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## Pinkie Promises or Blood Oaths? Using Social Clauses in U.S. Free Trade Agreements to Eradicate Child Labor

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## PINKIE PROMISES OR BLOOD OATHS? USING SOCIAL CLAUSES IN U.S. FREE TRADE AGREEMENTS TO ERADICATE CHILD LABOR

From north to south and east to west, child labor is a problem found around the world.<sup>1</sup> Despite the international character of the problem, the causes of child labor are national.<sup>2</sup> Since 1919, the United Nations has assisted the international community in identifying universal standards for labor rights and working conditions under the guise of the International Labour Organization (ILO).<sup>3</sup> Weak enforcement has diminished the beneficial impact of the ILO's child labor standards.<sup>4</sup> In 1992, the United States began conditioning new free trade agreements upon adherence to certain child labor principles.<sup>5</sup> These so-called "social clauses"<sup>6</sup> in free trade agreements theoretically afford stronger enforcement of child labor standards in the form of trade sanctions.<sup>7</sup> Despite these efforts, neither ILO standards nor U.S. free trade agreements have ended the worldwide exploitation of children for profit.<sup>8</sup>

Assuming that social clauses in U.S. free trade agreements can reduce the rate of child labor, the United States must improve its social clauses in three ways. First, ineffective boilerplate conditions in social clauses must be replaced by clauses tailored to address the particular dynamics of child labor within the trading nation. Second, continued free trade privileges

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1. The United Nations Children's Fund (UNICEF), Child Protection from Violence, Exploitation and Abuse, [http://www.unicef.org/protection/index\\_childlabour.html](http://www.unicef.org/protection/index_childlabour.html) (last visited Nov. 11, 2007) [hereinafter UNICEF Child Protection].

2. AMNESTY INTERNATIONAL, GLOBAL TRADE, LABOUR AND HUMAN RIGHTS 18 (2000) [hereinafter GLOBAL TRADE].

3. ILO, About the ILO, <http://www.ilo.org/public/english/about/index.htm> (last visited Nov. 11, 2007). The ILO is the United Nations agency which addresses social justice and equality in employment. *Id.* The ILO is the only agency created by the Treaty of Versailles still in operation. *Id.*

4. Stephen I. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48, 49 (1989); Phillip R. Seckman, *Invigorating Enforcement Mechanisms of the International Labor Organization in Pursuit of U.S. Labor Objectives*, 32 DENV. J. INT'L L. & POL'Y 675, 686, 689-90 (2004); Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 274 (2005).

5. See generally MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE (2000).

6. Federico Lenzerini, *International Trade and Child Labour Standards*, in ENVIRONMENT, HUMAN RIGHTS, AND INTERNATIONAL TRADE 287, 287 (Fredrico Francioni ed., 2001). A social clause is a provision or section in a trade agreement that is "aimed at conditioning the enjoyment of trade advantages by the respect of minimum international labour standards." *Id.*

7. See, e.g., Marley S. Weiss, *Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 718 (2003).

8. UNICEF Child Protection, *supra* note 1.

should be conditioned upon a demonstrable reduction in child labor rates and should be tied to progressive, specific, and measurable goals for ultimately eliminating child labor. Third, and a necessary corollary to the second requirement, trading nations must be required to collect child labor data to facilitate the tracking of child labor rates.

This Note contains four sections. First, it defines child labor and describes its national and international characteristics. Second, this Note reviews two strategies currently employed to eliminate child labor: the ILO's international child labor standards and free trade agreements with social clauses. Third, this Note examines representative U.S. free trade agreements and their impact, if any, on child labor. And finally, this Note advances a proposal for improving social clauses in free trade agreements and discusses its possible pitfalls.

