large-scale shift of labour in developing countries from traditional sectors such as agriculture, into manufacturing sectors, resulting in a general improvement of living conditions that has not seen a concomitant

⁴³⁵ *Canada-Israel Free Trade Agreement (CIFTA) – Update 2003* (2003), Online: Agriculture and Agri-Food Canada <http://www.agr.gc.ca/itpd-dpci/english/trade_agr/cifta.htm> (date accessed: 1 November 2005).

⁴³⁶ Michael Abbott, “Labour Side Agreements Involving Canada: Current Practices and Comparative Effectiveness” (2001) at p. 1, online: Canadian Industrial Relations Association <<http://www.cira-acri.ca/IIRA%20CIRA%20docs/Abbott,%20Michael.pdf>> (date accessed: 1 November 2005).

⁴³⁷ “Trade and Labour: Discussion Paper” (2001) online: Department of Foreign Affairs and International Trade Canada <<http://www.dfait-maeci.gc.ca/tna-nac/Labour-Feb00-en.asp>> (last modified: 23 September 2003) [“DFAIT”].

⁴³⁸ *Ibid.*

improvement in labour conditions.⁴³⁹ Within the framework of economic globalization, the achievement of long-term development goals including good governance standards and social stability are to be accomplished through labour development.

This chapter will analyze the underlying motivation and effectiveness of Canada's policy of negotiating labour cooperation accords within the context of free trade negotiations through an examination of the Canada-Chile Agreement on Labour Cooperation (CCALC) which came into effect in 1997. This case study first traces the history of Canadian labour development policy. It then analyzes the factors that shaped the negotiation of the CCALC in both Canada and Chile. Following this, the operation and effect of the agreement will be analyzed. The chapter concludes with some recommendations on the future use of the CCALC as a tool for labour development.

4.1 Evolution of Canadian Policy – Cooperative Enforcement of Labour Standards

As detailed in Chapter 2, the ILO developed the legal framework for international core labour standards through the implementation of the *Decent Work Agenda*, the creation of which was heavily influenced by developed countries, including Canada. The Canadian government has proclaimed its support for the *Decent Work Agenda* and in particular it has supported the ILO's research into the "social dimensions of globalization" which has examined the impact of globalization and the expansion of free trade on labour markets.⁴⁴⁰

The stated purpose in negotiating Labour Cooperation accords alongside free

⁴³⁹ Manning, *supra* note 271.

⁴⁴⁰ "Addressing the Social Dimension of Globalization" (2003), online: HRSDC <http://www.hrsdc.gc.ca/en/lp/spila/ila/07globalization.shtml> (last modified: 22 October 2003).

trade is to go beyond ensuring minimum workplace requirements and instead to contribute to the ILO goal of creating “an international legal framework for fair and stable globalization” even if the Agreements themselves do not necessarily incorporate ILO workplace standards.⁴⁴¹ A secondary unstated motivation that may be driving this policy is that it prevents the lowering of labour standards by one party to a free trade agreement to gain an unfair advantage, also known as the “race to the bottom.”⁴⁴² A more cynical interpretation of this policy then would view it simply as another form of protectionism, a view taken by many developing states but strongly denied by industrialized countries such as Canada.⁴⁴³

The legal framework coming into being creates contradictory expectations for developing countries. They are encouraged to open up markets and compete through membership in the WTO and the negotiation of free trade accords, while simultaneously being required to raise their labour standards to developed country levels, which developing countries argue makes competition within such a system more difficult. Canadian policy towards the ILO, despite its rhetorical support, in practical terms reflects this contradiction and has resulted in ambivalence towards the ILO.

May Morpaw, at that time the Director of the Inter-American Labour Cooperation Office’s Labour Program, summed up Canadian policy towards the ILO in remarks that acknowledged the organization’s long history and relevance for Latin America, then stated that “it is an institution which has not held much immediacy for Canada or the

⁴⁴¹ <http://www.ilo.org/public/english/standards/norm/introduction/why.htm>

⁴⁴² Abbott, *supra* note 436 at 12.

⁴⁴³ Krugman, *supra* note 287.

average Canadian.”⁴⁴⁴ The movement towards a Canadian alternative to the ILO led towards the development of institutions that acted in harmony with and could implement ILO policies. These institutions resulted from the negotiation of Labour Cooperation Accords.

4.2 Extending Free Trade and Labour Cooperation to Chile

Geography, cultural and linguistic differences conspire to make Chile seem like an unlikely partner for the first post-NAFTA free trade negotiations to incorporate any labour standards provisions. Moreover, in the mid-1990s the country had emerged from two decades of military dictatorship that had been particularly harsh on the Chilean labour sector. However, Chile did possess the most receptive economy to free trade negotiations. The neo-liberal economic experiment carried out by the Pinochet regime beginning in the mid-1970s had particularly deep implications for Chilean policy in the international trade area:

“Practically all restrictions other than tariffs were removed...[tariffs] were rapidly reduced from a 1973 mean high of 94% to a uniform tariff of 10% for all goods since 1979. Likewise trade liberalization resulted in the suppression of the price bands and public purchasing mechanisms designed to attenuate the transmission of external instability to the domestic economy. In line with the objective of unilateral and across the board opening of the [Chilean] market to the world, Chile withdrew from the Andean Pact in 1976.”⁴⁴⁵

This new economic model was brought to Chile by a group of American trained

⁴⁴⁴ May Morpaw, “Economic Integration, Labor Law and Social Security in the Americas: Notes for Remarks” (1998), online: Laboris <http://laboris.uqam.ca/conference/textes/morpaw_eng.htm> (date accessed 12 November 2005).

⁴⁴⁵ Ricardo Ffrench-Davis, *Economic Reforms in Chile: From Dictatorship to Democracy* (Ann Arbor: University of Michigan, 2002) at 33.

Chilean economists largely from the University of Chicago from 1957-1970.⁴⁴⁶ The transformation of Chile's economy relied on an economic model classified into three general areas: "liberalization of the price system and the market, an open regime on foreign trade and external financing operations; and reduced government involvement in the economy."⁴⁴⁷ Many analyses that focus on the success of the economic reforms carried out in the 1970s and 1980s center on the ability of the government during this period to maintain "fiscal discipline" and avoid budget deficits, while its open trade integration policies fuelled the growth of Chile's export sector, providing a buffer from economic shocks experienced by other Latin American countries during this period.⁴⁴⁸ The focus on this period was primarily on economic reform as social stability was maintained through harsh political repression. The export of American economic values by the Chicago Boys largely ignored any corresponding American labour values in their restructuring work, except to the extent that reforms of the labour sector were designed to aid their reforms of the Chilean economy.

American international labour policy was instead focused on maintaining social stability and securing a friendly government in Chile. The American Institute for Free Labor Development (AIFLD), as outlined in Chapter 1, was heavily involved in this process. During the American economic boycott of the Allende government, the U.S. government continued to provide funds for AIFLD work in Chile, while cutting most

⁴⁴⁶ Juan Gabriel Valdes, *Pinochet's Economists: The Chicago School in Chile* (Cambridge: Cambridge University Press, 1995) at 13.

⁴⁴⁷ *Ibid.* at 21 from "La Semana Politica" *El Mercurio* (28 March 1983).

⁴⁴⁸ Eliot Kalter, et al., *Chile: Institutions and Policies Underpinning Stability and Growth*, IMF Occasional Paper 231 (Washington, D.C.: International Monetary Fund, 2004) at 3.

other forms of aid to Chile.⁴⁴⁹ AIFLD cooperated with the Chilean Maritime Federation (COMACH), a union with strong connections to the Chilean navy (Chilean naval officers were prominent in the military coup leaders in Valparaiso, the first city to fall in 1973).⁴⁵⁰ The Confederation of Chilean Professionals, a union that was formed in May, 1971 with AIFLD assistance, was instrumental in the right-wing strikes that precipitated the military coup.⁴⁵¹ After the Pinochet junta took power in September 1973, the AIFLD program in Chile doubled.⁴⁵² In January, 1974 the junta arranged for a meeting of 26 small AIFLD-connected unions calling it the Chilean National Workers Confederation and outlawing all other labor organizing in the country.⁴⁵³

4.2.1 Effects of Economic Reforms on the Chilean Labour Sector

The large shifts in Chilean economic policies under the military dictatorship had profound effects for Chilean labour legislation, and unions in particular had their rights severely curtailed by the Pinochet regime. The pressure of international labour unions compelled the Pinochet government in 1979 to establish a "labor plan" reauthorizing collective bargaining and other workers' rights, but under a strict and "restrictive framework" controlled by the government.⁴⁵⁴ The effects of the Pinochet government's changes to the labour legislation, combined with political repression and economic crisis, did lead to the reduction in the power and influence of social organizations but perhaps the more long-lasting effect they had was to cause a drift towards informal work and

⁴⁴⁹ *Supra* note 13 at 33.

⁴⁵⁰ *Ibid.* at 35.

⁴⁵¹ *Ibid.* at 36-42.

⁴⁵² Tim Nesbitt, "Unionists Respond to AFL-CIO Links," *New American Movement*, 4 (October 1974), p. 6.

⁴⁵³ Hirsch, p. 41-42. The case of Chile, free trade and labour development is discussed in much more detail in Chapter 4 of my thesis.

⁴⁵⁴ Valdes, *supra* note 446 at 21.

deterioration in income distribution, which may persist to this day.⁴⁵⁵

The export of the neo-liberal economic model to Chile was designed to structurally transform Chilean society as a whole, and ultimately bring the country into line with developed world norms. Several reforms of Chilean labour laws were enacted during the Pinochet era all designed to complement the economic model being designed by the Chicago Boys. Prior to the coup, the Central Unitaria de Trabajadores (Central Labour Council or CUT) had held significant influence with the Allende government, at one point even fielding top leaders of the CUT within the cabinet.⁴⁵⁶ The CUT leadership had instructed workers during the period of the Allende regime to seize control of factories in case of a military coup attempt.⁴⁵⁷ Under Pinochet, most significant were changes instituted in the late 1970s, which were later codified in the 1987 Labour Code that radically changed the nature of employee-employer relationships, nullifying the protections workers enjoyed prior to the 1973 military coup.⁴⁵⁸

Near the end of the Pinochet dictatorship in 1989 it became clear to democratic forces within Chile that institutions such as the IMF and World Bank did not desire a return to Allende's economic and labour policies. Following the return to democracy in 1990, the democratic administration of Patricio Aylwin instituted only those reforms to the labour code that were deemed as "not prejudicing the interests of big business" (who had generally supported the modifications to the labour code undertaken by the Pinochet regime) and thus left in place a labour code that left large scope for "abuse and anti-union

⁴⁵⁵ French-Davis, *supra* note 445 at 201-202.

⁴⁵⁶ Sergio Bitar, *Chile: Experiment in Democracy* (Philadelphia: Institute for the Study of Human Issues, 1986) at 138.

⁴⁵⁷ *Ibid.* at 163.

⁴⁵⁸ Carol Pier, "Labor Rights in Chile and NAFTA Labor Standards: Questions of Compatibility on the Eve of Free Trade" 19 *Comp. Lab. L. & Pol'y J.* 185 at 193.

activity.”⁴⁵⁹ Following large-scale protests organized by the CUT, Chile’s highest national workers’ organization, newly elected President Eduardo Frei bowed to many of the workers’ demands in January 1995 and submitted new labour reform proposals incorporating many of the CUT demands to the Chilean Congress.⁴⁶⁰

In a 1998 conference organized under the auspices of the CCALC, the Chilean side did concede the continued existence of labour sector problems related to the Pinochet era. Guillermo Campero, Advisor to the Minister of Labour in Chile and one of the negotiators that participated in the shaping of the labour agreement with Canada, noted that

“[Chile] must also resolve historical problems which have to do with the military regime we lived under for 17 years. Many aspects of our Labour Act still reflect certain points, certain topics which come from the labour legislation enacted in 1979 under the military regime, and some of these standards that persist are the subject of discussion today in Chile...Everyone who has been in Chile, including some people here, are well aware that there is a debate between the sectors of employers, unions and the government on how to resolve these issues arising from our history prior to 1990.”⁴⁶¹

The CUT and other Unions have continued to criticize aspects of Frei’s reform

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.* at 194.

⁴⁶¹ “Seminar On Labour Legislation In Chile, Canada-Chile Agreement On Labour Cooperation” (30 April 1998), online: Social Development Canada <http://www.sdc.gc.ca/en/lp/spila/ialc/09seminar_labour_legislation_chile.shtml> (Last accessed 20 November 2005) [“SDC”]. This was the first public seminar to be held under the CCALC. The seminar was held to help Canadian labour officials and other non-governmental groups and individuals familiarize themselves with labour laws in Chile. Warren Edmondson, Canada’s Assistant Deputy Minister of Labor, described the seminar to the participants as an opportunity for “labour, management and all interested groups in Canada to learn more about Chile...we want to exchange information; we want to engage in discussion; we would like to develop ties between our two countries in new fields, particularly in labour and labour legislation. And I would encourage you to take advantage of the morning. It’s very brief, but a first opportunity. We have allowed time for discussion and dialogue, and I would encourage you to --there is a tremendous wealth of knowledge here at this front table from our friends from Chile, and they certainly are more than eager, and have been more than eager over the past two days, to share their knowledge with us, and I encourage you to take advantage of this very brief time to pick their brains and to get to understand their system better.”

package, in particular the maintenance of the legal structure inherited from the Pinochet era, and there were turbulent negotiations between the CUT and the Chilean government during the late 1990s as conservative legislators in the Chilean Congress continued to block passage of many aspects of the labour reform package.⁴⁶² Periodic protests from wide elements of Chilean society with respect to labour reforms have occasionally threatened Chile's social stability since the end of the dictatorship.

