The Social Clause of the U.S.-Jordan Free Trade Agreement: One Step Forward, Two Steps Back?

Malkawi, Bashar H.

Postprint / Postprint
Zeitschriftenartikel / journal article

The Social Clause of the U.S.-Jordan Free Trade Agreement: One Step Forward, Two Steps Back?

BY

Bashar H. Malkawi*

I. Introduction

The United States-Jordan Free Trade Agreement (hereinafter US-JO FTA) was the first FTA with an Arab country. In addition, the US-JO FTA was the second FTA between the U.S. and a middle-income country, after the U.S. and Canada expanded their FTA to include Mexico in North American Free Trade Agreement (NAFTA). There are several reasons that lead the U.S. to negotiate a free trade agreement with Jordan. Jordan was the right candidate for an FTA economically and politically. Economically, Jordanian imports into the U.S. would not threaten U.S. industries.[1] The FTA could also spur Jordan's economic growth, allowing for the possibility that it would become less dependant on foreign aid. Politically, the FTA reflects the U.S.'s appreciation for Jordan's role in the Middle East peace process and cooperation with international counter-terrorism activities.

---

* Bashar H. Malkawi is Assistant Professor of law at the Hashemite University. He holds S.J.D in International Trade Law from American University, Washington College of Law and LL.M in International Trade Law from the University of Arizona. I am grateful to Professor David Gantz at the University of Arizona and Professor Boris Kozolchyk, Director of National Center for Intern-American Free Trade for their tangible assistance and guidance. I also extend my thanks to Betty Thomas and Yasser Hamed for their research assistance and editorial help.

[1] A study conducted by the Office of Economics and the Office of Industries of the U.S. International Trade Commission, found that Jordan's exports to the U.S. would not have a measurable impact on U.S. industries, employment, and production. For one sector, textiles and apparels, a likely rise in U.S. imports of apparel is expected to have an effect, but this effect is a negligible. See U.S. International Trade Commission, Economic Impact on the United States of a U.S.-Jordan Free Trade Agreement, 5-1 Pub. No. 3340 (Sep. 2000).

On June 6, 2000, King Abdullah II and then President Clinton declared that the U.S. and Jordan would negotiate for a free trade agreement.[2] The US-JO FTA was signed in a record time on October 24, 2000. The National Assembly of Jordan ratified the US-JO FTA by acclamation in May 2001.[3] The U.S. Congress approved the FTA implementing legislation in September 2001.[4] President Bush signed the FTA into a law on September 28, 2001.[5] The US-JO FTA entered into force on December 17, 2001.

The US-JO FTA is comprised of a preamble, nineteen articles, three annexes, joint statements, memorandums of understanding, and side letters.[6] The US-JO FTA covers trade in goods and services. Moreover, the FTA covers rules of origin, e-commerce, and dispute settlement mechanism.

The basic purpose of this article is to examine the social clause or the environment and labor provisions of the US-JO FTA.[7] This article contends that the US-JO FTA labor and environmental provisions provide strong protection and it was a step forward. Recent U.S. FTAs with Arab countries, however, do not advance environment and labor protection. On the contrary, these FTAs move backward.

---

[2] See Gary G. Yerkey, U.S., Jordan Make "Substantial" Progress in Talks on Free Trade Agreement, USTR Says, 17 Int'l Trade Rep. (BNA) 1224 (Aug. 3, 2000) (following a meeting between President Clinton and King Abdullah on June 6 in Washington, D.C., U.S. officials announced initiation of negotiations).

[3] See Royal Decree, Official Gazette No. 4486, page 1664 (Apr. 1, 2001).

[4] See The United States-Jordan Free Trade Agreement Free Trade Area Implementation Act, H.2603, 107th Cong. (2001).

[5] See United States-Jordan Free Trade Agreement Implementation Act, Pub. L. 107-43, 115 Stat. 243, (2001).

[6] See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, Oct. 24, 2000, 41 I. L. M. 63.

[7] See Jagdish Bhagwati, The Boundaries of the WTO: The Question of Linkage, 96 Am. J. Intl L. 126, 127 (2002) (the use of the social clause terminology is traced back to former USTR Carla Hills. This is not just a question of semantics. Underlying the determined efforts of these to-date mainly northern lobbies to work their agendas into trade institutions and treaties is a public relations machine that rationalizes the campaigns by arguing that there is an intrinsic, hence legitimate need to bring environment and labor onto the trade scene).

The environment and labor provisions of the US-JO FTA gives the agreement a human face because they address issues other than traditional trade matters, such as tariff reductions, quotas, and rules of origin. The preamble of the US-JO FTA includes statements relating to sustainable development, environment, and labor.[8] However, the FTA covers environment and labor mainly in articles 5 and 6 respectively.

Negotiations to incorporate non-trade related environment and labor provisions into the FTA were undertaken to meet the demands of the U.S. administration.[9] For the first time in U.S. trade history, a trade agreement included provisions that address environment and labor in the main text of the agreement.[10] The inclusion of the social

---

[8] The FTA preamble states: [the U.S. and Jordan] Recognizing the objective of sustainable development, and seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different level of economic development". The FTA preamble also states: [the U.S. and Jordan] Desiring to promote higher labor standards by building on their respective international commitments and strengthening their cooperation on labor matters". See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* n. 6, premable. Sustainable development is a concept that contemplates the use of natural resources to meet the needs of the current generation, without jeopardizing the resources for future generations. It embraces two concepts; the concepts of rational development (or wise use) and some elements of eco-development. Therefore, it is an inter-generational concept. It was enunciated in this format by the Brundtland Report, Our Common Future, of World of the Commission on Environment and Development of 1987. For more on the concept of sustainable development see Michael McCloskey, The Emperor Has No Clothes: The Conundrum of Sustainable Development, 9 Duke Envtl. L. & Policy Forum 153, 155 (1999).

[9] See also Richard H. Steinberg, Trade-Environment Negotiations in the E.U, NAFTA, and WTO: Regional Trajectories of Rule Development, 91 Am. J. Intl. L. 231, 232, 235 (1997) (the trade-environment agenda is driven by wealthy states with relatively stringent environmental regulations which suggests that richer countries will produce less pollution per unit of output than poorer countries-not that richer countries produce less total pollution than poorer countries. Richer countries tend to be more powerful in trade negotiations than poorer countries since, in the international trade context, "power" may be seen as a function of relative market size. When powerful countries engage in an integration-deepening exercise, they require enhanced trade-environment solutions as part of the package they bring home for domestic ratification).

[10] See Howard Mann, NAFTA and the Environment: Lessons for the Future, 13 Tul. Envt. L.J. 387, 409 (2000) (suggesting that the impact of trade agreements on sustainable development requires that the environment be treated as an issue that is "over here", inside the agreement, not "over there" in another agreement). See Jerome Levinson, Certifying International Worker Rights: A Practical Alternative, 20 Comp. Lab. L. & Policy 401, 405 (1999) (arguing that incorporating worker rights into the main body of multilateral agreements has reached a dead end. The only path to progress now is unilateral actions on the part of the U.S. The more effective way is to resort to aggressive unilateral action).

clause in the FTA was determined more by economic and political needs that existed in the U.S. than by pressures exerted by Jordanian trade unions and environmental groups.

Section II gives background to the inclusion of environment and labor in the US-JO FTA, and briefly describes the divergent views for including or not including these issues in trade agreements. Section III analyzes the environment provisions of the US-JO FTA. It points out the inadequacies in the environment provisions. This section further points out the differences between the environment provisions of the US-JO FTA and the North American Agreement on Environmental Cooperation. Section IV reviews the labor provisions of the US-JO FTA. In addition, section IV explains the North American Agreement on Labor Cooperation. Section V discusses recent FTAs concluded between the U.S. and Arab countries such as Bahrain and Oman. Section VI presents some methods which have the potential of finding a common ground between free trade, environment and labor rights for future trade agreements between the U.S. and Arab countries. Concluding observations are in section VII.

II. Background: Debate between Free Trade Advocates, Environmentalists, and Labor Unions

The debate between advocates of free trade, environmentalists, and labor unions permeates free trade negotiations. It is highly probable that future trade agreements will have to withstand criticism from proponents and opponents of free trade. The US-JO FTA endured attacks by both environmentalists and labor unions, and free trade advocates.

Inclusion of environmental and labor provisions within free trade agreements remains controversial. Environmentalists and labor unions believe that free trade agreements and environmental and labor regulations are reconcilable and work in

concert.[11] Environmentalists and labor unions argue that free trade causes a race to the bottom, in which companies move their operations to the trading partner with the lowest environmental and labor standards. On the other side of the debate are free trade advocates opposed to attaching environmental and labor standards to trade deals. They fear that environmental and labor regulation is being used as an illegitimate means for unfairly protecting domestic industry against foreign corporations.[12] Their fear is premised on the philosophy of protectionism. Free trade advocates contend that the inclusion of environmental and labor provisions in trade agreements is a barrier to trade. This barrier, they argue, does not improve environmental and labor protection. They reason that a country cannot afford to protect its environment and workers if it does not have the necessary financial resources.

Free trade advocates argue that free trade ensures economic growth which will create the financial means to protect the environment and worker rights. Thus, the best way to encourage higher standards of environmental and labor protection is through free trade, and the growth it creates. As a country grows economically and is more prosperous is one more likely to be able to take care of their environment and a one more prosperous is one more likely to take care of their workforce.

An understanding of the legislative background and political backdrop in which the US-JO FTA was negotiated and ultimately signed is necessary to appreciate its structure and possible application to future trade agreements between the U.S. and Arab countries.

A. Environmental and Labor Protection of the US-JO FTA Debated in Congress

The conflict between proponents of free trade, environmentalists, and labor unions

[11] See Thomas J. Schoenbaum, Trade and Environment: Free International Trade and Protection of the Environment: Irreconcilable Conflict? 86 Am. J. Intl.L. 700 (1992).
[12] See Raj Bhala, International Trade Law: Theory and Practice 1539 (2d ed. Lexis Publishing 2001).

was apparent during the US-JO FTA negotiations. Significant congressional debate ensued regarding the US-JO FTA's inclusion of environmental and labor provisions. The US-JO FTA is the first trade agreement directly including provisions on environmental and labor regulations in the agreement's main text which are subject to the agreement's dispute settlement process.

U.S. industries were opposed to the imposition of labor and environmental standards through trade sanctions in the US-JO FTA. Representatives from the American Farm Bureau Federation, the U.S. Chamber of Commerce, and Business Roundtable (an association of chief executive officers of 150 U.S. companies) stated their belief that the labor and environmental provisions should be stripped out of the FTA. For example, the U.S. Chamber of Commerce opposed the use of trade sanctions stating that "the sole purpose of the FTA is load it with labor and environmental standards, and sold it as a template that future trade agreements should follow."[13]

Environmental groups favor the use of environmental standards in the main text and their enforcement by invoking trade sanctions. The National Wildlife Federation and Defenders of Wildlife advocated the use of environmental standards enforced by trade sanctions in the US-JO FTA.[14] Labor groups also favor the use of trade sanctions in the US-JO FTA, the same way environmental standards would be enforced.[15] The FTA received overwhelming and diverse support in Jordan from both the General Federation

---

[13] See Gray G. Yerkey, U.S. Chamber Will Press Congress to Pull "Non-Trade" Provisions From U.S.-Jordan FTA 17 Int'l Trade Rep. (BNA) 1685 (Nov. 2, 2000) (stating Thomas Donohue, president and CEO of the U.S. chamber of commerce [which represents about three million businesses] saying that it is inappropriate in the chamber's view to seek to address social issues in trade agreements. He stated that the chamber will work with Congress to remove unnecessary non-trade provisions from the pact).

[14] See U.S., Jordan Ratify Trade Pact with Environmental Provisions, Oct. 4, 2001, available at Lexis Environmental News Network. See also Hearing Testimony on U.S.-Jordan Trade Agreement by Rodger Schlickeisen, March. 20, 2001, available at Lexis Federal Document Clearing House Congressional Testimony.

[15] See Joseph Kahn, Labor Praises New Trade Pact with Jordan, N.Y. Times, October 25, 2000, at C1.

of Jordanian Trade Unions and from the Jordanian American Business Association.[16]

The Senate Finance committee held a mark-up session for the US-JO FTA implementation bill, during which Republican Senator Phil Gramm offered an amendment that would have restricted the scope of the FTA dispute resolution mechanism when dealing with environmental and labor issues. The amendment was rejected. During the Senate debate, Senator Gramm warned that he would oppose any effort to turn the US-JO FTA into a model.[17] Senator Gramm and Rep. Dreier argued that including labor and environmental provisions in all trade agreements would lead to a loss of sovereignty by the U.S. and subject the country to penalties for pursuing its economic self interest. Senator Gramm urged environmental and labor protection should be left to each individual country and should not be a part of trade deals.

On the other hand, Senate Finance Committee Chairman Max Baucus, Rep. Levin, and Rep. Bonior indicated that the US-JO FTA would set a precedent for how future trade agreements would address issues like labor and the environment. Senator Baucus argued the US-JO FTA's inclusion of environmental provisions was a positive development. He also disagreed with Senator Gramm's statement that the provisions would undermine U.S. sovereignty or prevent lawmakers from enacting and enforcing U.S. environmental and labor laws. Senator Gramm concurs with free trade advocates who oppose the inclusion of environmental provisions in trade agreements. Senator Baucus' views coincide with environmentalists.

---

[16] See Gray G. Yerkey, House Democrats Hail "Precedent" Set By Labor, Environment Clauses in Jordan FTA 17 Int'l Trade Rep. (BNA) 1685 (Nov. 2, 2000) (citing a letter by Richard A. Gephardt dating Oct. 24 saying that Jordanian business, labor, and environmental communities were united in their support of including labor and environmental issues in trade negotiations).

[17] Mary Jane Bolle, Library of Congress, Congress Research Service Report, Jordan-U.S. Free Trade Agreement (FTA) (Sept. 25, 2001).

After the September 11, 2001 attacks on the U.S., Senator Gramm dropped his effort to block the implementation of the US-JO FTA. Senator Gramm explained that he decided not to oppose the agreement because it was important that the U.S. send a signal of friendship to Jordan, an ally.[18] Arguably, if the September 11, 2001, attacks on the U.S. did not occur, the proposed US-JO FTA would not have been implemented.

III. Environmental Protection and the US-JO FTA

While the US-JO FTA includes specific references to environment in various articles, article 5 is the main environmental provision.[19] The US-JO FTA was the first trade agreement to include environmental provisions in its main text. On the other hand, NAFTA contains environmental protection provisions in a side agreement, known as the North American Agreement on Environmental Cooperation (NAAEC).[20]

A. Analysis

The US-JO FTA considers lower environmental protection to be unfair trade. The purpose of the FTA is to prevent race to the bottom.[21] Accordingly, the U.S. and Jordan

---

[18] Some Congressmen softened the pass of the implementing legislation of the FTA by weaving the FTA in historical friendship relationship between the two countries. For example, Rep. Kolbe of Arizona played down the environmental and labor provisions of the FTA on foreign policy argument. He stated that Jordan has played a very difficult role in promoting peace in the region. It is in the heart of a region that is plagued by centuries of conflict. It lies on the edge of a potential conflict all along all of its borders. Rep. Cantor of Virginia fashions the FTA in a foreign policy issue stating that in a region where daily violence has almost become a fact of life, the establishment of economic cooperation is a vitally important aspect of creating an environment where the nations of the Middle East can exist in peace and with prosperity. See H.R. REP. NO. 107-176, at 4878 (2001).

[19] For example, the U.S. and Jordan may exclude from patentability certain inventions to avoid prejudice to the environment. Additionally, the FTA incorporates by reference article XX of GATT 1994 including environmental measures necessary to protect human, animal or plant life or health and measures relating to the conservation of "living and non-living" exhaustible natural resources. See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* n. 6, arts. 4.18 & 12.1.