4.2.2 Chilean Compliance with labour standards

The legacy of the Pinochet years is at least partially responsible for concerns that Chile was, and in some cases may remain, in violation of several basic labour standards. There are legal restrictions on labour rights such as organizing and collective bargaining that could be seen as being in violation of several basic labour rights.⁴⁶³ In addition, it is both a source and destination country for human trafficking. The U.S. State Department has stated that despite making some effort the Chilean government "does not fully comply with the minimum standards for the elimination of trafficking."⁴⁶⁴ Chilean labour protections for children and young persons also remain problematic as child labour continues to be seen as means of obtaining a "flexible labor force" in certain sectors in Chile, such as mining, fishing and agriculture.⁴⁶⁵

Democratic governments have since 1990 devised "labour-based inclusion policies" targeted at vulnerable social groups, especially youth and women heads of

⁴⁶² Pier, *supra* note 458 at 194-196.

⁴⁶³ "Worker Rights and Regional Trade Pacts" online: solidaritycenter.org <http://www.solidaritycenter.org/files/JFA_Chapter4.pdf> (last accessed 17 December 2005).

⁴⁶⁴ "Trafficking in Persons Report" (2006), online: U.S. State Department <<http://www.state.gov/g/tip/rls/tiprpt/2006/65988.htm>> (last accessed 2 August 2006).

⁴⁶⁵ Pier, *supra* note 458 at 245.

households, for inclusion into labour market training programs.⁴⁶⁶ Although there have been great improvements in the area of Occupational Health and Safety, Chile continues to struggle with non-compliance of government mandated standards by businesses in certain sectors, notably again in the areas of mining, fishing and agriculture, but also in the apparel industry.⁴⁶⁷

The central dilemma in labour compliance is that the structure of the international economy and the goals of free trade act to contradict attempts to secure compliance with internationally negotiated labour standards. Economic development is seen as a primary, inexorable structural goal while labour standards problems amounting to human rights violations continue to be seen as aberrations to be dealt with on a case-by-case basis.

4.2.3 Free Trade with Chile, Labour on the Side

In December 1994, at the Summit of the Americas in Miami, the three NAFTA signatories officially invited Chile to become a contractual party to the Agreement and in February 1995, Washington announced its intention to incorporate NAFTA's labour and environmental provisions in any free trade negotiations with Chile.⁴⁶⁸ However, for various reasons largely involving domestic U.S. politics the accession negotiations stalled and Chile increasingly looked towards negotiating bilateral free trade agreements with

⁴⁶⁶ Rodrigo Castro-Fernandez, Carine Clert, and Quentin Wodon, "Government Programs for the Insertion of Youth and Women in Chile's Labor Market: A Discussion" from *World Bank Country Study: Chile's High Growth Economy: Poverty and Income Distribution, 1987-1998* (Washington D.C.: World Bank, 2002) at 167.

⁴⁶⁷ Pier, *supra* note 458 at 256.

⁴⁶⁸ "NAFTA Timeline" (2005), online: North American Forum on Integration <<http://www.finanafta.org/eng/integ/chronologie.asp?langue=eng&menu=integ>> (Last Modified 11 October 2005).

Mexico and Canada.⁴⁶⁹ On November 18, 1996, the Canada-Chile Free Trade Agreement (CCFTA) was signed in Ottawa by Canadian Prime Minister Jean Chrétien and Chilean President Eduardo Frei. It is the first free trade agreement signed between Chile and a member of the G7. Interestingly, Canada took the position during the negotiations that an agreement reached with Chile would be an “interim agreement” subject to the goal of creating a hemispheric wide free trade zone by 2005.⁴⁷⁰ The CCFTA’s principles are “broadly consistent with the NAFTA” although there are some notable exceptions regarding energy, agricultural trade and other matters.⁴⁷¹ The CCFTA also goes beyond the NAFTA in the area of trade remedies and the “application of anti-dumping measures” - the Agreement states that the parties will introduce a “mutual exemption from the application of anti-dumping measures” phased in over a period of six years.⁴⁷²

Several conclusions can be drawn from the CCFTA negotiations and resulting agreement. First, although the CCFTA was designed to be broadly consistent with NAFTA, there were still some important differences between the two agreements. Second, despite these differences, it is clear that the CCFTA was negotiated within the framework of Chile’s anticipated NAFTA accession and this limited the scope for innovation within the agreement. The decision to integrate Chile into the NAFTA process was based first and foremost on economic concerns – social concerns regarding

⁴⁶⁹ Peter A. Quinter, “NAFTA, Chile, and the Proposed Free Trade Area of the Americas” (1995), online: Becker & Poliakoff <http://www.becker-poliakoff.com/publications/article_archive/nafta_chile_trade.htm> (Last accessed 18 November 2005).

⁴⁷⁰ Janice Paskey and Roberto Duran Sepulveda, *Unlikely Allies: Canada-Chile Relations in the 1990s* (Ottawa: Canadian Foundation for the Americas, 1996) at 7.

⁴⁷¹ “Canada-Chile Free Trade Agreement (CCFTA): Relationship between CCFTA and NAFTA” (2000), online: International Economics <<http://intl.econ.cuhk.edu.hk/rta/index.php?did=9>> (Last accessed 18 November 2005).

⁴⁷² “Canada-Chile Free Trade Agreement” (2001) Online: Elkind, Lipton & Jacobs LLP <http://www.eljlaw.com/pub_canada_chile.html> (Last accessed 21 November 2005).

labour and the environment played little or no role in the decision. Chile's openness first towards NAFTA, and then towards bilateral free trade negotiations with Canada, stem from a continuing commitment to maintaining the economic model established by the military regime.⁴⁷³ Canadian policy with respect to Chile focused almost exclusively on tapping into the South American market. Then Minister of International Trade Pierre Pettigrew stated in a 2001 address to the Canada-Chile Chamber of Congress that when the Free Trade Agreement was signed in 1996, "most Canadians viewed Chile as an unknown and distant market."⁴⁷⁴ Canada continues to view labour issues in the Canada-Chile relationship within the primary context of economic opportunities, while the enforcement of labour standards is a secondary objective.

Nevertheless, the contradictory elements of negotiating free trade and labour standards with a developing country became apparent when former Trade Minister Pettigrew raised the issue of labour within the context of the CCFTA. Pettigrew cited the food processing industry as an example where Canadian labour and benefit costs were less than comparable costs in the United States, and encouraged Chilean investors to come to Canada instead.⁴⁷⁵ In other words, Pettigrew was touting the advantages of a lower-paid workforce to encourage a developing country to invest in a developed one. Unwittingly, Pettigrew illustrated the differing and contradictory interests of free trade and labour rights, while reminding his audience that trade interests were the dominant

⁴⁷³ Paskey and Sepulveda, *supra* note 470 at 16.

⁴⁷⁴ Pierre S. Pettigrew, "Canada In The Americas" Notes For An Address By The Honourable Pierre S. Pettigrew, Minister For International Trade, To The Canada-Chile Chamber Of Commerce" (5 March 2001) online: Department of Foreign Affairs & International Trade (DFAIT) <http://w01.international.gc.ca/minpub/Publication.asp?publication_id=378225&Language=E> (Last accessed 29 November 2005).

⁴⁷⁵ *Ibid.* Pettigrew stated that "Labour and benefits are, on average, 30 percent less in Canada than in the United States...Overall, a 110-person food-processing operation in Canada could save you as much as US\$1.5 million a year in labour and benefits...compared with the United States."

consideration in Canadian policy calculations. Chile was viewed by Canadian trade policymakers as the “key to anchoring Canada’s trade initiative” in Latin America and it was targeted because of its “friendly foreign investment rules and open economy.”⁴⁷⁶

By 1995, Chile had already negotiated a free trade agreement with Mexico and Canadian diplomatic efforts were stepped up to include instructing the Canadian Embassy staff under Ambassador Marc Lortie to begin courting key opinion leaders in Chile, adding a fulltime NAFTA officer to the Embassy staff in Santiago, and supporting Chile’s membership in APEC.⁴⁷⁷ To be fair, there are areas where Chile’s performance in complying with ILO labour standards is noteworthy. The Ministers of Labour of the Inter-American Conference interpreted the ILO’s *Declaration on the Rights at Work* to mean that member countries were obligated to “extend the coverage of collective bargaining to the greatest possible number of sectors of the economy” and the Chilean government afterward “adopted the immediate operational standard of more than doubling the collective bargaining coverage rate.”⁴⁷⁸

Several problems in complying with labour standards commitments by developed countries surface within the free trade dynamic as well. Canadian governments do not “explicitly” promote collective bargaining with the Federal government maintaining a strict position of neutrality with respect to workers’ forming a union.⁴⁷⁹ And although the ILO has stated that freedom of association includes the “right to bargain collectively and the right to strike” the Supreme Court of Canada has held that these rights are not

⁴⁷⁶ Paskey and Sepulveda, *supra* note 470 at 5.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ Adams, *supra* note 272.

⁴⁷⁹ *Ibid.*

protected under the Canadian Constitution.⁴⁸⁰ Canadian governments, both federal and provincial, regularly engage in the practice of ordering legally striking workers back to work and of excluding certain professional and agricultural workers from collective bargaining laws, in contravention of ILO rules.⁴⁸¹ And despite the existence of strong Canadian laws on child labour, the ILO has raised concerns about enforcement problems continuing in the sex trade, leather industry, agriculture and manufacturing.⁴⁸²

In the final analysis, despite the shortcomings of Chilean labour legislation and workplace conditions, these considerations were not instrumental in halting Canada's drive to first attempt to have Chile accede to the NAFTA, and then to negotiate a bilateral free trade accord. The serious problems existing in the Chilean labour sector did not alter Canada's perception of Chile as the most developed state in Latin America.

However, strict compliance with the standard set by the NAFTA side agreements may have seemed a difficult goal for Chile as well. The Canadian Embassy in 1994 did commission a study on whether Chile would comply with the NAFTA environmental provisions. The results indicated that enforcement of NAFTA levels of environmental regulations would "cause certain sectors of the Chilean economy to grind to a halt."⁴⁸³ Again, the emphasis in this analysis was on economic development and not environmental concerns, although presumably that would be the main purpose of an environmental side-accord to a free trade agreement.

Rather than halting the negotiations, however, the Canadian government appears

⁴⁸⁰ *Ibid.* See also *Professional Institute of the Public Service of Canada v. Commissioner of the Northwest Territories* [1990] 2 S.C.R. 367.

⁴⁸¹ Adams, *supra* note 272 at 83.

⁴⁸² ILO, *Regional Integration Agreements in the Americas: The Labour Dimension* (Geneva: International Labour Office, 2003).

⁴⁸³ Paskey and Sepulveda, *supra* note 470 at 26.

to have taken the position that the best solution to any problems in the Chilean labour sector lay in providing technical support and cooperation to enable Chile to meet the standards set by the NAALC.⁴⁸⁴ In practice, the emphasis on education and cooperative action insured that labour concerns would be addressed by the parties, if at all, in a manner that would not contradict the model of economic development supported by Canada.

4.3 Adopting the NAALC Model for the CCALC

The same factors which influenced, and limited, the CCFTA negotiations were applicable to the CCALC negotiations as well. The major political reason for adopting the NAALC model in negotiating the CCALC was the hope that Chile would accede to the NAALC in short order.⁴⁸⁵ The adoption of the NAALC model by Ottawa also underscored a growing divergence between the Canadian and American approaches to regulating labour standards through free trade agreements.

The differences between the United States under the Clinton Administration and Canada regarding the imposition of labour standards within the scope of free trade Agreements lay mainly in the implementation of those standards, i.e. whether such issues would be continued to be dealt with in side agreements, or could be incorporated into the body of the trade agreements themselves.⁴⁸⁶ There was little deviation in the definition of

⁴⁸⁴ *Ibid.*

⁴⁸⁵ Aaron Cosbey, Simon Tay, Hank Lim and Matthew Walls, "The Rush to Regionalism: Sustainable Development and Regional/Bilateral Approaches to Trade and Investment Liberalization" at 17, online: IISD http://www.iisd.org/pdf/2005/trade_rush_region.pdf (Last accessed 1 December 2005). ["Cosbey"].