[20] See North American Agreement in Environmental Cooperation, Sept. 14, 1993, 32 I.L.M 1480.

[21] The term "race-to-the-bottom" refers to a progressive relaxation of environmental standards, spurred by competition to attract industry. The widely accepted theoretical model for the race-to-the-bottom is non-cooperative game theory. According to this model, although all states would be better off if they each cooperated with each other by collectively maintaining optimally stringent environmental standards, the incentives are such that each state will instead relax its standards in an ultimately unsuccessful bid to attract

"shall strive" not to waive or derogate from environmental laws as an encouragement of trade with each other.[22] However, the FTA language in this regard is non-binding because it uses mostly hortatory language such as "shall strive". Moreover, the FTA only mentions trade as the economic activity not to be encouraged by relaxing domestic laws. Since investments are not included, the FTA leaves open the possibility of environmentally damaging investments that do not comply with environmental standards.

The US-JO FTA permits each country to determine its own substantive environmental laws, but requires that those laws provide high levels of environmental protection and strive to improve them.[23] Therefore, the FTA does not override current Jordan or U.S. environmental laws.[24] While the FTA neither requires harmonization of environmental laws nor sets minimum environmental standards, it omits a method for determining what is considered "high levels of environmental protection." Since the parties are only required to "strive to" improve those laws, an inference can be made that the FTA does not compel actual improvement. The US-JO FTA could have mandated a firmer obligation on the parties by removing the words "strive to" from the language.

---

industry. For more see Kirsten H. Engel, State Environmental Standard-Setting: Is There a "Race" and is it "to the Bottom," 48 Hastings L.J. 271, 297 (1997).

[22] See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* n. 6, art. 5.1.

[23] The US-JO FTA states "Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies, and to adopt or modify accordingly its environmental laws, each party shall strive to ensure that its laws provide for high levels of environmental protection and shall strive to continue improve those laws". United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* n. 6, art. 5.2.

[24] The environmental statutes of the U.S. have been recognized as some of the most rigorous in the world. See Michael J. Kelly, Environmental Implications of North American Free Trade Agreement, 3 Ind. Intl. & Comp. L. Rev. 361, 368 (1993). U.S. environmental statutes include: Clean Air Act of 1967, 42 U.S.C. § 7401 (2000) Clean Water Act of 1972, 33 U.S.C. §1251 (2000), The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 (2000), The Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (2000), The National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2000), and The Endangered Species Act of 1973, 16 U.S.C. § 1531 (2000).

The FTA requires that the parties "effectively enforce" their environmental laws.[25] However, the FTA does not determine how each party will enforce its environmental laws. The FTA leaves to each party the choice of measure of enforcement. The FTA speaks of "effective enforcement," which excludes actions by the U.S. Congress or Jordanian National Assembly. In other words, the FTA applies only to the executive actions and does not apply to actions by the legislature.

To measure whether either party of the FTA has failed to "effectively enforce" its environmental laws, the agreement provides a two-prong test. This test requires a "sustained or recurring" course of action or inaction in a manner affecting trade between the parties. The FTA does not define the terms "sustained or recurring." Although "sustained or recurring" implies something that happens more than one time, the definition may not be settled so easily. For example, "sustained or recurring" may be defined as a failure to act twice every year, ten times in one month, or a failure to act every two years. The second-prong of the test requires that the sustained action/inaction be in a manner that affects trade. This prong determines what violation is actionable or non-actionable. Only sustained action or inaction that "affects" trade is actionable. Therefore, environmental obligations are linked to trade in a manner that would otherwise be considered an intrusion into the domestic arena of the FTA parties. The second-prong of the test does not determine if the US-JO FTA covers trade under this agreement only or extends to other trade arrangements such as the qualifying industrial zones program between the U.S. and Jordan.

---

[25] See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* n. 6, art. 5.3 (a).

The US-JO FTA reserves to each party the right to exercise discretion in the investigation, prosecution, regulation, and compliance with environmental matters.[26] The FTA considers a party not in violation of its obligation to "effectively enforce" its environmental laws if that party exercises reasonable discretion or makes a *bona fide* decision as to how allocate resources. This language may be used to avoid the stringent obligation of effective enforcement of environmental laws. First, the FTA provides the parties with significant discretion and flexibility in prioritizing their environmental needs and allocation of resources. Further, the FTA subjects the compliance and enforcement components to the availability of technical and financial resources. The FTA language is subject to so many caveats that, in reality, it is hard to imagine any circumstance egregious enough to constitute a violation.

Environmental laws in the US-JO FTA are defined as statutes, regulations, or provisions with the primary purpose of the protection of environment or prevention of a danger to human, animal, or plant life or health.[27] These environmental laws or regulations include: those related to the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants, those related to the control of environmentally hazardous or toxic chemicals, and those related to the protection of wild flora and fauna and their habitat. Under the FTA, environmental laws are defined narrowly to those laws and regulations "primarily" aimed at protecting the environment or preventing a danger to human, animal, or plant life or health. Under the US-JO FTA definition, agricultural law or mining law, for example, may be excluded

---

[26] *Id*. art. 5.3.

[27] *Id*. art. 5.4. The definition of environmental laws in article 5 of the US-JO FTA FTA is wider in scope than that of article 45.2 of the NAAEC. Environmental law in the NAAEC is defined as any statute or regulation the primary purpose is to protect the environment, or to prevent a danger to human life or health. Thus, article 5 of the FTA includes the prevention of danger to animal or plant life or health.

from coverage. The FTA does not determine the scope of what laws qualify as environmental law.

The US-JO FTA fails to address the distinction between standards regulating a final product and standards regulating the process of production of that product.[28] The failure to make the distinction will restrict the ability of the U.S. to exclude Jordanian products produced in a manner that is damaging to the environment.[29] In addition, the FTA fails to set forth the relationship between the US-JO FTA and international environmental agreements that use international trade measures as enforcement mechanisms.[30] The absence of a definitive relationship between the US-JO FTA and these international agreements may be seen as a major setback for those seeking to use trade as a vehicle for environmental protection. Finally, the US-JO FTA does not force Jordan to use wealth generated from trade resulting from the FTA for environmental protection.

---

[28] The standards regulating the process of production of a product are known as process and production methods (PPMs). PPMs specify criteria for how a product is manufactured, harvested, or taken. Terms such as "made with", "produced by", and "harvested by" signify a PPMs standard. All PPM standards apply to the production stage, for example before a product is placed on the market for sale. These standards specify criteria for how a product is produced or processed. However, the PPM standard may address the environmental effects of a product all during its life-cycle, for example effects which may emerge when the product is produced, transported, consumed or used, and disposed of. For more on PPMs see Steve Charnovitz, The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality, 27 Yale J. Intl L. 59, 65 (2002) (the subject of PPMs is one of the knotty controversies in the debate over trade and environment. The term "processes and production methods" originated in the GATT agreement of 1979 on Technical Barriers to Trade and referred to product standards focused on the production method rather than product characteristics).

[29] In GATT Tuna/Dolphin II case, a case based on article XX exception of GATT 1994 which is incorporated by reference in the FTA, the panel ruled that import restrictions may not be imposed on products solely because they were made or obtained in an environmentally unsound manner outside the jurisdiction of the importing country. The panel reasoned that measures designed to make other countries change their policies, and that are effective only if such changes occur, are not considered justifiable under Article XX (g). See GATT Dispute Panel Report, United States-Restrictions on Imports of Tuna, 33 I.L.M 839 (1994), para. 5.39.

[30] See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* n. 6, art. 1.2. Article 104 of NAFTA provides that in the event of an inconsistency between NAFTA and the trade provisions of the listed international environmental agreements, the obligation of a party to use a trade measure under the international environmental agreements "shall prevail" to the extent of the inconsistency, provided that where a party has a choice among equally effective and reasonably available means of complying with such obligations, the party chooses the alternative that is the least inconsistent with the other provisions of NAFTA.

B. The US-JO FTA and NAAEC Compared

The US-JO FTA was the second trade agreement to include environment provisions. NAFTA was negotiated with a side agreement concerning the environment.[31] The NAAEC and article 5 of the US-JO FTA both protect the environment and share some substantive norms. For example, like the US-JO FTA, NAAEC permits each country to determine its own substantive environmental laws.[32]

There are several important differences between article 5 of the US-JO FTA and NAAEC. The environmental provisions in the US-JO FTA can be found in the core text of the FTA. On the other hand, environmental protection in NAFTA can be found in a side agreement known as NAAEC.

The NAAEC relies on moral persuasion, publicity, and dialogue to ensure compliance. For example, NAAEC requires each party to prepare and periodically publish a report on the state of environment in its territory.[33] On the other hand, the US-JO FTA does not contain a similar provision requiring periodic reports on the state of environment. Moreover, the US-JO FTA does not address some of the provisions that were addressed in NAAEC. Under NAAEC, any non-governmental organization or individual person may assert a claim to the NAAEC Secretariat that a party is failing to

---

[31] Originally, NAFTA was negotiated without an agreement concerning the environment and labor. However, then President Clinton has indicated, when he took over presidency, that he would not submit NAFTA to Congress until negotiations have been completed on several side agreements regarding the environment, labor, and import surges. See Gustavo Vega-Canovas, NAFTA and the Environment, 30 Denv. J. Intl. L. & Policy 55, 56 (2001). The NAAEC was implemented to alleviate the concerns of many NAFTA critics who feared that NAFTA would prompt economic growth at the expense of the environment. See Edmund W. Sim, Derailing the Fast-Track for International Trade Agreements, 5 Fla. J. Intl. L. 471, 482 (1990) (citing criticism that came also from agriculture, consumer, human rights, and religious groups). See also Beatriz Bugeda, Is NAFTA Up to Its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation, 32 U. Rich. L. Rev. 1591, 1591 (1999).

[32] See North American Agreement in Environmental Cooperation, art. 3, Sept. 14, 1993, 32 I.L.M 1480.

[33] *Id*. art. 2.1.

effectively enforce its environmental laws.[34] Because of this claim procedure, many private petitions have been filed that sought to challenge the enforcement of environmental regulations in the U.S., Canada, and Mexico.[35]

The NAAEC also establishes a state-to-state dispute settlement process for the failure to enforce environmental laws.[36] Thus, NAAEC creates a two-tiered system: chapter twenty dispute settlement mechanism for any dispute arising under NAFTA and the separate NAAEC dispute settlement process. NAAEC permits a dispute panel to impose monetary fines against a country found to have engaged in a persistent pattern of ineffective environmental law enforcement.[37] While NAAEC creates a two-tiered system, the US-JO FTA establishes a single dispute settlement mechanism for all disputes arise under the agreement.[38] Moreover, while the NAAEC imposes monetary

---

[34] NAAEC requires for any submission to identify the organization making the submission and that its aim is to promote enforcement and not to harass an industry. The submission must merit requesting a response from the party in question. The Secretariat determines that a factual record is warranted, it shall do so upon approval by the council of the Commission on Environmental Cooperation. The council can make the factual record public upon two-thirds vote. *Id*. art. 14.1.

[35] Between 1995 and 2000, twenty-eight citizens' submissions on enforcement matters were registered: nine regarding Canadian enforcement, eleven regarding Mexican enforcement and eight regarding U.S. enforcement. Two factual records have been published to date. The first factual record was "The Cozumel Factual Record" of 1997 concerning port terminal project in Playa Paraíso, Cozumel, Quintana Roo in Mexico. The second factual record was "The BC Hydro factual record" of 1997 concerning hydroelectric dams in British Columbia, Canada. The third factual record was "The Metales y Derivados Factual Record" of 1998 concerning lead smelter in Tijuana, Mexico. See Mark R. Goldschmidt, The Role of Transparency and Public Participation in International Environmental Agreements: The North American Agreement on Environmental Cooperation, 29 B.C Envtl. Aff. L. Rev. 343, 376-383 (2002).

[36] See North American Agreement in Environmental Cooperation, *supra* n. 32, art. 22.

[37] *Id*. art. 34.4.b.

[38] The US-JO FTA uses a multi-step process for dispute settlement. Under the US-JO FTA, the parties must first make every attempt to arrive at a mutually agreeable resolution through consultations whenever a dispute arises concerning interpretation of the agreement, a party considers that the other party has failed to carry out its obligations under the agreement, or a party considers that measures taken by the other party severely distort the balance of trade benefits accorded by the agreement or substantially undermine fundamental objectives of the agreement. If the parties fail to resolve their dispute through consultations within sixty days, either party may refer the matter to the Joint Committee, which tries to resolve the dispute. If the Joint Committee does not resolve the matter within either ninety days or another period that they have agreed upon, either party can refer the matter to the dispute settlement panel. In order to resolve the dispute, the dispute settlement panel prepares non-binding recommendations in a report. Within ninety days, the dispute settlement panel has to present a report to the parties containing findings of fact and its determination. Regrettably, since the report is not binding, the US-JO FTA's dispute settlement system

fines, the US-JO FTA imposes trade sanctions for failure to enforce environmental protection.[39] Trade sanctions under the US-JO FTA include tariff increases, import bans, reductions in financial aid, or other financial penalties. However, the US-JO FTA does not determine how to measure or quantify trade sanctions that would be commensurate with a violation of an environment provision of the FTA.

To ease concerns regarding imposing trade sanctions for environmental violations, the U.S. and Jordan exchanged side letters, whereby both parties expressed their intention not to exercise trade sanctions for these violations.[40] These letters were requested by the U.S. and not Jordan. They were the U.S. idea.[41] Although it is too early to forecast whether these letters will affect the actions of the U.S. or Jordan, the validity of these letters is in question. Based on the experience of the NAFTA sugar side letter, the U.S. and Jordan should have included the language of the letters into the main text of the FTA so as to form a binding, legal commitment.[42]

---

really just acts as a mediator between the parties. See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* n. 6, art. 17.1.

[39] After the dispute settlement panel compiles its report, the Joint Committee then endeavors to resolve the dispute, taking the report into account. If the Joint Committee does not resolve the dispute within thirty days after receiving the panel report, the affected party "shall be entitled to take any appropriate and commensurate measure." This provision in the US-JO FTA appears to permit the use of trade sanctions as an enforcement mechanism. *Id.* art. 17.2.

[40] On July 23, 2001, former USTR Robert Zoellick and then Jordan's Ambassador to the U.S. Marwan Muasher, exchanged formal and official letters which discussed the implementation of the FTA's dispute settlement procedures. In the letters, both countries stated their intention not to apply the agreement's dispute settlement enforcement procedures in a manner that results in blocking trade. The letters also state that bilateral consultations and other procedures such as alternative mechanisms would be appropriate measures that will help secure compliance without recourse to traditional trade sanctions.

[41] See Grary G. Yerkey, USTR Says Bush Administration Supports U.S.-Jordan Free Trade Agreement "as it is," 18 Intl. Trade Rep. (BNA) 1013 (June 28, 2001) (Sen. Grassley suggested attaching "side letters" to the agreement in which the United States and Jordan promise not to use sanctions to enforce labor and environmental provisions of the accord). See also Nancy Ognanovich, Bush Tells Abdullah He Will Push Hill To Adopt Jordan Free-Trade Agreement, 18 Intl. Trade Rep. (BNA) 632 (Apr. 19, 2001) (Jordanians indicated that they are going to leave that [specifics of environment and labor provisions] to the [U.S.] administration to work with Congress directly).

[42] During the NAFTA debate, the U.S. and Mexico agreed to a sugar deal that was attached as a side letter to the text of NAFTA. However, the U.S. and Mexico are still litigating the validity of the letter.