⁴⁸⁶ Masahiro Ken Kuwahara, "Evaluation of Canadian Policy on Labour Cooperation Agreements from 1994 to 2003: A Model for International Free Trade Agreements" (2004), online: Japanese Association for Canadian Studies <<http://www.jacs.jp/AnnualConf2005/11kuwaharaE.pdf>> (Last accessed 1 December 2005).

labour standards. American policy moved towards incorporating labour standards within the text of free trade Agreements, including labour and environmental provisions within the scope of the U.S.-Jordan Free Trade Agreement (USJFTA), and following this policy in subsequent trade agreements thereby making the dispute resolution mechanisms of the main treaty available to the labour provisions of these agreements.⁴⁸⁷ The U.S. also incorporated internationally recognized labour provisions into the text of USJFTA.⁴⁸⁸ This is a policy the Bush Administration has followed in subsequent free trade negotiations with Central American countries.

Other than the hope that Chile would accede to the NAFTA, it may seem puzzling to determine why the Canadian government chose to emulate the NAALC in its negotiations with Chile. North American unions largely spurned the NAALC after failing to stop the Agreement from being passed through the U.S. Congress. The President of the AFL-CIO at the time dismissed the NAALC as a “bad joke.”⁴⁸⁹ However, the result of this was a marginalization of the influence of organized labour, whose definition of development in any case did not necessarily fit within the economic development framework created by free trade. During the CCALC negotiations, it appears that the Canadian government felt little need to accommodate the interests of organized labour as by then labour’s opposition to a NAALC type side-agreement had solidified and there was little to be gained politically by any modifications to the NAALC model.

⁴⁸⁷ Mary Cornish, Fay Faraday, and Veena Verma, “Reference Guide To The Legal Frameworks And Trade Agreements/Negotiations For Enforcing International Labour Standards And Human Rights In The Americas” (15 October 2004), online: Cavalluzzo Hayes Shilton McIntyre & Cornish LLP <http://www.cavalluzzo.com/publications/Reference%20documents/referenceguidelabourhumanrightsstandardssept20_04.pdf> (Last accessed 2 December 2005).

⁴⁸⁸ Manley, *supra* note 313.

⁴⁸⁹ Graubart, *supra* note 409.

Thus, despite organized labour's criticisms of the NAALC, the model established in that agreement was intentionally followed in CCALC negotiations. Guillermo Campero, Advisor to the Minister of Labour in Chile, stated that there was an effort while negotiating the CCALC to "simplify certain aspects in order to make them more operable."⁴⁹⁰ Interesting, Campero also maintained that the decision to negotiate a Labour Cooperation accord with Canada was not the result of external pressures, but rather the result of democratic reforms and resisting pressures from certain business sectors in Chile not to conclude labour or environmental accords as part of Free Trade negotiations. This defense by Campero was prompted by Sophie Dufour, then a Professor at Sherbrooke University, at an April 1998 CCALC seminar who inquired whether the CCALC was

"simply concluded to continue the trend or as a form of political will a way of asserting that finally the social aspect had become...a fundamental point of discussion between Canada and Chile? Was it not ultimately concluded more as a result of political pressures or did it really fulfill a need?"⁴⁹¹

To which Campero responded

"to those who claim there was pressure, I can only respond that this would be very strange since long before anyone began speaking of this Agreement, in 1990 when our first democratic government took office, we were already interested in the link between labour aspects and international trade, when we began to consider some form of association with Mercosur (which is a regional agreement in which we are participating not as full members, but rather with "special status"). So this topic was already on our minds, and the reforms to our Labour Code began in 1990."⁴⁹²

The larger project of these external pressures to adopt developed world labour

⁴⁹⁰ SDC, *supra* note 461.

⁴⁹¹ *Ibid.*

⁴⁹² *Ibid.*

standards was also, on the Chilean side, tied into the pressure to develop democracy in the aftermath of the Pinochet dictatorship. Pablo Lazo stated that the stability necessary for free trade to develop is aided by instruments such as the CCALC.⁴⁹³ In response to questions regarding the utility of the CCALC and the stability of Chilean society, Lazo stated that “instilling democracy...is the sensation and perception that the society in question affords the minimum essential well-being that will enable people to live and develop, including in the areas of health, education, social security and, of course, labour rights.”⁴⁹⁴ The CCALC was seen by Lazo and other Chilean officials as an instrument that aided the development of democratic rights in post-Pinochet Chile and, by extension, the maintenance of social stability as well.

4.3.1 The Canada-Chile Labour Cooperation Accord

The end result of the negotiations is a CCALC that is structurally almost identical to the NAALC. The role of the ILO remains limited in the Agreement and the CCALC does not incorporate ILO labour standards into the text of the Agreement. The CCALC explicitly mentions the ILO only in the context of seeking to draw upon the “expertise and experience” of the ILO for the purposes of forming the Evaluation Committee of Experts (ECE).⁴⁹⁵ Annex I of the CAALC does identify the goal of providing migrant workers in a Party's territory with the same legal protection as the Party's nationals with respect to working conditions. In keeping with the original spirit of the CCFTA, Article

⁴⁹³ *Ibid.*

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Canada-Chile Agreement on Labour Cooperation (CCALC)*, online: HRSDC <http://www.hrsdc.gc.ca/en/lp/spila/ialc/06Canada_Chile_Agreement.shtml> (Last Modified 29 March 2004). [“CCALC”] Specifically, Article 42 outlines that “The Parties shall seek to establish cooperative arrangements with the ILO to enable the Council and Parties to draw on the expertise and experience of the ILO for purposes of implementing Article 22(1).”

48 of the CCALC expresses the desire for the parties to work towards the “early accession” of Chile to the NAALC.

The institutions created for the NAALC were adapted by Canada to act for the CCALC. Since the CCALC is a bilateral accord, two labour ministers sit on its Ministerial Council, not three as in the NAALC. Instead of a permanent tri-national secretariat, the functions of the NAALC secretariat and the NAOs are fused into a CCALC national secretariat located in both Chile and Canada.⁴⁹⁶ For this purpose, and likely in anticipation of extending labour cooperation to other parts of Latin America, the Canadian NAO was renamed the Office of Inter-American Labour Cooperation.⁴⁹⁷ The national secretariats in the CCALC have the same responsibility as the NAOs for the NAALC in developing cooperative activities aimed at enforcing national labour legislation relevant to the CCALC in each country.

4.3.2 Emphasis on Cooperative Activities

Like the NAALC, the CCALC stresses cooperation over confrontation. Article 11 of the CCALC outlines a variety of cooperative activities to be undertaken by the parties with respect to occupational safety and health, child labour, migrant workers, employment standards, and many other areas. The emphasis shortly after the signing of the CCALC was on developing cooperative activities between the governments and various other stakeholders, rather than on developing institutions that could be seen as having an adversarial component.⁴⁹⁸ The emphasis on cooperation was seen by Ottawa

⁴⁹⁶ “Worker Rights and Regional Trade Pacts” online: [solidaritycenter.org](http://www.solidaritycenter.org/files/JFA_Chapter4.pdf) <http://www.solidaritycenter.org/files/JFA_Chapter4.pdf> (last accessed 17 December 2005).

⁴⁹⁷ *Ibid.*

⁴⁹⁸ Morpaw, *supra* note 444.

as a necessary element complementing the inherent potential for conflict in combining free trade and labour standards within the same framework.

While outlining the components of agreements such as the CCALC, Morpaw noted that the ability to promote labour principles and enforce domestic labour laws requires the need for cooperation on labour law and labour market issues, trends, policies and programs which “must co-exist with the process for handling conflict among the three countries, creating an internal tension in terms of expectations and implementation of the Agreement.”⁴⁹⁹ In a wide-ranging session of government officials, labour experts, academics, business and union representative on the 10th Anniversary of NAFTA, the “accumulation of cooperative activities” under both the NAALC and CCALC was cited as one of the most positive aspects of the hemispheric free trade agreements.⁵⁰⁰

4.3.3 Canada’s Opposition to Trade Sanctions

The CCALC outlines the enforcement of fines for violations of the agreement through domestic courts, rather through trade sanctions. Part of this is due to continuing Canadian opposition to the use of trade sanctions to enforce labour standards. This is a continuation of a policy established during the NAALC negotiations, when Canada “adamantly opposed trade sanctions” as a means of enforcing the NAALC provisions.⁵⁰¹ Ottawa’s position on the issue was summed up in a February 2000 policy statement issued by the Department of Foreign Affairs and Trade:

⁴⁹⁹ *Ibid.*

⁵⁰⁰ Kuwahara, *supra* note 486.

⁵⁰¹ Kimberly Ann Elliott, “Finding Our Way on Trade and Labor Standards?” (April 2001), Online: Institute for International Economics (IIE) <<http://www.iie.com/publications/pb/pb.cfm?ResearchID=73>> (Last accessed 2 December 2005).

“The enforcement of core labour standards through trade sanctions is not an optimal instrument to effect change. Sanctions have a narrow and limiting effect...[and] also have the potential for misuse as an instrument for protectionism...Sanctions are a blunt instrument and can have the effect of depriving workers of income. Such sanctions are also limited to the traded sector (exported products) and would not necessarily lead to any overall change in the implementation of domestic labour law for workers in domestic industries....Trade sanctions can also isolate countries from the trading system, depriving them of income and reducing opportunities for and creating resistance on the part of targeted countries (workers as well as governments) to political change.”⁵⁰²

As an alternative to trade sanctions, the fines process outlined in the CCALC is designed to enforce labour standards by correcting improper behavior through “detering or punishing violators” or by “redirecting resources to address enforcement problems.”⁵⁰³ The procedure for correcting labour standards violations relies upon domestic judicial enforcement, problematic where the parties do not have “well-functioning judicial systems,” but not a serious concern for either Canada or Chile.⁵⁰⁴ The question of fines in general raises other problems, such as who actually pays the fine and what happens to any revenue collected by the fine, but these issues are not specifically addressed in the CCALC.⁵⁰⁵

4.3.4 Enforcement Procedures and Problems

One result of the emphasis on the cooperative nature of the Agreement is that the enforcement provisions of the agreement remain limited as the CCALC contains many of NAALC’s limitations on the use of its more coercive procedures. There must be a “persistent pattern” (not including a single case) of violating “mutually recognized”

⁵⁰² DFAIT, *supra* note 437.

⁵⁰³ Elliott, *supra* note 501.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Ibid.*

national labour laws (laws of both countries that address the same infractions in the same manner - not violations of ILO standards).⁵⁰⁶ A change from the NAALC is the provision in the CAALC for domestic collection and enforcement of panel determinations. Article 37 of the CAALC defines a “panel determination” and specifies procedures in both Canada and Chile for the collection of panel determinations.

In Canada, the National Secretariat of Chile (NSCH), acting on behalf of the Commission, may in the name of the Commission file in a court of competent jurisdiction a certified copy of a panel determination only if the Party complained against has failed to comply with the determination within 180 days of when the determination was made. Once filed, the panel determination, for purposes of enforcement, becomes an order of the court. The NSCH may then take proceedings for enforcement of that determination/order against whom the determination is addressed in accordance with paragraph 6 of Annex 43 of the Agreement.⁵⁰⁷ Significantly, Article 37(2)(h) of the CCALC specifies that a panel determination that has been made an order of the court is not subject to domestic review or appeal. An order issued under these proceedings would be governed by the federal *Crown Liability and Protection Act*.⁵⁰⁸

In Chile, there are similar procedures, with the National Secretariat of Canada (NSCA) acting on behalf of the Commission. The court of competent jurisdiction is the Chilean Supreme Court and like Canada the panel determination is final and not subject to any appeal. Once the petition is filed, the Supreme Court issues a resolution ordering the enforcement of the panel determination within 10 days. Article 37(3)(f) specifies that

⁵⁰⁶ *Ibid.*

⁵⁰⁷ Canadian proceedings to enforce a panel determination/order are conducted by way of summary proceedings.

⁵⁰⁸ R.S. 1985, C-50.

this resolution be directed to a “competent administrative authority” for “prompt compliance.” The enforcement and collection provisions also have a protective clause in Article 37(4) which states that “any change by the Parties to the procedures adopted and maintained by each of them pursuant to this Article that has the effect of undermining the provisions of this Article shall be considered a breach of this Agreement.” The reliance on both Canadian and Chilean political legal systems to deal with enforcement of disputes represents and acknowledgement that, at least in its judicial system, Chile has achieved a level of development that could potentially allow Canada to surrender a certain amount of control over conflict resolution procedures.

A brief comparison with the main enforcement points of the labour chapter of the U.S.-Chile Free Trade Agreement (USCFTA) negotiated in 2002 reveals some interesting contrasts and similarities with the CCALC. Unlike the CCALC, the USCFTA recognizes core ILO labour rights.⁵⁰⁹ Any recourse to the treaty dispute resolution process requires the completion of "Cooperative Consultation" procedures in the treaty and is only available, in wording similar to that of the CCALC, for disputes resulting from a “sustained or recurring course of action or inaction.”⁵¹⁰ Specifically exempted from the treaty are minimum wage laws.⁵¹¹ Despite the inclusion of core ILO rights and the entire labour standards text within the body of the free trade agreement, the emphasis by the United States, like Canada, remains on a cooperative approach to enforcing labour standards, largely created by the developed world, on the developing state that is a party

⁵⁰⁹ *U.S.-Chile Free Trade Agreement* (6 June 2003), online: Office of U.S. Trade Representative <<http://www.ustr.gov/new/fta/Chile/final/index.htm>> (Last accessed 7 December 2005). [“USCFTA”] See Art. 18.1(1).