IV. Labor Protection and the US-JO FTA

A. Analysis

The US-JO FTA was the first trade agreement to include labor protection provisions in its main text. The agreement requires the U.S. and Jordan to "strive" to ensure that internationally recognized labor rights are recognized and protected within domestic law.[43] In addition, the U.S. and Jordan reaffirmed their obligations as members of the International Labor Organization (ILO).[44] Jordan has ratified all of the ILO fundamental conventions, of which there are eight.[45] In contrast, the U.S. has ratified only two of the conventions: the convention concerning abolition of forced labor and the convention eliminating worst forms of child labor.[46] The language of the FTA not only indicates trade inconsistency but it also indicates trade hypocrisy on the part of the U.S.

The FTA ensures that each party does not waive or derogate from its domestic labor laws.[47] The U.S. and Jordan have the right to set their own domestic labor standards. The FTA does not require the harmonization of labor norms. The FTA requires each party to effectively enforce its labor laws. Thus, the FTA adopts the "enforce its labor laws" standard, which is an indication that Jordanian labor laws comply with ILO standards. The U.S. and Jordan may exercise discretion in allocating resources in the enforcement of their labor laws.

---

[43] See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* n. 6, art. 6.1.
[44] The North American Agreement on Labor Cooperation is absent any linkage between ILO conventions and internationally recognized labor rights. Reference to the ILO in NAALC is limited to article 24.1 which mandates that the ECE chairman be selected from a roster of experts in consultation with the ILO.
[45] See Organization for Economic Cooperation and Development, International Trade and core Labor Standards 24 (2000).
[46] *Id*. at 25. The U.S. have not ratified conventions on freedom of association, right to organize and bargain collectively, equal payment, non-discrimination, and minimum age.
[47] See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* n. 6, art. 6.2.

The US-JO FTA recognizes cooperation as a mean for enhanced opportunities to improve labor standards.[48] The FTA defines labor laws as those statutes and regulations that are directly related to internationally recognized labor rights.[49] The FTA excludes from its coverage of labor rights the right to strike and the right of non-discrimination in employment.[50] If gender equality was incorporated in the US-JO FTA, it may have generated great criticism in Jordan due to cultural or religious concerns. International labor rights are not culture-neutral but rather are culture-laden. Labor laws in Jordan reflect a balance between religious and social forces.

B. The US-JO FTA and NAALC Compared

While the US-JO FTA includes labor provisions within its main text, NAFTA contains labor protection provisions in a side agreement. NAFTA originally was negotiated without addressing labor issues. However, this sparked tremendous concern on the part of unions.[51] U.S. companies would potentially move to Mexico because of lower labor and wage standards.[52] The North American Agreement on Labor Cooperation (NAALC) came into existence to address these concerns.

---

[48] *Id*. art. 6.5.

[49] These internationally recognized labor rights are: right of association, right to organize and bargain collectively, prohibition on the use of any form of forced or compulsory labor, minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. *Id.* art. 6.6.

[50] NAALC includes laws against employment discrimination. See Reka S. Koerner, Pregnancy Discrimination in Mexico: Has Mexico Complied with the North American Agreement on Labor Cooperation? 4 Tex. F. C.L. & C.R. 235, 236-241 (1999).

[51] Matthew J. Griffin, The North American Agreement on Labor Cooperation: A Flawed Attempt at Promoting Continental Labor Standards, 21 Suffolk Transnatl. L. Rev. 113, 115 (1997) (noting American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) was major opponent of NAFTA. U.S. labor unions objected to the lack of penalties within NAALC for violations of industrial relations law and the cumbersome nature of NAALC process).

[52] Then presidential candidate Ross Perot described Mexico as "great sucking sound". See Marley Weiss, The North American Agreement on Labor Cooperation (NAALC): Accelerating Development (s)? SE27 ALI-ABA 909, 911 (1999).

The NAALC aims at improving working conditions and living standards.[53] It acknowledges the right of each party to establish its own domestic labor standards. However, NAALC requires each party to ensure that its labor laws and regulations provide high labor standards consistent with high quality and productivity in workplaces. NAALC provides an illustrative list of government actions that each party may take to effectively enforce its labor laws.[54]

NAALC created a Commission for Labor Cooperation to facilitate its objectives in a cooperative and consultative manner.[55] The organizational structure of the NAALC also includes a national component, the National Administrative Offices (NOAs). The NAO is a unique institution that takes up labor rights issues outside the national territory.[56] Unlike the US-JO FTA, any government, non-governmental organization, or individual may submit complaints regarding labor issues involving other NAALC countries to the NAO of their own country. The main advancements in the NAALC evolution were made through the NAO public complaints review.[57] Since the NAALC's entry into force, a total of twenty-three labor submissions have been filed.[58]

---

[53] See North American Agreement on Labor Cooperation, art. 1, Sept. 8, 1993, 32 I.L.M. 1499.
[54] *Id*. art. 3.
[55] *Id*. art. 8.
[56] See Lance A. Compa, The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape, 3 U.S.-Mex. L.J. 159, 163 (1995) (a critical function of NAO is to review labor law matters in one or both of the other NAALC parties, not domestic matters. In this sense, the thrust of the NAO's function runs counter to the otherwise firm preservation of sovereignty under NAALC).
[57] See Emmanuelle Mazuyer, Labor Regulation in the North American Free Trade Area: A Study on the North American Agreement on Labor Cooperation, 22 Comp. Lab. L. & Policy J. 239, 244 (2001).
[58] One of the well known submissions concerning labor law matters under NAALC public submission procedure was the International Brotherhood of Teamsters (IBT), a U.S. labor union, submission. That submission involved workers at a Honeywell electronics factory in Chihuahua, Mexico who were fired after expressing an interest in joining an independent Mexican labor organization. In a report released in Oct. 1994, the U.S. NAO found that the former Honeywell employees accepted severance pay from the company and, thereby, had preempted an investigation by Mexican officials into their dismissals. On that basis, the NAO declared that it could not conclude that Mexico failed to enforce its labor laws and that it could not recommend that the dispute proceed to ministerial consultations. See David Lopez, Dispute Resolution under NAFTA: Lessons from the Early Experience, 32 Tex. Intl. L.J. 163, 196 (1997).

The NAALC created a dispute settlement mechanism to resolve disputes over any matter that could affect the operation of the NAALC.[59] However, NAALC dispute settlement mechanism applies only to occupational safety and health standards, child labor issues, or minimum wage right that are trade-related and mutually recognized by labor laws of each party.[60] Other labor principles such as forced labor, right of association, right to organize and bargain collectively, and hours of work are not covered.[61] Therefore, the basis for actionable violations is wider in scope under the US-JO FTA than under the NAALC. The NAALC was criticized for its failure to include sanctions for basic labor-relations violations. In the history of the NAALC, not a single case has reached the arbitration process. The dispute resolution procedures established by NAALC are bureaucratic, byzantine, cumbersome, and protracted, all of which would hamper timely settlements.

The U.S., in the FTA with Jordan, assumes that labor standards in Jordan are not adequately protected. The U.S. overlooks the fact it should itself begin protecting worker rights by extending labor protection to agricultural workers. Otherwise, it seems

---

[59] NAALC created four-step dispute settlement process that consists of: 1) initial consultations between NAOs regarding the other party's labor law, its administration, or labor market conditions in its territory 2) ministerial consultations regarding any matter within the scope of NAALC 3) expert evaluations regarding patterns of non-enforcement of domestic labor law in each party country and 4) further consultations whether there has been a persistent pattern of failure by a party to effectively enforce occupational safety and health, child labor or minimum wage technical labor standards that may lead to non-binding arbitration. See North American Agreement on Labor Cooperation, *supra* n. 53, art. 20.

[60] *Id*. art. 29.1.

[61] Labor principles under NAALC are subject to different treatment. Right of association, right to organize and bargain, and right to strike are subject only to review and consultation. Eight technical labor principles concerned with forced labor, child labor, minimum wage and hour standards, employment discrimination, equal pay for men and women, job health and safety, workers' compensation for occupational injuries and illnesses and protection of migrant workers are subject to evaluation and recommendations by an ECE. Only violations of child labor, health and safety, and minimum wage and hour standards can go forward to dispute resolution with the possibility of sanctions. In case of an alleged persistent of failure to enforce occupational safety and health, child labor or minimum wages technical labor standards, the last venue is the dispute resolution by an arbitral panel, which may develop an action plan for effective enforcement of national labor law. Failure to implement this plan may result in fines or trade sanctions.

hypocritical on the part of the U.S. The U.S. labor laws favor employers over employees.[62] Moreover, the U.S. is a country where May 1st, the International Workers' Day, is not considered a Federal holiday or even celebrated.[63]

In Jordan, the only existing union federation is heavily dependent on government financial support.[64] The government subsidizes the union federation, which is considered a restriction on the right to establish a free union. Even the U.S. AFL-CIO cannot escape such criticism.[65] In the U.S. today only about one out of every seven workers belongs to a labor union. The principal causes for the decline of U.S. organized labor are its overuse of the work stoppage, tolerance for criminal infiltration or corruption, its philosophical underpinnings, and its tolerance for the entrenchment of internal power.[66]

---

[62] See Andrew K. Stutzman, Our Eroding Industrial Base: U.S. Labor Laws Compared With Labor Laws of Less Developed Nations in Light of the Global Economy, 12 Dick. J. Intl. L. 135, 142 (1993) (the U.S. judiciary is reluctant to protect employee rights and that it construes worker projections narrowly in favor of employers. Furthermore, the U.S. Constitution does not explicitly protect worker' rights).

[63] The May 1st, International Worker's Day, dates back to the eight-hour working day movement. See Scott D. Miller, Revitalizing the FLASA, 19 Hofstra Lab. & Empl. L.J. 1, 13 (2001) (the eight-hour movement of the nineteenth century is based on a vision of working less, living more. It embraces workers' desire for personal time from industrial order, and freedom for home life and cultural matters outside wage and job concerns. (8 hours for work, 8 hours for sleep, and 8 hours for what we will).The movement started. In 1886, Sameul Gompers, the leader of the Federation of Organized Trades and Labor Unions, called for a nationwide strike by all workers on May 1st to achieve shorter working hours. This strike became the first general strike in the history of the international labor movement. The U.S. Army and riot-trained police surpassed the strike by use of force).

[64] See Organization for Economic Cooperation and Development, *supra* n. 45, at 94.

[65] Organized labor is embodied in the U.S. umbrella confederation, the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO). The key forces behind the creation of the Congress of Industrial Organizations had roots in socialism with events during and just after World War I effectively purged organized labor of its radical elements. The AFL is composed mainly of the craft unions and the CIO by contrast organized workers in the mass industrial sector, the basic industries. The American Federation of Labor and Congress of Industrial Organizations often quarreled over direction and philosophy. The AFL had a horizontal structure-all electricians were in the electrician's union regardless of their employer, and the CIO was organized vertically-all auto workers belonged to the auto workers union, regardless of their job description-and these competing structures generated jurisdictional infighting. The typical craft union member was also different from the typical industrial worker. The latter was more likely to be a relatively recent Eastern European immigrant who brought some Marxist ideology along or a worker from the ranks of the underprivileged social classes in America such as the southern Black workers who had migrated northward and into the factories and manufacturing plants after World War I. See Fredrick Englehart, Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation, 29 Case W. Res. J. Intl. L. 321 (1997).

[66] The Laborers International Union of North America was one of four major unions singled out as corrupt by a presidential commission in 1985. *Id*.

V. Recent US FTAs with Arab Countries

The U.S. announced its intention to launch a 10-year effort to form a US-Middle East free trade area.[67] The U.S. will employ a "building-block" approach. This approach requires, as a first step, a Middle East country to accede to the WTO or concluding Trade and Investment Framework Agreement(s) (TIFA). Afterward, the U.S. will negotiate FTA with individual countries. Finally, preferably before 2013, a critical mass of bilateral FTAs would come together to form the broader US-Middle East FTA.[68]

A. The US-Morocco FTA

The U.S. concluded FTA with Morocco.[69] The FTA with Morocco addresses traditional trade matters. It cuts tariffs and covers all agricultural products.[70] In the services area, the FTA offers new market access opportunities in Morocco for U.S. banks, insurance companies, telecommunications firms, audiovisual services, computer

---

[67] See Grary G. Yerkey, President Bush Lays Out Broad Plan for Regional FTA with Middle East by 2013, 20 Intl. Trade Rep. (BNA) 856 (May 15, 2003).

[68] It is unfortunate that the U.S. adopted such approach by concluding bilateral free trade agreements rather than a joint free trade agreement at the outset (bundling approach). The U.S. approach will place these Arab countries in weak position on the bargaining table. In FTA negotiations using the bundling approach, Middle East countries would be represented by a panel of representatives from each Middle Eastern country. Moreover, one has to question the utility of negotiating FTAs with small Middle East countries rather than with the Middle East as a whole. In addition, it seems that the U.S. follows the EC footsteps by adopting hub and spoke system in which the U.S. would conclude a series of bilateral agreements with relatively small countries. In such a system, trade between each spoke and the hub will be more than trade among the spokes themselves.

[69] The Senate approved the US-Morocco Free Trade Agreement pact July 21, 2004 by a vote of 85-13. The U.S. House of Representative approved the pact (H.R. 4842) on July 22, 2004 by a vote of 323-99.

[70] Under the agreement, more than 95 per cent of trade between the U.S. and Morocco in consumer and industrial products will become tariff-free immediately, with all the remaining tariffs targeted for elimination within nine years. Morocco agreed to immediately eliminate tariffs on products such as pistachios, pecans, frozen potatoes, whey products, processed poultry products, pizza cheese, and breakfast cereals. Tariffs on other products will be phased out in five years, including walnuts, grapes, pears, cherries, and ground turkeys. For its part, the U.S agreed to phase out all agricultural tariffs, most in 15 years. An agricultural "safeguard" will be available in the event of significant prices reductions for certain horticultural products. The negotiations on agriculture had been particularly difficult given Morocco's huge and politically sensitive agriculture sector. Some 12 million Moroccans currently live in rural areas out of a total population of roughly 31 million.

and related services, express delivery companies, distribution services, and construction and engineering services.

Similar to the US-JO FTA, each chapter's obligations of the US-Morocco FTA are parts of the core text of the agreement. The US-Morocco FTA, like the Jordan agreement, will require both countries to enforce their own domestic labor and environmental laws, as well as to – in the case of labor standards – "strive to ensure" that they match internationally recognized standards such as the right of association and the right to organize and bargain collectively.[71] The U.S. and Morocco commit not weaken or reduce labor and environmental laws to attract trade and investment. There were concerns over Morocco's labor laws.[72] The FTA between the U.S. and Morocco, in large part, had forced Morocco to complete difficult labor reforms, which had been stalled for some 20 years. The new Moroccan Labor Code that entered into force on June 8, 2004 contains provisions dealing with collective bargaining, worker safety, compensation and benefits, child labor protections, gender discrimination, and layoff protections.

The US-Morocco FTA, however, represents a step backward from the Jordan FTA. The US-Morocco FTA lacks adequate safeguards to ensure protection of the environment. The US-Morocco FTA excludes certain basic environmental protection provisions contained in the US-JO FTA. Moreover, the FTA with Morocco does not contain the extensive public participation framework that appeared in NAAEC. The US-Morocco FTA includes a provision regarding a roster of panelists and panel selection

---

[71] See the US-Morocco FTA, arts. 17.1, 17.2(2), available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/asset_upload_file679_3854.pdf (last visited Feb. 7, 2006).