⁵¹⁰ *Ibid.*, Articles. 18.6(8) and 18.2(1)(a).

⁵¹¹ *Ibid.*, Article 18.8.

to the agreement.

4.4 Effects of the CCALC

Following the implementation of the CCALC, the flow of information between Canada and Chile increased as they exchanged a “wide range of publications and reference materials” on labour law and related issues.⁵¹² The Cooperative Work Program agreed to by both countries consisted of four activities: two cooperative seminars for the exchange of technical information and two public educational conferences. The primary objective of these activities, outlined below, is to promote the exchange of information and increase understanding of labour legislation as well as inspection and compliance measures to effectively enforce these standards in the two countries. Although the exchange of information was announced as a mutually cooperative program, an analysis of the activities reveals that information tended to flow in one direction only, from Canada to Chile.

4.4.1 Cooperative Seminars

Seminars are contemplated by Article 11(2)(a) of the CCALC as a means of furthering the general aims of the agreement. Canada and Chile have utilized this clause to provide for a variety of seminars between government, corporate and labour officials of both countries. Two seminars, not open to the general public, were held in 1998. The first was held in Santiago in January 1998 and its focus was on individual employment standards and occupational health and safety legislation. Both governments subsequently

⁵¹² “First Annual Report: Canada-Chile Agreement On Labour Cooperation (July 1997-June 1998)” (1998) online: HRSDC <<http://www110.hrdc-drhc.gc.ca/doc/ialc-cidt/eng/e/backen.htm#annual>> (Last accessed 8 December 2005).

acknowledged that the number of participants was “limited” although they also claimed that the views of “government, business and labour were incorporated into the discussions.”⁵¹³ The Canadian delegation consisted of government officials from HRDC, Occupational Safety and Health (OSH), Federal and Provincial Deputy Labour Ministers, while business and labour were represented respectively by one delegate each.⁵¹⁴

The composition of the Canadian delegation to Chile indicated an effort to offer comprehensive advice on how best to structurally reform Chile’s labour system to comply with standards set by the CCALC. Presentations on Chilean labour legislation and practice were made by various Chilean government officials and the subjects discussed included each country’s standards with respect to individual employment agreements and workplace health and safety. Chilean legislation, regulations and methods of enforcement were explained, especially in the field of mining, due to significant Canadian investment in this sector of the Chilean economy.⁵¹⁵ The Canadian delegation then explained its system, emphasizing jurisdictional issues with Canada’s federal system and providing examples of federal and provincial issues (Quebec and Manitoba issues were also discussed, as their government representatives were present). On January 9, the delegation met with senior Chilean union and business delegates from the CUT; the Confederación de la Producción y del Comercio [Confederation of Production and Trade] (CPC); and the Canada-Chile Chamber of Commerce.⁵¹⁶ The give and take process described by the two governments somewhat belied the true nature of the exchange as

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.* The business and labour delegates were Gerald Foley, Director, Human Resources, Sudbury Division, Falconbridge Limited; and Andrew King, National Health and Safety Coordinator, Canadian Office of the United Steelworkers of America.

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid.* These meetings were chaired by Roberto Alarcón Gómez, Walter Riesco Salvo and James Drake, respectively.

information tended to flow predominantly from the Canadian side to the Chilean side.

The second seminar held in April 1998 in Ottawa followed a similar pattern, although the focus was more on industrial relations. The objective of this seminar was “to provide government officials with an opportunity to describe and compare Chilean and Canadian industrial relations law and practice.”⁵¹⁷ In addition to Government officials outlining the Canadian Labour Code, labour sector representatives explained various labour services available in Canada. The Chilean delegation then outlined their system of industrial relations including an overview of the system of industrial relations and the functioning of labour tribunals and possible legislative proposals under consideration by the Chilean government. One interesting difference from the composition of the Canadian delegation in Santiago is that the Chilean delegation in Ottawa did not include any representatives from the Chilean business or labour sector.⁵¹⁸ The composition of the Chilean delegation likely reveals that the Chilean government felt that attendance of its business and labour representatives would not be necessary, as the primary function of Chile’s delegation was to outline and explain Chilean government practices in the labour sector. Any advice or input from Chilean business or labour representatives would not fit into the Ottawa meeting’s agenda.

4.4.2 Educational Conferences

Like seminars, educational conferences dealing with subject matter such as labour law and related human rights issues are outlined by the CCALC as a cooperative means

⁵¹⁷ *Ibid.*

⁵¹⁸ *Ibid.* The Chilean delegation consisted of Guillermo Campero and Patricio Nova, advisors to the Minister of Labour and Social Security of Chile; Rafael Pereira, Head of the Department of Labour Relations of the Labour Branch; Sebastián Saez, Economic Relations Branch, Ministry of External Relations of Chile; and Pablo Lazo, Executive Secretary of the Agreement on Labour Cooperation.

of reaching the objectives laid out in the Agreement. Unlike the seminars, the parties claimed that the conferences have a broader objective of disseminating information in both countries in order to increase public awareness and understanding of each other's labour legislation and enforcement practices as well as future directions in workplace practices. The seminars' stated goal is to "address the social dimension of economic integration" and "ensure respect for basic human rights and labour standards in the workplace."⁵¹⁹

On April 30, 1998, a conference on labour legislation in Chile was held in Ottawa. In contrast to the previous two seminars, attendance reflected a much broader spectrum and over 50 Canadian participants from business, labour, government, and academia attended the conference.⁵²⁰ The broader participation was, however, reflected only on the Canadian side – Chilean participation was limited to the same government officials who had participated in the previous industrial relations seminar. Again, the composition of the Chilean delegation revealed the one-way nature of the exchange. The Chilean government used the occasion to express hope that the relationship in labour-cooperation areas between Canada and Chile be used as model to extend to other parts of Latin America. The Executive Secretary of the CCALC for Chile expressed this clearly in his opening address:

"But what we are very interested in is in saying that there is a great opportunity here to make an experience of cooperation, not just between Canada and Chile, but between Chile as a Latin American country and Canada. That means that here we have an approach to Latin America, and because of that with this experience we are going to give ideas about cooperation to the rest of Latin America."⁵²¹

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid.*

⁵²¹ SDC, *supra* note 461.

As noted above, there were no representatives from the Chilean labour sector in Ottawa. Instead, labour laws and issues were outlined by Rafael Pereira, the Head of the Department of Labour Relations of the Labour Directorate, the Chilean body responsible for monitoring and supervision of all labour legislation. Both sides clearly acknowledged that the issues dealt with during the conference went well beyond labour relations. Pablo Lazo noted the importance of a "social dialogue" which brings together a broad spectrum of parties to discuss the most serious issues affecting collective labour relations.

"This of course ensures greater participation, the creation of a social fabric that eliminates many of the misunderstandings of the past which led to the inertia of compartmentalization, of separations between unions and business owners, as a result of a political situation and authoritarian political system which was in effect until 1990."⁵²²

The Chilean government welcomed further labour development assistance within the context of developing Chilean democracy. On the issue of whether the Chilean government was enthusiastic about signing a labour cooperation accord, or whether it was pressured into doing so by Canada or the United States, the Chilean delegation repeated its position that labour and environmental issues be dealt with in separate texts that incorporate labour standards, but that such standards not be made incorporated into a free trade agreement.⁵²³ This statement repeats Chilean concerns about coercive measures being taken by Canada and reflects the operating nature of regulating labour standards through the CCALC and the pressure for change felt largely by the developing country in

⁵²² *Ibid.*

⁵²³ *Ibid.* Guillermo Campero stated Chilean policy "to be precise, is that we are in favour of the system of complementary agreements, both with respect to the environment and labour -- not as issues that are introduced into the trade agreement itself, but as complementary agreements which we consider, I repeat, to be necessary and fundamental. These agreements must have their own text and their own regulations."

the relationship. The outcome of negotiations for the United States-Chile Free Trade Agreement, however, points towards a change in the Chilean position on this issue and acceptance, at least with regard to the United States, that such standards be made part of the main trade agreement. The United States was successful in imposing a potentially more coercive arrangement upon Chile, but the basic operation of the agreement, with pressure emanating from developed to developing country for labour sector reforms, remained similar to the CCALC.

4.4.3 The CCALC and Related Activities

In addition to the bilateral Cooperative Work Program, Canada also played host to a conference on Income and Security organized under the auspices of the CCALC, that “enabled a comparative analysis of income and security programs” in both countries.⁵²⁴ As well, on April 14-15, 1998, a conference on labour law and social security and its relationship to economic integration was held in Viña del Mar, Chile. The conference was organized by a Montreal labour law firm in partnership with the Canadian and Chilean governments, business and labour representatives from both countries, as well as other NGOs.⁵²⁵ Conference participants included a broad spectrum of figures from the government, business, labour and human rights sectors, as well from academia. Organizations represented at the Conference included the ILO, Universite du Quebec a Montreal and the International Centre for Human Rights and Democratic Development in

⁵²⁴ Online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/rma/dpr/99-00/hrdc-drhc/hrdc9900dpr03_e.asp> (last accessed 14 December 2005).

⁵²⁵ *Ibid.* Melançon, Marceau, Grenier & Sciortino organized the conference in partnership with Montreal management firm Martineau Walker and benefitted from sponsorship and cooperation from organizations such as Human Resources Development Canada, the Government of Quebec, the International Labour Organization (ILO), the Canadian Association of Labour Lawyers, the Asociación Gremial de Abogados Laboralistas de Chile (Labour Lawyers Association of Chile), the International Society for Labour Law and Social Security and the Sociedad Chilena de Derecho del Trabajo (Chilean Society for Labour Law).

Montreal. Legal experts from other countries also participated in the conference and conference publications were made available to the public on the internet.⁵²⁶ The involvement of business groups reflected the Canadian government's stated position that there is an "important role" for the private sector in helping to enforce the CCALC.⁵²⁷ However, the private sector and academic representatives in this conference were overwhelmingly drawn from the Canadian side.

The opportunity for Canadian and Chilean representatives from government, business and labour organizations to interact and resolve conflicts under the CCALC continued in November 2003 with a Forum on Labour-Management Collaboration held in Montreal. A tripartite delegation of Chile made up of groups from the three sectors discussed labour-management relations and policy, but perhaps more importantly several meetings were held "on the margins of the forum, allowing the Chilean delegation to meet with union and management representatives as well as federal and provincial specialists in mediation and conciliation" and providing conflict resolution tools to the Chilean delegation.⁵²⁸

The operation of these seminars and conferences indicates that the process of cooperative dialogue may help form ideas which could develop into enforceable laws.

⁵²⁶ *Ibid.* Other participants included Oscar Ermida, Senior Technical Specialist at the ILO; Jorge Rosenbaum, Secretary of the Institute of Labour Law at the Universidad de la República in Uruguay; Mario Pasco, senior professor of Labour Law at the Universidad Católica de Perú; Leoncio Lara, Legal Advisor to the Secretariat of the North American Commission for Labour Cooperation; Alfredo Conte-Grand, official in charge of the ILO Multidisciplinary Technical Team in Chile; Lucie Lamarche, professor at the Université du Québec à Montréal; Warren Allmand, President of the International Centre for Human Rights and Democratic Development in Montreal; Craig Forcese, Canadian legal expert on codes of conduct for multinational companies; and René Roy, Vice-President of the Fonds de Solidarité du Québec (Quebec Solidarity Fund) and the Quebec Federation of Labour. Legal representatives from outside the two CCALC parties included delegates from Argentina, Brazil, Mexico, Peru, the United States and Uruguay.

⁵²⁷ DFAIT, *supra* note 437.

⁵²⁸ "Forum on Labour-Management Collaboration" (10-13 November 2003) (Montreal, Canada), online: HRSDC <http://www.hrsdc.gc.ca/en/lp/ila/NIILA/Cooperative_Act_CCALC.shtml> (last accessed 22 December 2005).

As the Canadian government reveals in a statement, these dialogues act as a “means of establishing dialogue between participatory countries that, in the future, could lead to more intrusive employment protections that hold a stronger enforcement mechanism.”⁵²⁹

The ideas that form the basis for these employment laws originate predominantly from a Canadian paradigm. The cooperative dialogue that results from these seminars and conferences invariably results from resources that are disproportionately drawn from the Canadian side. Such dialogues require funding and although a general criticism of the CCALC is that cooperative activities have been poorly funded by both governments, the operation of the agreement illustrates that, not surprisingly, Canada has devoted more resources to the operation of the CCALC.⁵³⁰ Lack of proper funding may also have been partially responsible for the lack of any presence of Chilean business and labour leaders in the Chilean delegation during the second Ottawa seminar in 1998.