[72] Rep. Sander Levin (D-Mich.), the ranking Democrat on the Ways and Means Trade Subcommittee, was reassured by a letter from the Moroccan government that it is committed to protecting the right to strike for Moroccan workers.

procedures which ensure that panels addressing environmental issues have the requisite expertise in a side letter, rather than in the core text of the FTA. The US-Morocco FTA incorporates parties' understanding regarding articles XX(b) and XX(g) of GATT, which are related to measures necessary for protection of human, animal, plant life or health that these articles include environmental measures, in a side letter, rather than in the main text of the FTA. In the US-JO FTA, the understanding regarding articles XX(b) and XX(g) of GATT was accomplished in the main text.[73]

The labor language contained in the US-Morocco FTA is insufficient to ensure that internationally recognized labor standards will be respected. In particular, the US-Morocco FTA lacks language committing both countries to abide by the core labor standards of the International Labor Organization. The labor provisions will not protect the core rights of workers in either country. The US-Morocco FTA's enforcement procedures, in particular, completely exclude obligations for governments to meet international standards on workers' rights. In the Morocco FTA, only one labor right obligation – the obligation to enforce domestic labor laws- is enforceable through dispute settlement.

The US-Morocco FTA will allow either country to levy relatively minor monetary fines -- rather than trade sanctions -- on the offending country for violating the terms of the pact.[74] Under the US-Morocco FTA, the offending country will be permitted to settle the case by paying an annual "monetary assessment" to the complaining party in commercial disputes equivalent to 50 percent of the level of trade that the dispute

[73] See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* n. 6, art. 12.1.

[74] According to the dispute settlement provisions of the US-Morocco FTA, if consultations fail to resolve a dispute over non-implementation, a three-member panel will be set up to determine whether the terms of the agreement have been breached.

settlement panel has determined to have been adversely affected by noncompliance.[75] The agreement, however, fixes the limit of the assessments for violations of the labor and environmental provisions of the US-Morocco FTA at $15 million, adjusted annually for inflation. The assessment cap of $15 million is low that the fines will have little if any deterrence effect. The US.-Morocco FTA lacks clear guidelines on how such fine or assessment would be spent. Therefore, the US-Morocco FTA approach to resolving trade disputes fails to adequately deter egregious behavior. The trade sanctions approach has previously been used, for example in the bilateral FTA that the United States has concluded with Jordan.

B. The US-Bahrain FTA

The US-Bahrain agreement, the first free trade pact to be negotiated between the U.S and a member of the six-nation Gulf Cooperation Council (GCC) and the third with an Arab country (after Jordan and Morocco), was finished in May 2004.[76] The FTA will free up trade in all industrial and consumer products from the day it entered into force and will also immediately bring 98 percent of Bahrain's agricultural tariffs lines to zero (alcohol and tobacco excluded). Bahrain will phase out tariffs on the remaining products

---

[75] See the US-Morocco FTA, supra n. 71, art. 20.12. A side letter to the US-Morocco FTA drafted by Catherine A. Novelli, then assistant U.S. trade representative for Europe and the Mediterranean, said that, if the offending party fails to pay the assessment, the complaining country may take "appropriate steps" to collect the assessment or "otherwise ensure compliance, bearing in mind the agreement's objective of eliminating barriers to trade and seeking to avoid unduly affecting parties or interests not party to the dispute." The assessments levied under the US-Morocco FTA can be used to pursue appropriate labor or environment initiatives, including efforts to improve or enhance enforcement in that [offending] party's territory.

[76] The negotiations took only five months to complete. The talks proceeded relatively smoothly because there were no controversial issues that needed to be sorted out. Moreover, the negotiations proceeded relatively quickly in part because both sides had decided not to take on new obligations in the area of investment in the FTA because a Bilateral Investment Treaty (BIT) already exists between the two countries. On Dec. 7, 2005, the U.S. House of Representatives approved implementing legislation for the US-Bahrain FTA by a vote of 327 to 95. The Senate on Dec. 13, 2005 approved implementing legislation for the agreement by voice vote. On Jan. 11, 2006, President Bush signed legislation (H.R. 4340) implementing the U.S. free trade agreement with Bahrain.

within 10 years. The U.S will give immediate duty-free access on 100 percent of Bahrain's current exports of consumer, industrial, and agricultural products to the U.S. Textiles and apparel trade will be duty-free immediately.[77] The US-Bahrain FTA also requires Bahrain, among other things, to further open its market to U.S. banks and other service providers and to strengthen its protection of intellectual property rights.[78] . Bahrain has made broad commitments to open its service market wider than has any other U.S. free trade partner.

Bahrainis have made considerable efforts to improve the labor situation in their 2002 law by legalizing trade unions. The US-Bahrain FTA notably also includes procedures to facilitate cooperation between the U.S and Bahrain on environmental and labor matters, including a chapter reinforcing Bahrain's recent legislative actions to expand democracy and improve the protection of worker rights, particularly with respect to trade unions.[79] However, the US-Bahrain FTA does not improve labor and environmental standards. The United States-Bahrain Memorandum of Understanding on Environmental Cooperation is not an integral part of the trade agreement, rather it is found in a side agreement. Moreover, the Memorandum does not have dedicated funding sources. The US-Bahrain FTA does not include a statement or provision on promoting sound corporate stewardship and good behavior.

The FTA lacked some provisions that were included in a previous trade agreement with Jordan that would have been appropriate to include in the Bahrain FTA as well.

---

[77] Under the US-Bahrain FTA, qualifying textiles and apparel must contain either U.S. or Bahraini yarn and fabric. The agreement contains a temporary transitional allowance for textiles and apparel that do not meet these requirements so that U.S. and Bahrain producers can develop and expand business contacts.

[78] The services provisions of the US-Bahrain FTA are based on a "negative list" approach, meaning that all services sectors are covered unless specifically excluded.

[79] See the United States-Bahrain Memorandum of Understanding on Environmental Cooperation, art. 2 (Sep. 2004).

Additionally, an extensive public participation network, like the one in NAAEC, was missing. The labor provisions of the US-Bahrain agreement fall far short of the provisions contained in the US-Jordan agreement. Only one of the labor rights obligations contained in the US-Bahrain FTA -- i.e., the obligation for Bahrain to enforce its own labor laws -- was actually enforceable through dispute settlement.[80] All of the other obligations contained in the labor chapter of the US-Bahrain FTA are explicitly not covered by the dispute settlement system and are thus completely unenforceable. Further, fines and sanctions available under labor enforcement measures in the US-Bahrain FTA are capped at a low level. The US-Bahrain FTA will allow deficiencies in labor laws to persist. In short, the US-Bahrain FTA will not protect workers in either country and represents a step backward from the US-JO FTA.

C. The US-Oman FTA

The Oman agreement is the fourth such agreement signed between the U.S. and Arab country (after Jordan, Morocco, and Bahrain).[81] The FTA with Oman addresses traditional trade matters such as tariff reductions.[82] Under the US-Oman FTA, tariffs on 100 percent of all consumer and industrial products and 87 percent of all agricultural goods will be eliminated on the first day that the agreement takes effect.

The free trade agreement with Oman does not contain any specific provisions dealing with labor standards. Labor standards were dealt with in the International Labor Organization. The absence of any specific provisions dealing with labor standards such as

---

[80] Article 15.6 of the US-Bahrain FTA, provides for bilateral consultations if either side fails to carry out its obligations on worker rights under the pact, including seeking to improve its labor standards.

[81] See Thomas Signals Support for U.S.-Oman FTA After Middle East Visit, Inside US Trade (Nov. 26, 2004). On Jan. 19, 2006, the U.S. and Oman signed the FTA.

[82] See U.S. International Trade Commission, U.S.-Oman Free Trade Agreement: Potential Economy wide and Selected Sectoral Effects, Investigation No. TA-2104-19, USITC publication 3837 (Feb. 2006).

workers' rights to organize and prohibition against discrimination could prove a perennially contentious issue among members of the U.S. Congress, particularly Democrats who push for the inclusion of environment and labor provisions. The US-Oman FTA actually moves backwards from the labor provisions of the U.S. free trade agreement with Jordan.