The problems in securing funding for broader participation on the Chilean side may be partially offset by securing the support of business, organized labour and NGOs as an alternative source of funding for CCALC related activities, as demonstrated by the Viña del Mar Conference. However, the composition of these organizations tended to tilt towards Canadian sources as well. One exception to this pattern was the presence of the CUT in the first seminar discussion. This is noteworthy, given the harsh repression of the Union during the Pinochet dictatorship and its often contentious relationships with democratic governments in place since 1990. Both governments issued statements emphasizing the value of these exchanges, noting similarities in the actions taken by both countries. In practice, the similarities in actions tended to reflect Chilean adoption of

⁵²⁹ Abbott, *supra* note 436.

⁵³⁰ Cosby, *supra* note 485 at 18.

ideas put forward by the Canadian side.

This trend has continued as more recent cooperative activities have focused on modernizing service delivery mechanisms with respect to online services for labour and employment programs through the use of the Canadian model to assist Chile in developing its own government on-line service.⁵³¹ The health and safety of workers in small and medium sized businesses in both Canada and Chile was the subject of a three-day seminar held in November 2002 in Santiago. The seminar included the Canadian delegation outlining of its “incentive programs, risk management, funding alternatives and union-management collaboration” to the Chilean side “as a means through which to improve workplace safety and disability management.”⁵³² Although the seminar was touted as an “exchange of information” in practice the dialogue once again mainly involved the Canadian side outlining its programs to Chile for adoption as a workplace safety management model.

The real success of the CCALC as a serious instrument of dialogue among equal partners may rest on greater Chilean civil society participation in the cooperative process.⁵³³ The educational conferences in particular, as the main vehicle for public participation in the cooperative process, must be properly funded, to allow for full participation by both sides in the process and notice of such conferences must be widely

⁵³¹ “Service Delivery Mechanisms in the New Digital Era” (23-25 April 2002) (Ottawa, Canada), online: HRSDC <http://www.hrsdc.gc.ca/en/lp/ila/NILA/Cooperative_Act_CCALC.shtml> (last accessed 22 December 2005).

⁵³² “Small and Medium Enterprises (SME): Opportunities and Challenges” (27-29 November 2002) (Santiago, Chile), online: HRSDC <http://www.hrsdc.gc.ca/en/lp/ila/NILA/Cooperative_Act_CCALC.shtml> (last accessed 22 December 2005).

⁵³³ M.R. Goldschmidt, “The Role of Transparency and Public Participation in International Environmental Agreements: The North American Agreement on Environmental Cooperation” (2002) 29:2 Boston Col. Env. Aff. L. R. 343.

given to a wide range of potential participants in civil society. However, many of the shortcomings of the CCALC are the result of non-implementation of many parts of the Agreement.

4.5 The CCALC's Unfulfilled Objectives

The two governments have acknowledged several delays in the full implementation of the agreement. The first detailed review of the CCALC occurred in December 2002. The delay in implementing the CCALC was blamed, at least partially, on the failure of Chile to accede to the NAFTA and an acknowledgement was made that “tasks that may have been deferred in anticipation of Chile’s possible accession to NAFTA should be completed at the earliest opportunity.”⁵³⁴ The parties promised a second detailed review of the CCALC by the end of 2006.⁵³⁵ The reasons behind Chile’s failure to accede to the NAFTA lie partially in the United States’ insistence on negotiating differing trade, labour and environmental terms. Following the implementation of the USCFTA, increased activity under the CCALC appears to be an objective of Canadian policy.

4.5.1 The Complaints Process

The number of complaints filed as of January 2006 under the CCALC has been miniscule. From 1998-2005, there were no Canadian submissions. Four submissions were received from Chileans “complaining about Chilean non-enforcement of domestic

⁵³⁴ “Ministerial Council Report On The Three-Year Review Of The Canada-Chile Agreement On Labour Cooperation” (December 2002) online: SDC <http://www.sdc.gc.ca/en/lp/spila/ialc/2003_2004/02canada_chili_agreement.shtml> (Last Modified 12 August 2004) [“Three-Year Review”].

⁵³⁵ *Ibid.*

[labour] laws.”⁵³⁶ The results of these cases have indicated a lack of interest on pursuing complaints launched from the Chilean side:

“In two cases the Joint Submission Committee found no need for a factual record, in one case it found the guidelines for submission not followed, and in one case it recommended the preparation of a factual record but the Parties, who have the final say, decided not to prepare one.”⁵³⁷

The operation of the CCALC may be showing signs of being affected by the “dynamics” inherent in a bilateral agreement where, unlike in a multi-lateral agreement such as the NAALC, “one party will find itself subject to a complaint and the other can hardly force its consideration.”⁵³⁸ This may act to limit the influence Canada can exert upon Chile under the CCALC’s complaints mechanisms. This dynamic may also be fuelled by the desire of both the Canadian and Chilean governments to avoid engaging the conflictive aspects of the CCALC, and by the institutional and procedural aspects of the agreement itself. Canada does not need to force its objectives through a conflictive process when a cooperative process can achieve similar results, though perhaps in a longer timeframe and without the need for immediate confrontation.

4.5.2 Labour’s Perspective

In Chile, the CUT identified several institutional and procedural concerns regarding the CCALC. Chilean unions generally wanted to be involved in the negotiation and evaluation of the labour-cooperation agreements so as to facilitate better discussions

⁵³⁶ Cosbey, *supra* note 485 at 18. As Cosbey notes, “This compares with over 50 submissions disputes under NAFTA’s citizen submission process in its first ten years, 10 of which led to the preparation of factual records.”

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.*

and to provide development opportunities to modernize Chilean unions.⁵³⁹ The Chilean labour sector also expressed the opinion that it was “socially desirable” to “penalize infringing companies” while noting that “it is not typical of Canadian companies to have labour problems,” an admission that the CCALC would largely be directed against Chilean companies.⁵⁴⁰ While calling for a “company-by-company analysis” of the CCFTA and the CCALC, Chilean unions also admitted that this was a new experience for them, that their involvement with the CCALC until now had been “relatively low,” and that monitoring the Agreement has “not been one of their priorities.”⁵⁴¹

Chilean unions have been generally lukewarm towards the CCALC, however the Agreement’s low visibility has hampered efforts to engage Chilean labour groups into the process. As outlined above, the involvement of the CUT in the process is a very positive sign that the CCALC is viewed by Chilean organized labour as an instrument worth participating in. However, representation of a much broader spectrum of Chilean civil society, including the Chilean business sector, is necessary to facilitate a true dialogue between Canada and Chile.

4.5.3 The Business View

Despite the suggestions from some Chilean officials regarding resistance from some sectors in Chile to the concept of enforcing labour standards as part of free trade negotiations, the Chilean business sector has largely viewed the CCALC as a low-profile instrument for helping to maintain social stability in the labour sector. The CCALC is seen by Chilean companies as an instrument that provides useful educational

⁵³⁹ SDC, *supra* note 461.

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

opportunities in the area of industrial safety but its utility is limited by the agreement's lack of promotion and by businesspersons' lack of knowledge about it.⁵⁴² Chilean investors in Canada generally pay little heed to the CCALC as Canada is viewed as a developed country with very high labour standards.⁵⁴³ Chilean business interests have also found the CCALC a useful instrument to facilitate education on health care for workers, particularly in the forest sector.⁵⁴⁴ The Canadian labour model is seen as an example for Chile to emulate through the CCALC. Chilean business in general favors the cooperative functioning of the CCALC and has not expressed any desire for further implementation of the Agreement that may lead to a more conflictive situation.

4.6 The CCALC's Potential as a Labour Development Tool

Compa's comments on the NAALC process as a "unique accomplishment" among the parties, as well as his observations that criticism of the NAALC being based "more on impatience than on analysis"⁵⁴⁵ are particularly relevant to the changes in labour policy and system structure that are occurring because of the CCALC. These changes are occurring in a low-key manner directed primarily at reforms of the Chilean labour sector.

The most recent publicly available *2003-2004 CCALC Action Plan* has identified some areas requiring more attention by the parties in order to fulfill the main objectives of the Agreement. Greater focus was urged on initiatives to improve the administration of labour justice and the role of labour law and policy in relation to the international

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid.*

⁵⁴⁵ Lance Compa, "Another Look at NAFTA" (Winter 1997) Dissent at 46-48.

economy, in collaboration with the ILO.⁵⁴⁶ These initiatives were directed at reforming Chilean labour law to comply with CCALC standards. The parties seemed to have acknowledged the CCALC's lack of visibility and public awareness and seek to correct the problem "by facilitating exchanges of practical knowledge and by involving international organizations in its activities."⁵⁴⁷ Workshops would be regularized semi-annually and would alternate between Canada and Chile, with topics focusing on labour market information, building social dialogues between unions and employers, and the links between labour policy and globalization.⁵⁴⁸

Neither Canada nor Chile has announced any attention to change the focus of the discussion activities from their mainly educational focus. The parties seem likely to make the discussions more productive by tying them in to specific issues or problems. Evidence from the NAALC's history points towards cooperation and capacity building evolving more from discussions (seminars, workshops, conferences) linked to allegations of existing problems that "elicit more attention from key actors and are more likely to change their behaviour than activities that are seen as purely informative."⁵⁴⁹ Such behaviour modification, however, is directed primarily at Chile as cooperation programs designed to export Canadian technology to Chilean labour sectors.

Canada has expressed the desire for increased technical cooperation in the labour field between the two countries although no formal technical assistance program has

⁵⁴⁶ "Canada-Chile Agreement on Labour Cooperation, 2003-2004 Plan of Action" (2003), online: HRSDC <http://www.hrsdc.gc.ca/en/lp/spila/ialc/2003_2004/01canada_chili_agreement.shtml> (Last Modified 25 March 2004).

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

⁵⁴⁹ Polaski, *supra* note 288 at 24.

materialized thus far.⁵⁵⁰ There may be other factors involved in delaying the full implementation of the CCALC. Despite being subject to the same considerations as the CCALC, the Canada-Chile Agreement on Environmental Cooperation (CCAEC) has developed much further along, with an infrastructure that includes specific guidelines for submission of complaints and even a comprehensive dedicated website that provides information to the public about the Agreement.⁵⁵¹

One possible reason for the CCALC's slow implementation is that it seems to have suffered from a bureaucratic shuffle among federal departments within the Canadian government. Much of the information that the public gains today regarding federal programs and agreements comes from the internet. On the internet, the Agreement was located first under the rubric of the Department of Foreign Affairs and International Trade (DFAIT). In fact, DFAIT still maintains a website of trade agreements and associated information.⁵⁵² Some information on the CCALC is located online under Social Development Canada.⁵⁵³ Still another Government of Canada website lists the CCALC under the Service Canada department.⁵⁵⁴ More comprehensive information is found under the umbrella of the Department of Human Resources and Skills Development Canada (HRSDC). Within HRSDC is International Labour Affairs which

⁵⁵⁰ "Canada Announces Labour Technical Assistance Program for Costa Rica" (4 August 2004) online: SDC <<http://www.sdc.gc.ca/en/cs/comm/hrsd/news/2004/040804.shtml>> (Last Modified 6 August 2004). Although Canada recently signed such a technical assistance agreement with Costa Rica under the auspices of the Canada-Costa Rica Labour Cooperation Agreement.

⁵⁵¹ "Canada-Chile Agreement on Environmental Cooperation (CCAEC) Canadian National Secretariat" (2000), online: Environment Canada <<http://can-chil.gc.ca/English/Resource/Agreements/AECCC/Default.cfm>> (Last accessed 9 December 2005).

⁵⁵² "Regional and Bilateral Initiatives" (2005), online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/reg-en.asp>> (Last accessed 10 December 2005).

⁵⁵³ SDC, *supra* note 461.

⁵⁵⁴ Online: Service Canada <http://www1.servicecanada.gc.ca/en/lp/spila/ialc/06Canada_Chile_Agreement.shtml> (last accessed 10 December 2005).

manages Canada's participation in the ILO as well as acting as the repository for International Labour Agreements, various policy papers and enforcing international standards with respect to child labour, migrant workers, etc.

The website for HRSDC-ILA is the main repository for information relating to the CCALC.⁵⁵⁵ There is no dedicated website for the CCALC as there is for the NAALC. This is an important consideration in an age where an increasing portion of the public gets its information and government resources from the internet. More significantly, it points to a lack of organizational infrastructure created for the CCALC, similar to that created for the NAALC. During the CCALC negotiations, Canada clearly anticipated use of the NAALC structures to manage its relationship with Chile. The somewhat ad-hoc nature of the CCALC's operation thus far indicates a policy that, although it has articulated long-range goals, is still in its formulative stages.

The parties seem to be in no hurry for providing guidelines for accessing provisions of the agreement. In 2003 – six years after the Agreement came into force - Canada and Chile committed to releasing public guidelines for the submission of complaints under the CCALC. Yet, two more years have passed and there are still no easily accessible guidelines available for public submissions to the CCALC. This stands in contrast to Canadian policy regarding the NAALC, which has guidelines regarding the submission of complaints publicly available on the internet.⁵⁵⁶ The NAALC submissions process, although subject to widespread criticism, has nevertheless maintained at least

⁵⁵⁵ "International Labour Affairs and Agreements" (2005), online: HRSDC <<http://www.hrsdc.gc.ca/en/gateways/business/cluster/category/ilaa.shtml>> (Last accessed 11 December 2005).

⁵⁵⁶ "Guidelines for Filing Public Communications" (2002), online: HRSDC <http://www.hrsdc.gc.ca/en/lp/spila/ialc/pcnaalc/02Guidlines_for_filing.shtml> (Last accessed 11 December 2005).

some credibility among civil society groups as an effective means of generating political pressure on the parties to the Agreement.⁵⁵⁷

However, the NAALC complaints mechanism has also operated “in ways that frequently manage to embarrass the Parties.”⁵⁵⁸ Several analysts have pointed to this as the main reason there “there has been almost no replication of this mechanism in other FTAs.”⁵⁵⁹ The emphasis by both Canada and Chile on the cooperative nature of the agreement may reflect a reluctance to fully enable the complaints mechanism of the CCALC.

There may also be reluctance on the part of civil society in Chile to make use of the CCALC, as some Chilean unions have refused offers from their counterparts in Canada to file complaints regarding alleged violations of Chilean labour law and enforcement.⁵⁶⁰ This reveals a perception among Chilean civil society that the CCALC is either seen as an instrument to further Canada’s labour development goals, or ineffective at addressing their own labour concerns, or perhaps both. Nevertheless, the CCALC purports to replicate the NAALC’s complaints mechanism and it is imperative that guidelines be issued promptly if the CCALC is to be taken more seriously as a vehicle for civil society groups to express their concerns over any possible violations to the agreement.

4.6.1 Labour Cooperation and Canada’s Federal System

There appears to have been no progress made by Canada in achieving an inter-

⁵⁵⁷ Graubart, *supra* note 409 at 140.

⁵⁵⁸ Cosby, *supra* note 485 at 16.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ “Worker Rights and Regional Trade Pacts” online: [solidaritycenter.org](http://www.solidaritycenter.org)
<http://www.solidaritycenter.org/files/JFA_Chapter4.pdf> (last accessed 17 December 2005).

governmental agreement between the Federal government and the provinces regarding the implementation of the CCALC. This is particularly important for Canada, as “jurisdictional responsibility for labour regulation falls primarily to the provinces and territories” with only “10 percent” of the labour force falling under federal jurisdiction.⁵⁶¹ The adherence of territorial and provincial governments to any labour cooperation agreement is thus critical to their effectiveness.

An Intergovernmental Agreement respecting the NAALC has been adhered to by only four provinces.⁵⁶² In June 2004, Federal, Provincial and Territorial Labour Ministers met in Banff, Alberta to discuss this issue and the need for a new Intergovernmental Agreement to encompass all provinces in post-NAALC negotiations. They recommitted themselves to reviewing “an approach to provincial and territorial participation in Canada’s labour cooperation agreements” and directed the Canadian Association of Administrators of Labour Legislation “to develop a draft of an intergovernmental agreement that will describe how provinces and territories can participate in managing labour cooperation agreements, and in handling disputes.”⁵⁶³

The text of an Intergovernmental Agreement designed to facilitate full implementation of all labour cooperation accords across Canada has been made public on

⁵⁶¹ “It’s Your Turn” (May 2003) online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/IYT/scfait-en.asp>> (last accessed 12 December 2005).

⁵⁶² http://www.hrsdc.gc.ca/en/lp/spila/ialc/nao/03signatories_canadian_intergovernmental_agreement.shtml <last accessed 5 January 2006>. The provincial signatories to the NAALC Intergovernmental Agreement are Alberta, Manitoba, Quebec and Prince Edward Island.

⁵⁶³ “Federal-Provincial-Territorial Meeting of Ministers Responsible for Labour” (22-23 January 2004) online: Canadian Intergovernmental Conference Secretariat <http://www.scics.gc.ca/cinfo04/830811004_e.html> (Last accessed 10 December 2005). The Canadian Association of Administrators of Labour Legislation (CAALL) is an association of federal-provincial-territorial departments of Labour and heads of Occupational Safety and Health (OSH) agencies.

the HRSDC website.⁵⁶⁴ However, no provincial signatures to this Intergovernmental Agreement have been announced by the Federal Government. The inability to secure full provincial ratification of the CCALC is a serious matter which may suggest Ottawa's inability to obtain "blanket [nationwide] coverage" for labour cooperation agreements, and thus jeopardize Canada's ability to negotiate future agreements on these matters.⁵⁶⁵ The lack of progress made in this intergovernmental process may reflect the belief among provincial governments that international labour regulation through federally negotiated agreements such as the NAALC and CCALC is both unwelcome and unnecessary in their jurisdictions.

4.6.2 Comparing the CCALC to the USCFTA

Unlike Canada, the United States appears to be heading in the direction of solidifying its policy to directly incorporate internationally recognized labour standards into the text of free trade agreements. The U.S. is deviating from the previous NAALC model, and current policy, and is no longer negotiating labour side agreements to free trade agreements. Instead, since the signing of the *U.S.-Jordan Free Trade Agreement* in 2000, the U.S. has incorporated internationally recognized labour provisions into the text of Free Trade Agreements, thus making them subject to the same dispute resolution mechanisms available to other trade issues.⁵⁶⁶

A brief look at the main points of the labour chapter of the 2003 *U.S.-Chile Free Trade Agreement* reveals some interesting contrasts with the CCALC. Unlike the

⁵⁶⁴ "Canadian Intergovernmental Agreement Regarding The Implementation Of International Labour Cooperation Agreements", online: HRSDC <<http://www.hrsdc.gc.ca/en/lp/ila/NIILA/CIAll.shtml>> (last accessed 10 January 2006).

⁵⁶⁵ Abbott, *supra* note 436 at 18.

⁵⁶⁶ Manley, *supra* note 313 at 106-107.

CCALC, the U.S.-Chile FTA recognizes core ILO labour rights and both parties "reaffirm their obligations as members of the International Labour Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work."⁵⁶⁷ There is a dispute resolution process in the Treaty, however any recourse to it requires the completion of "Cooperative Consultation" procedures in the treaty and is only available, in wording similar to that of the CCALC, for disputes resulting from a "sustained or recurring course of action or inaction."⁵⁶⁸ Specifically exempted from the treaty are minimum wage laws.⁵⁶⁹

One interesting provision of the labour chapter of the U.S.-Chile FTA is an allowance for the substitution of fines rather than trade sanctions for violations of any of the labour provisions in the agreement.⁵⁷⁰ This is similar to the provision found in the CCALC, and mirrors the long-held preference of Canadian governments for the use of fines to punish labour violations, rather than trade sanctions. Interestingly, some American labour advocates "see this as a retreat from the trade sanction remedy theoretically available in the U.S.-Jordan FTA."⁵⁷¹

The Canadian government has been influenced by several factors in pursuing its labor cooperation policy in bilateral and multilateral negotiations. First, there is the obvious similarity, outlined above, between Canadian and U.S. trade policy on incorporating labour (and environmental) standards into FTA negotiations. Recent FTA negotiations by both countries illustrate their common interests as developed countries in

⁵⁶⁷ USCFTA, *supra* note 509. See Art. 18.1(1).

⁵⁶⁸ *Ibid.*, Arts. 18.6(8) and 18.2(1)(a).

⁵⁶⁹ *Ibid.*, Arts. 18.8.

⁵⁷⁰ *Ibid.*, Arts. 16.1(2).

⁵⁷¹ Manley, *supra* note 313 at 111.

exporting labour values to the developing world. Second, a global approach to linking labour and trade through the WTO seems unlikely, at least in the short term. The stalled WTO negotiation on a social clause has led to the entrenchment of labour development within Canadian FTAs. Finally, the lack of an ILO enforcement mechanism has led the Canadian government to develop a cooperative approach to exporting developed world labor standards.

This approach, as will be discussed in the following chapter, is not cooperative in the sense that both sides receive a common benefit from labour development programs. But the approach has proved successful in exporting Canadian economic and labour values through dialogue among actors with divergent interests yet who are all stakeholders are in the continuing process of globalization. A positive view of Canada's labour cooperation process is that it will result in a process of dialogue that could result in progressive change and an equal partnership between parties to these agreements. However, the inherent contradictions of economic and labour development in today's paradigm of globalization, which will be discussed further in the Conclusion, make this an unlikely prospect.

CHAPTER 5: CONCLUSION

This thesis has argued that the reconciliation of labour development and neo-liberal economic globalization, at least within the current framework of free trade and economic development, is extremely difficult. Neo-liberal economic globalization has led to the shrinking of the industrial working class and its replacement by a new type of worker. This has not resulted in the improvements in working conditions that many economists had promised nor has it prevented increasing attempts to offset the negative effects of globalization through labour development programs.

Labour development is increasingly relevant for both the developed and developing worlds in several respects. It has provided a means to effect social changes in the workplace within the context of globalization. This concluding chapter will address the issue of law within labour development.

Does the current implantation of labour development programs constitute a new post-Westphalian legal system representing cosmopolitan legality? Potentially, yes, as the process has the potential to empower non-state actors and legitimize individual complaints against state actors within international law. An example of this would be the individual migrant worker lodging a complaint against the American government. In practical terms it is difficult to define labour development as a legitimate tool of cosmopolitan legality.

Labour development represents a counter-hegemonic theory. It is, as Santos and

Garavito have noted, a new form of subaltern cosmopolitan law and politics.⁵⁷² In theory, labour development could provide both the developed and developing world with a legal and social framework that could address the inherent tensions of counter-hegemonic globalization.⁵⁷³

5.1 The Developed World

In practice, countries such as the United States and Canada have utilized bilateral agreements (or in the case of the NAALC, a trilateral agreement) within the context of free trade negotiations to export developed world notions of economy and labour. My analysis of the theoretic and legal frameworks developed in Chapter 1 combined with Chapter 2's history of the development of International Labour Standards and the ILO indicate that international labour standards have been largely created by the developed world and are exported to developing countries under the guise of Labour Cooperation Agreements, or labour provisions within Free Trade Agreements. Since the assumption is that developing countries are in a less advanced stage than their developed world partners, this is not a cooperative process between equals.

First and foremost, labour development has provided the means for developed countries to export notions of economic policy within the context of reforming labour laws. Macroeconomic policies which view labour as capital are essential to the process of neo-liberal economic globalization.⁵⁷⁴ Indeed, the phrase "human capital" which was

⁵⁷² Boaventura de Sousa Santos, César A. Rodríguez-Garavito, eds. *Law and Globalization from Below* (Cambridge: Cambridge Univ. Press, 2005). I am using the term of "subaltern" in Gramsci's sense of "groups who are outside the established structures of political representation." See online <<http://www.subaltern.org/>>.

⁵⁷³ *Ibid.*

⁵⁷⁴ See Friedman, *supra* note 41.

pioneered by neo-classical economist Jacob Mincer in the late 1950s⁵⁷⁵ has entered the official policy lexicon of many Western governments.⁵⁷⁶

Chapter 1 of this thesis has argued that the developed world economic notions of human beings as capital, in the simple Chicago-school notions of explaining all wage differentials among workers, cannot co-exist with the types of labour development programs illustrated in Chapters 3 & 4. Chapter 4 has shown that on a macroeconomic level, Canadian labour cooperation policy is geared towards the lifting of wages of Chilean workers. As the case study of the CCALC has shown, these attempts have thus far not succeeded in eliminating the social imbalances in Chilean society, or even improving working conditions across the board. Chapter 3 illustrates on a microeconomic level those same policies geared towards a specific group – Mexican migrant workers in the United States. Though Mexicans working as migrant workers in the United States make many times higher wages than their fellow nationals in Mexico, they continue to face harsh working conditions and legal inequalities within American society.

As opposed to a narrow economic analysis of human capital, my theory of labour development differentiates the social and instructional capacities of a human being applying himself or herself in economic activity. The economic conception of human capital trumps social considerations in the current implementation of labour development programs. Rather than refer to human beings as capital, labour development programs should view human beings as social units. In Chapter 4, I noted comments made by

⁵⁷⁵ Jacob Mincer, "Investment in Human Capital and Personal Income Distribution" (1958) 66:4 J. Pol. Econ. 281

⁵⁷⁶ See for example "Budget 2005 Announcements", online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/est-pre/20052006/HRSDC-RHDCC/HRSDC-RHDCCr5601_e.asp>.

former Trade Minister Pierre Pettigrew on the CCALC and investing in Canada under the CCFTA. His remarks on that occasion, which stated that “Labour and benefits are, on average, 30 percent less in Canada than in the United States,” were designed to provide an economic incentive to investors and not to emphasize Canada’s compliance with the CCALC.⁵⁷⁷

In addition to economic restructuring, the developed states of North America, the United States and Canada, are creating a new legal framework for international labour regulation through agreements such as the NAALC and CCALC. This framework may be cosmopolitan and post-Westphalian in certain aspects. In particular the complaints mechanism of the NAALC and CCALC empowers non-state actors as seen in the complaints launched under the NAALC. The various educational and consultative activities under the CCALC also, to a degree, empower various elements of Canadian and Chilean civil society. However, the linkage of these agreements to trading agreements with far greater scope and power of action by the respective governments undermines the cosmopolitan nature of labour development.