VI. Possible Solutions

The free trade agreements analyzed in this article represent a step in the right direction by recognizing the significance of the trade, environment, and labor. None, however, represents a satisfactory solution. These agreements underscore the inherent limits in raising labor and environmental standards. Respect for sovereignty, consensus on how minimum standards are to be determined, and the suspicion of disguised protectionism all pose challenges for designing a model respectful of high labor and environment standards yet consistent with true trade liberalization.

Trade, environment, and labor matters demand a comprehensive evaluation and an aggressive plan of reform offering reliable and lasting resolution. In its final analysis, this article asserts that no one approach is entirely satisfactory unto itself; each engenders uncertainty, either in terms of whether it can be implemented or whether, if implemented, it can offer meaningful resolution. A combination of approaches might be called for. This article does, however, make one unequivocal finding: cooperation between advocates of free trade and advocates of environmental and labor protection is an important element of resolution no matter which approach is selected. Both interests must recognize that healthy, sustainable economic growth depends on protection of the environment and

worker rights. In turn, vigorous advocacy of environmental and labor protection is best achieved in a thriving global economy infused by free trade.

One strategy that represents a long-term, possibly utopian, solution to resolving trade and environment disputes is the creation of a Global Environmental Organization that would be to environmental protection what the GATT/WTO regime is to trade liberalization. Another key strategy is the recognition that the goal of potential penalties in free trade agreements between the U.S. and Arab countries is not to utilize them *per se*, but rather to establish a disincentive or punishment that is adequate to deter a party from failing to carry out its obligations, and thus encourage voluntary compliance. Because the ultimate victim of a party's non-compliance is the working population of that country and not the government or employers, care must be taken to ensure that the penalty will help and not harm those workers. A fine that is used directly to address the labor or environment problem may be more effective than a withdrawal of trade benefits in correcting the underlying violations. One additional consideration to be taken into account in establishing penalties is any asymmetry of power and wealth between the parties. A withdrawal of benefits may hurt a small or more open economy more than a large or less open one. By contrast, fines could be structured in such a way as to equalize the relative impact of penalties. However existing trade agreements do not make use of this potential, as they impose caps on fines that are the same for all parties, regardless of differences in the size of their economies and traded sectors. For example, the US-Morocco establish a maximum fine of $15 million for a party's failure to enforce its labor laws, despite the very different impact that a fine of that magnitude would have on the budget of the U.S compared to that of Morocco.

Enforcement mechanisms in trade agreements between the U.S. and Arab countries have relied on penalties, or negative incentives, for deterrence in the first instance and punishment as a last resort. But it is also possible to elicit compliance with environment and labor commitments through positive incentives. For example, trade agreements between the U.S. and Arab countries could set quotas for exports to the U.S. The quotas can be increased if those countries meet obligations it undertook to improve enforcement of its own environmental and labor laws.

Guaranteeing respect for environment and labor rights necessarily entails roles for both governments and private sector employers. While the U.S. trade agreements with Arab countries impose binding obligations on governments, it is private sector employers who determine, in the first instance, whether environmental and labor rights are a reality in the private sector workplace. Therefore it is important to take both of these actors into account in fashioning environment-labor-trade linkages.

Virtually all trade agreements between the U.S. and Arab countries envisage cooperation and technical assistance between the parties on environment and labor matters. Some create new institutional mechanisms to carry out such activities and to engage in technical assistance (e.g., the US-Bahrain FTA). In practice, the cooperation has not been very extensive or sustained. Discussions (whether through hearings, workshops or other fora) that are linked to allegations of existing problems - and that could lead to adverse consequences such as sanctions - can elicit more attention from key actors and are more likely to change their behavior than activities that are seen as purely informative. A final point about technical assistance must be considered. The actual amount of capacity-building needed is huge. If cooperative capacity-building and

technical assistance are to be seen as a meaningful complement to direct trade incentives or penalties, financial resources must be committed on a higher order of magnitude than current efforts.

Combining technical assistance and capacity-building with economically meaningful positive or negative consequences is likely to produce better results, in terms of faster and sustained improvement, than implementing technical assistance in isolation. Carefully designed programs that combine trade opportunities (with incentives for compliance with labor rights or penalties for non-compliance) and targeted technical assistance carry the greatest promise for swift progress on environment and labor.

VII. Conclusion

The US-JO FTA can be subdivided into two packages: the less controversial package of tariff reductions and the more controversial relating to environment and labor issues. The US-JO FTA would have been of little value if it did not include environment and labor provisions within the text of the FTA. The U.S. demanded that these provisions be included within the text of the FTA.

Free trade agreements compound the dilemma of discerning how to adequately protect the environment and worker rights. This article argues that the US-JO FTA does not possess the language or enforcement mechanisms necessary to truly protect the environment and labor. The environment and labor provisions in the US-Morocco FTA, US-Bahrain FTA, and US-Oman FTA were not stronger than those contained in the US-JO FTA. The free trade agreements after the US-JO FTA demonstrate that the pendulum has shifted back to a position where environment and labor are not as important as trade.

The environment and labor provisions of the US-JO FTA may be described as "not unexpected and material step but falling short." Applying all of these terms can help form judgments about the significance of these provisions. The social clause of the US-JO FTA may be described as "not unexpected" because it was negotiated by the Clinton administration and its constituencies who advocate for the protection of the environment and worker rights. The exchange of side letters between the U.S. and Jordan was not expected by the Bush administration who appears to be resisting incorporating such language in bilateral free trade pacts.

Articles 5 (environment) and 6 (labor) of the US-JO FTA represent material steps towards advancing an environmental and labor agenda by linking the FTA with non-trade provisions. However, these articles fall short of expectations. For example, the U.S. and Jordan have recognized in the FTA that it is inappropriate to encourage trade by relaxing domestic environmental and labor laws, but the FTA does not prohibit the parties from doing so. The FTA does not define the relationship between the FTA and the multilateral environmental agreements. Moreover, the FTA does not define terms such as "sustained action/inaction." The social clause of the US-JO FTA was structured in a way that would avoid the language of standards. The US-JO FTA contains a scapegoat clause that allows each party to exercise discretion in allocating resources to enforce its environment or labor laws. The US-JO FTA does not permit non-governmental organization to submit claims that either party is failing to enforce its environmental or labor laws effectively.

Recent U.S. FTAs with Arab countries do not advance environment and labor protection. On the contrary, these FTAs move backward. They negate the material step taken in the US-JO FTA which included environment and labor provisions in the core

text of the agreement for the first time in trade history. The US-Morocco FTA lacks language committing both countries to abide by the core labor standards of the International Labor Organization. The labor provisions of the US-Bahrain agreement fall far short of the provisions contained in the US-Jordan agreement. Only one of the labor rights obligations contained in the US-Bahrain FTA -- i.e., the obligation for the U.S. and Bahrain to enforce its own labor laws -- was actually enforceable through dispute settlement. Further, fines and sanctions available under labor enforcement measures in the US-Bahrain FTA are capped. The free trade agreement with Oman does not contain any specific provisions dealing with labor standards.

The US-Jordan FTA, which is generally considered to have the most rigorous labor provisions of any trade agreement, includes both national and international standards among its obligations. In contrast to the US-Jordan FTA, the recently concluded US-Bahrain and US-Oman FTAs transform a similar commitment by the parties to "strive to ensure" that their laws protect the fundamental ILO rights into a purely hortatory exercise. This is done by explicitly excluding the possibility of dispute settlement proceedings if a party fails in that commitment.

In recent years since environment and labor rights provisions were included in US-Arab trade agreements, significant experience has accumulated. It is now possible to examine the different tacks that have been taken and to begin to draw some conclusions about the likely efficacy of various approaches. No one model has yet emerged as a single template for future US-Arab trade agreements, but some approaches stand out for their achievements or compelling logic. The US-Jordan FTA has several provisions that set a benchmark for the parties in addressing environment and labor rights. At the same

time, there are many useful positive and negative lessons to be learned from other Arab trade agreements that take different approaches. In coming years, countries have the chance to learn these lessons and apply them in new and more successful combinations.