The case of Mexican migrant workers and the NAALC demonstrates this dichotomy. The employment conditions of Mexican migrant workers in the United States have been the subject of increasing complaints through the NAALC. As noted in Chapter 3, many of the NAALC public communications have resulted in closed door meetings to discuss the issues among Labor ministers only, the so-called Ministerial Conferences. The NAALC process thus empowers non-state actors, and is inclusive of global civil society, but only to a certain point. Civil society is allowed to file NAALC complaints

⁵⁷⁷ *Supra* note 474. Pettigrew went on: “Overall, a 110-person food-processing operation in Canada could save you as much as US\$1.5 million a year in labour and benefits...compared with the United States.”

but, as illustrated in the migrant worker cases outlined in Chapter 3, it is not truly involved in the Ministerial Conferences during the decision making process. The potential for a new form of cosmopolitan legality through the NAALC is undermined by this closed door decision-making by top level government officials.

The positive result of the NAALC process has been greater cooperation and inclusiveness among various groups. This includes previously marginalized groups such as unofficial Mexican unions and Mexican migrant workers in the United States. This could form the basis for a truly global civil society acting as a counter-hegemonic force.

The shortcoming to the NAALC approach is a lack of enforceability within the labour cooperation framework when dealing with a recalcitrant party. The NAALC process in dealing with migrant workers is most effective when used to approach a specific problem, rather than dealing with theoretical legal problems or social issues. The approach is less successful in dealing with more widespread issues relating to a specific group rather than to an individual case. In all cases, the lack of enforceability undermines the legality of the process.

Labour development also provides a potential political mechanism for developed countries to protect key domestic industries and labour sectors by citing labour violations in developing countries as a lever for trade barriers. As noted in Chapter 4, Canada's opposition to the use of trade sanctions as enforcement mechanisms in Labour Cooperation agreements underscores the potential misuse of labour development tools for short-term economic and political gains. Protectionism in this form represents the clash of economic and political interests that can arise through labour development programs.

In its current implementation, labour development is essentially an economic and

political tool, used to pacify domestic opposition to free trade negotiations and selectively implemented based on domestic political considerations. The case of Mexican Migrant Workers in the United States provides an excellent example of the politicized nature of the labour development process. In all of the complaints outlined in Chapter 3, not once could the United States government, whether under President Clinton or President Bush, be seen to be responding to complaints originating from the Mexican NAO. This included not only modification of U.S. labour laws to comply with international standards, but even extended to proper enforcement of *current* laws and guaranteeing migrant workers their legal rights.⁵⁷⁸

Fundamentally, the NAALC has not succeeded in reversing the historic pressure flowing for labour rights development flowing from developed to developing world. Practically speaking, as my analysis has shown in Chapter 3, this has resulted in unsatisfactory responses when the NAALC has been used as a tool to address alleged labour rights violations in the United States. The conclusions reached in my analysis point to a very limited capacity of the NAALC to effect changes when directed against a developed country.

Labour development's operation also belies its ostensibly cooperative nature. An analysis of the migrant worker complaints outlined in Chapter 3 points to a lack of cooperation on the part of the United States when faced with complaints challenging enforcement of its labour laws. For a several political and economic reasons outlined in

⁵⁷⁸ "Graham Says Republicans Risk 'Political Suicide' on Immigration", Online: Bloomberg.com <<http://quote.bloomberg.com/apps/news?pid=10000087&sid=a8c5s6ESKKFc&refer=home>> (last accessed 30 July 2006). Some far sighted Republicans have recognized the political danger in playing the game of populist and nativist politics. U.S. Senator Lindsey Graham said the Republican party would be committing "political suicide" if Congress adopted immigration legislation that did not offer illegal migrant workers some options besides deportation and building walls along the U.S.-Mexico border.

Chapter 3, U.S. politicians are reluctant to comply with labour complaints originating from the Mexican NAO.

The pattern of complaints under the NAALC reveals that the NAALC has not functioned solely to promote American labour and human rights values in Mexico. There have also been increasing uses of the NAALC to address alleged violations of the accord in the United States. The key difference between labour development's application against Mexico and the United States is that Mexico has acquiesced to some changes labour law enforcement and policy resulting from NAALC complaints, while the United States has not. This is illustrated in Chapter 3 by my account of the NAOs as being subject to political processes, as well as the U.S. government's own response to the complaint lodged against North Carolina employers.⁵⁷⁹ The American government has framed the issues of NAALC complaints directed against it in political terms, and thus made the process subject to domestic political considerations.

5.2 Canada and the Future of Labour Development

The "cooperation" in labour cooperation agreements is a misleading term since the association between developed and developing states is not one of common labour benefits. As noted in Chapter 4, for political reasons Canada in particular has continued to emphasize cooperation in negotiating and implementing labour cooperation agreements. *Cooperation* is a politically acceptable term, more acceptable say than *export*, but also less accurate in this context. My examination of activities under the CCALC reveals that, although there are formal exchanges of information and knowledge,

⁵⁷⁹ *Supra* note 381. See in particular *Mexican NAO 2003-1 – Migrant Workers complaint against U.S. and North Carolina employers*

in practical terms the agreement is almost exclusively devoted to exporting Canadian models of labour laws and technology to Chile.

The export of developed world labour laws and technology continues to be a main facet of the current implementation of labour development programs. A feature of Canada's preliminary discussions with Brazil on labour cooperation issues introduces, for the first time, the concept of pay equity as developed under Canadian labour law.⁵⁸⁰ In December 2004, the two countries renewed a *Memorandum of Understanding (MOU)* signed in 2001 that is designed to facilitate cooperation and share information in several labour and employment areas between the two governments.⁵⁸¹ The *MOU* outlines cooperative activities, duties and funding guidelines in many areas, including sharing information on the reformation of the Canada Labour Code and on development of equity and integration legislation in the workplace.⁵⁸² It is clearly designed to serve as a precursor to a Labour Cooperation agreement between the two countries.⁵⁸³ All of the initiatives outlined in the *MOU* take Canadian models as solutions to the problems outlined in Brazil's labour sector.

Subsequent negotiations involving labour standards tied to trade agreements have continued to emphasize the *cooperative* nature of regulating labour, incorporating

⁵⁸⁰ Abbott, *supra* note 436 at 20.

⁵⁸¹ "Canada-Brazil Memorandum of Understanding on Labour Cooperation", online: HRSDC <http://www.hrsdc.gc.ca/en/lp/ila/NIILA/MOU_index.shtml>. (last accessed 4 January 2006). The *MOU* states that the parties will work to implement cooperative activities in Industrial Relations; Labour Inspection (Operations); Occupational Safety and Health; Workers Compensation Systems; Equity and Integration in the Workplace; Workplace Information; Labour Market Information; Incentives for Decent Work in Small and Medium Enterprises.

⁵⁸² "Canada-Brazil *MOU* Cooperative Activities", online: HRSDC <http://www.hrsdc.gc.ca/en/lp/ila/NIILA/Cooperative_Act_MOU.shtml>. (last accessed 4 January 2006).

⁵⁸³ "Memorandum Of Understanding In The Area Of Labour And Employment Between The Department Of Labour And Employment Of The Federative Republic Of Brazil And The Labour Program Of The Department Of Human Resources Canada" (October 2001) online: HRSDC <http://www.hrsdc.gc.ca/en/lp/spila/ialc/canada_brazil_understanding.shtml>

elements of civil society in labour negotiations while reducing the active involvement of civil society groups in the actual operation of the agreement. The 2001 Free Trade Agreement between Canada - Costa Rica is accompanied by the Canada-Costa Rica Labour Cooperation Agreement (CCRALC). The CCRALC contains principles similar to those outlined in previous agreements however the CCRALC addresses a major criticism of the NAALC by setting time limits to its consultative process. The CCRALC is also the first Labour Cooperation Agreement negotiated by the Canadian government to include ILO core labour standards. However, the CCRALC excludes the principles found in the NAALC/CCALC relating to equal national treatment and migrant workers' rights.⁵⁸⁴

The key differences between the CCRALC and prior agreements is the lack of any specified institutional mechanisms for handling disputes, and the dropping of a fines based enforcement mechanism for any violation of the Agreement.⁵⁸⁵ The CCRALC eliminates the ECEs found in both the NAALC and CCALC. In place of the ECEs, the CCRALC allows for an "open-ended process" where the parties follow recommendations of independent review panels respecting alleged violations and because of this the CCRALC is I would put forth that it is even less enforceable than previous agreements, since the probability of sanctions "is effectively non-existent."⁵⁸⁶ The CCRALC also contradicts official Canadian government policy statements on strengthening the role of civil society in the labour cooperation process through its weak citizens' submission

⁵⁸⁴ "Worker Rights and Regional Trade Pacts", online: [solidaritycenter.org](http://www.solidaritycenter.org) <http://www.solidaritycenter.org/files/JFA_Chapter4.pdf> (last accessed 17 December 2005).

⁵⁸⁵ Cosby, *supra* note 485 at 18.

⁵⁸⁶ Abbott, *supra* note 436 at 18.

process and poor funding by both the Canadian and Costa Rican governments.⁵⁸⁷

The cooperative activities under the CCRALC follow the same pattern as in the CCALC. Programs flow from Canada to Costa Rica and it is even more obvious that the CCRALC is seen as a development tool by the Canadian government to enable Costa Rica to adopt Canadian labour models. Thus far, activities under the CCRALC have been limited to a Labour Technical Assistance Program that was instituted by the Canadian Government and the Costa Rican Ministry of Labour, in consultation with the ILO and to which Canada has contributed just under \$1 million “in support of Costa Rica’s initiatives to modernize its labour administration.”⁵⁸⁸ A main component of the “Strengthening Governance in Costa Rican Labour Administration” project is to promote “social dialogue” and “consensus” on labour legislation and reform proposals, and to include activities that will allow for respect for labour standards and ability to respect labour agreements with Canada, as well as with other states.⁵⁸⁹ Unlike Canadian government descriptions of CCALC activities, there is little effort to couch CCRALC activities as mutual exchanges of information. Instead Canada has put forward its labour development model as the main rationale for the CCRALC. This policy has been repeated in recent Canadian negotiations on labour cooperation accords with the “Central American Four” countries⁵⁹⁰ as well as in ongoing negotiations with Singapore⁵⁹¹ and

⁵⁸⁷ Cosby, *supra* note 485 at 18.

⁵⁸⁸ “CCRALC: Technical Assistance” online: HRSDC <http://www.hrsdc.gc.ca/en/lp/ila/NILA/Tech_Ass_CCRALC.shtml> (last accessed 29 December 2005).

⁵⁸⁹ *Ibid.*

⁵⁹⁰ “Canada - Central America Four Free Trade Agreement Negotiations” (2005), online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/ca4-en.asp>> (Last Modified 20 June 2005) [“CA4”]. The CA4 countries are comprised of El Salvador, Guatemala, Honduras and Nicaragua.

⁵⁹¹ “Canada - Singapore - Free Trade Agreement Negotiations” (2005), online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/singapore-en.asp>> (Last Modified 7 March 2005).

South Korea.⁵⁹²

The implementation of these labour development programs seems increasingly contradictory to official Canadian government statements. The policy clashes with the broad aims of the Canadian government to not only discuss labour cooperation issues on a bilateral or multilateral level with other governments, but to establish a “constructive dialogue with civil society” on these issues.⁵⁹³ The most recent agreements limit the ability of civil society groups to launch complaints on labour violations by eliminating many of the institutions created by agreements such as the NAALC and CCALC.

The delays in recent trade and labour accord negotiations have revealed increasing resistance from developing countries to this paradigm. Prime Minister Jean Chretien announced the start of negotiations with Singapore in October 2001 and meetings between officials of the two countries to exchange information on labour laws and practices took place several times during early 2002.⁵⁹⁴ Formal negotiation sessions on a labour cooperation accord between Singapore and Canada occurred in June and November 2002, and in October 2003.⁵⁹⁵ Negotiations have not progressed further since then and no further updates have been made available to determine the nature of the impasse on the negotiations. Similarly, although progress had been made on a draft labour cooperation accord between Canada and the “Central America four” countries, DFAIT has announced that associated trade negotiations hit an impasse in early 2004 and

⁵⁹² “Canada-Korea – Free Trade Agreement Negotiations” (2005), online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/RB/korea-en.asp>> (Last Modified 1 September 2005).

⁵⁹³ DFAIT, *supra* note 437.

⁵⁹⁴ “Canada-Singapore Agreement on Labour Cooperation”, online: Social Development Canada <http://www.sdc.gc.ca/en/lp/spila/ialc/canada_singapore_agreement.shtml> (last accessed 12 December 2005).

⁵⁹⁵ “Current Negotiations of Labour Cooperation Agreements”, online: HRSDC <http://www.hrsdc.gc.ca/en/lp/ila/NIILA/CNLCA_index.shtml> (last accessed 7 January 2006).

no date has been given for another round of negotiations to resolve the impasse.⁵⁹⁶ These delays may mirror a process of resistance by developing countries that occurred in earlier WTO negotiations, as outlined in Chapter 2.

The Canadian government has clearly been influenced by the stalled WTO negotiations on a social clause in pursuing its labour cooperation policy in bilateral and multilateral negotiations. The lack of an ILO enforcement mechanism has led the Canadian government to develop a cooperative approach to exporting developed world labour standards. This approach has proved successful in exporting Canadian economic and labour values through dialogue among actors with divergent interests yet who are all stakeholders are in the continuing process of globalization. A positive view of this process is that it will result in a process of dialogue between governments and global civil society that could result in progressive change and an equal partnership between parties to these agreements. However, the inherent contradictions of economic and labour development in today's paradigm of globalization would seem to make this an unlikely prospect.

5.3 The Developing World

Developing countries' resistance to labour development proceeding through bilateral/multilateral trade negotiations results from the fact that this is not a cooperative process among equals. Analyzing the history and data provided in Chapters 2-4, and more recent agreements described above, one cannot escape the conclusion that labour development in its current implantation does not represent the potential Kantian form of

⁵⁹⁶ CA4, *supra* note 590.

legal cosmopolitanism nor does it achieve Gramsci's potential for political inclusion of marginalized workers. In fact, the current implementation of labour development through trade and labour cooperation accords represents a form of sub-altern cosmopolitanism, in Spivak's sense of the "sub-altern" as an individual's status in society rendering him or her without agency.⁵⁹⁷

The developing world's resistance to labour development occurs because of a fundamental conflict between the current progress of economic development and free trade, and current attempts to implement labour development. I argue, within the current context of labour cooperation accords and trade agreements, that labour development is linked dialectically to a contested form of neo-liberal economic globalization. Historically, both labour and economic values have been challenged by competing global visions and local customs. But the imposition of the Washington Consensus in the 1990s has impacted upon the dialectical relationship in new ways, producing new economic, political, and social realities.

For developing countries, it is difficult to resist pressure from potential developed world trading partners to implement developed world labour standards. As noted in Chapter 2, the political pressures originate from domestic constituencies in the developed world to incorporate labour development under the rubric of trade negotiations. Developing countries have attempted to maintain some independence in the negotiating process. As noted in Chapter 4, Chilean officials have maintained that the decision to negotiate a separate Labour Cooperation accord with Canada was not the result of external pressures, but rather the result of democratic reforms and pressures from certain

⁵⁹⁷ Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" *Colonial Discourse and Postcolonial Theory: A Reader*, Patrick Williams and Laura Chrisman eds. (New York: Columbia University Press, 1994)

business sectors in Chile not to include labour or environmental provisions as an integral part of a Free Trade Agreement. Chilean officials denied that the CCALC was concluded “as a result of political pressures” and asserted that since 1990, successive Chilean governments had been “already interested in the link between labour and international trade.”⁵⁹⁸

The CCALC’s perception by some segments of Chilean civil society contradicts some of the criticisms of the NAALC and reveals an instrument that at least shows promise to foster dialogue by bringing together and engaging various groups of civil society in both Canada and Chile. Although it has been 15 years since the end of the Pinochet regime, the process of democratic reconciliation and restoration continues in the Chilean labour sector and the CCALC is seen by some actors in Chile as helping to facilitate that process. This process, however, is taking place within terms defined by developed countries, with Canada acting in this instance acting as a labour development model for Chile to follow.

The government of Chile has also seemed to accept that some form of labour development will be incorporated into trade negotiations with developed countries. Chile and the European Union concluded a Free Trade Agreement in 2002, which includes a “Social Cooperation” clause that “recognizes the importance of social development, and the fundamental role the ILO’s conventions play in this.”⁵⁹⁹ In the subsequent Free Trade negotiations between Chile and the United States, labour was not relegated to a side

⁵⁹⁸ *Ibid.* See exchange between Dufour and Campero.

⁵⁹⁹ “Everything that is not WTO – Labour: The Spread of Bilateral Trade Agreements” (14 December 2004), online: [bilaterals.org](http://www.bilaterals.org) <http://www.bilaterals.org/article.php3?id_article=1042> (Last accessed 5 December 2005). The Chile-EU agreement makes “no explicit mention of trade unions, nor any direct connection between this social co-operation and the trade section, such that the agreement would ensure that trade improve social and labour conditions and not the opposite.”

accord - enforcement of International Labour Standards and domestic labour laws were made part of the integral Free Trade Agreement text, and thus made subject to the dispute resolution mechanisms of the Free Trade Agreement.

The notion of labour development has spread beyond agreements involving developed countries. For example, the states comprising Mercosur implemented a residency agreement for their citizens in November 2002 that was designed to regulate the movement of migrant workers among the member states.⁶⁰⁰ Another important development occurred when the members of the Andean Community implemented an Andean Instrument for Labour Migration in 2003 that revised and enhanced protections for migrant workers.⁶⁰¹ These labour provisions have been adopted even without the active participation of any of the NAFTA countries. They illustrate that the principle of linking labour standards to trade negotiations originated by the NAALC may be in the process of becoming a customary part of trade negotiations throughout the Western Hemisphere.

5.4 The Future of Labour Development

The heart of this thesis is that the individual worker, in both developed and developing country, is a man or woman who can through his or her actions develop not just ideas but also the techniques that enable them to transform their social space in the workplace they occupy. For example, the subaltern migrant worker in Chapter 3 is a person who disrupts conventional spatial divisions in the United States through the NAALC and produces newly conspicuous spaces of work, habitation, and politics. But

⁶⁰⁰ Towards A Fair Deal, *supra* note 333 at 84.

⁶⁰¹ *Ibid.*

like Gramsci's subaltern, he or she is liable to endorse politics that combine elements of the conservative and the revolutionary.

Thus the individual worker may be empowered by labour development, but labour development's current implementation maintains the state's monopoly on power and the developed world's hegemony in economic, political and social fields. The worker in the "developing world"⁶⁰² in this scheme remains, in Bhabha's definition, one of a number of oppressed groups whose presence provides an essential self-definition for the ruling group.⁶⁰³ The worker is in a position to affect social power relations to subvert the authority of those who have hegemonic power: but as Chapters 3 and 4 have shown, it is extremely difficult for individual workers to act on their own to effect any positive changes.

The success of any labour development process rests upon active involvement of global civil society groups. As noted in Chapter 2, relying upon global civil society in labour development poses particular problems when dealing with developing countries. It is often difficult to find NGOs, independent unions, and even individuals based in developing countries to successfully carry forth complaints. Several Chilean unions have refused offers from their counterparts in Canada to file complaints under the CCALC regarding alleged violations of Chilean labour law and enforcement.⁶⁰⁴

The reluctance of civil society in developing countries to engage in the form of labour development represented by the NAALC/CCALC reflects the domination of the

⁶⁰² And in this sense, I use developing world to define both the migrant worker community in a country such as the United States, as well the worker in countries such as Mexico and Chile.

⁶⁰³ Homi Bhabha, "Unsatisfied: Notes on Vernacular Cosmopolitanism" in Laura Garcia-Morena and Peter C. Pfeifer, eds. *Text and Nation*. (London: Camden House, 1996) at 191-207.

⁶⁰⁴ *Supra* note 560.

developed world in the process. As illustrated in Chapter 3, the majority of the complaints dealing with Mexican migrant workers have been largely carried forth by NGOs, unions, human rights activists and lawyers based in the United States. The case of migrant workers represents a particularly unique example, since these are individuals who are largely on the fringes of American society, lacking the legal benefits available to American citizens. The failure of American society to address the legitimate concerns of Mexican migrant workers risks bringing a type of social instability to the U.S. that is normally seen in the labour sectors of the developing world.

Labour development has historically attempted to address this social instability through the institution of the ILO and its policies. Examining the results of nearly a century of the ILO's existence - the ongoing debate over defining, negotiating, and implementing ILO labour development programs - reflects the ineffectiveness of this process. Attempts to incorporate labour development into the mandate of the WTO also reflect the inability thus far to effectively reconcile labour and economic development interests. The resort to regional agreements to implement labour development programs represents a continuing effort to offset the social instability arising from globalization and economic development programs.

Applying the labour development theory to the concrete microeconomic and macroeconomic examples illustrated in Chapters 3 and 4 indicates a fundamental flaw in the current *implementation* of labour development programs. Developed countries have used a neoclassical economic theory to justify a social development policy. What is needed is an approach which emphasizes sociological goals over economic ones in the implementation of labour development programs. This would entail, among other things,

not looking at a human being solely in terms of capital, or at least certainly not within the narrow framework of Friedman and the Chicago school economic paradigm described in Chapter 1.⁶⁰⁵

The attachments of labour to economic interests in the current implementation of labour development results from the perception that trade policies are harmful to certain labour sectors. Some human rights activists and NGOs in the developed world also put forth the idea that trade pressure is necessary to secure labour agreements with developing countries. I do not dispute these notions; I maintain that they are not as relevant to developing countries as widely believed.

It is in the self-interest of developing countries for labour development programs to succeed. As I stated in the beginning of Chapter 1, the new class of exploited worker created by globalization is resulting in an increasing danger of social instability in many developing and developed world countries. Labour development serves to secure social stability in the face of neo-liberal economic globalization. Because of their weak infrastructure and under-funded social programs, developing states face the greatest threat to social stability. Their governments need to insure against worker unrest by providing for a fair and just legal labour framework, supported by financial and logistical support from developed world partners.

Social stability's importance does not diminish if labour agreements are no longer subsumed under the rubric of free trade. On the contrary, negotiations conducted solely

⁶⁰⁵ The idea of "human capital" should not be confused with Marx's notion of "labor power." Marx defined "labor power" as an "aggregate of those mental and physical capabilities existing in a human being, which he exercises whenever he produces a use-value of any description" but challenged the notion of cooperative relations between the "money-owner" or capitalist and his labourer. See online: Marxists.org <<http://www.marxists.org/archive/marx/works/1867-c1/ch06.htm>>.

for the purpose of furthering labour development programs would have the effect of empowering developed world partners by legitimizing certain unique cultural and social aspects to those countries' societies and to their work. As Chapter 4 illustrates, Chilean society, for example, is economically advanced but socially split in the aftermath of two decades of military dictatorship. It is a recovering democracy that is reforming its labour code after the experiment of Chicago style economics under Pinochet. Costa Rica by contrast is a long-standing democracy that does not even have a national army, but is much less economically advanced than Chile, with a labour force that is largely agricultural based. These two countries require different labour policies catered not just to their economic needs but above all else to their different social structures.

Finally, I would like to conclude by turning to labour development and the nature of the relationship between the developed and developing world. Analyzing the criticisms of the ILO outlined in Chapter 2, it is difficult to escape the conclusion that current labour development programs represent a new form of "cultural imperialism" to many developing countries.⁶⁰⁶ My analysis of the operation of labour development in Chapters 2-4 indicates that the ILO/NAALC/CCALC communities contain Tully's three characteristics of an "informal imperial relationship between hegemon and subaltern"

1. It is an unequal relationship of economic, political, legal, cultural, educational, linguistic power.
2. What makes this "imperial" is that the dominant parties in these relationships are states or coalitions of states.
3. This relationship is not 'under the shared authority of those who are subject to it'. That is, the less powerful actors are subject to a relationship - of norms, of governance, and of subjectification – over which they do not have an effective say.⁶⁰⁷

⁶⁰⁶ *Supra* note 231.

⁶⁰⁷ Jim Tully, "On the Nature of the 'New' Imperialism", Lecture at Demcon, Victoria Colloquium on Political, Social, and Legal Theory session, Victoria, B.C., (30 September 2005).

Labour development agreements cannot function as a non-imperial community if they are linked to institutions such as the WTO, IMF or World Bank: These are the very institutions that carry forth the “new” imperialism of the United States and other developed countries.⁶⁰⁸ A detailed discussion of the building of a new non-imperial supranational labour community, involving global civil society as an equal partner in the implementation of labour development programs, is beyond the scope of this thesis. However, suffice it to say that a new relationship among labour development partners would be non-imperial to the extent that the relationship would be under the “the shared authority of those subject to it.”⁶⁰⁹

To correct labour development’s implementation, labour agreements should thus be detached from economic negotiations. The creation of labour development programs independent of trade considerations has the potential to lead to the creation of a new relationship that is both non-imperial and truly cooperative. Ideally, the ILO would act as a global organization to resolve labour disputes along the lines of the WTO and its approach to trade disputes. In the absence of an effective global labour regime, labour development would proceed through bilateral or multilateral accords negotiated entirely separately from trade agreements but maintaining similar powers and priorities, and including the active involvement of global civil society groups in the negotiation, implementation and decision-making process of such agreements. The risk of a power imbalance arising from these direct labour negotiations outweighs the pernicious effects of the current linkage of labour and economy.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *Ibid.*

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