#### I. DEFINING THE PROBLEM: CHILD LABOR

For many, the mention of child labor elicits images of small children clad in rags and laboring under abhorrent conditions<sup>9</sup> in developing nations.<sup>10</sup> Such a stereotype, however, obscures the true range of situations where child labor occurs. Conversely, it would be overly inclusive to define child labor as all work performed by children.<sup>11</sup> A properly inclusive definition, and the definition embraced in this Note, recognizes that child labor is all “work carried out to the detriment and endangerment of the child, in violation of international law and national legislation.”<sup>12</sup>

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9. See, e.g., S. BETH ATKIN, VOICES FROM THE FIELDS: CHILDREN OF MIGRANT FARMWORKERS TELL THEIR STORIES (1993); TANYA ROBERTS-DAVIS, WE NEED TO GO TO SCHOOL: VOICES OF THE RUGMARK CHILDREN (2001).

10. *Child Labour Does Not Need Exaggeration*, AUSTL. CHILDREN'S RIGHTS NEWS (Defence for Children Int'l, Melbourne, Austl.), Sept. 2001, at 1, 4 [hereinafter ASDCI] (observing that “child labour is being defined as a condition of what are termed ‘Third World’ countries”).

11. INTERNATIONAL LABOUR OFFICE OF THE ILO, ACTION AGAINST CHILD LABOUR 4 (Nelien Haspels & Michele Jankanish eds., 2000) [hereinafter ACTION AGAINST CHILD LABOUR]. In fact, “[c]ertain kinds of work can have a positive impact on children’s development.” ROBERTS-DAVIS, *supra* note 9, at 5.

12. ACTION AGAINST CHILD LABOUR, *supra* note 11, at 4. The ILO has published a more comprehensive definition of child labor, which

includes both paid and unpaid work and activities that are mentally, physically, socially or morally dangerous and harmful to children. It is work that deprives them of opportunities for schooling or that requires them to assume the multiple burdens of schooling and work at home and in other workplaces; and work that enslaves them and separates them from their family.

*Id.*

Although child labor is an international problem—an estimated 218 million children were exploited worldwide as of November 11, 2006<sup>13</sup>—it is caused by national and regional conditions. Specifically, poverty and substandard educational opportunities within a nation can increase the rate of child labor in any given nation.<sup>14</sup> In addition to directly harming children,<sup>15</sup> child labor leads to greater poverty, poorer educational opportunities, and greater human rights abuses.<sup>16</sup> Child labor is an international problem that demands a timely solution.

## II. THEORETICAL AND APPLIED REMEDIES FOR CHILD LABOR

For a program to succeed in eliminating child labor, it must be enforceable<sup>17</sup> and address the country-specific causes of child labor.<sup>18</sup> World governments, non-government organizations, and international governing bodies, such as the ILO and UNICEF,<sup>19</sup> have employed a

13. UNICEF Child Protection, *supra* note 1.

14. GLOBAL TRADE, *supra* note 2, at 19–20. In some cases, three year-old children have been required to assume responsibility for their own welfare because once “finished with breast-feeding, [they] became too expensive to feed.” JENS CHR. ANDVIG SUDHARSHAN CANAGARAJAH & ANNE KIELLAND, WORLD BANK, ISSUES IN CHILD LABOR IN AFRICA 19 (2001), available at [http://siteresources.worldbank.org/AFRICAEXT/Resources/child\\_labor.pdf](http://siteresources.worldbank.org/AFRICAEXT/Resources/child_labor.pdf). See also Christopher M. Kern, *Child Labor: The International Law and Corporate Impact*, 27 SYRACUSE J. INT’L L. & COM. 177, 182 (2000). But see Sylvain Dessy & Stephane Pallage, *Child Labor and Coordination Failures*, 65 J. DEV. ECON. 469 (2001) (applying game theory to demonstrate that economic factors other than poverty make parents prefer employment of their children over education); CANAGARAJAH & KIELLAND, *supra*, at 7 (noting that poverty is not correlated with child labor rates in Africa because “most African child labor is not wage labor, but labor performed in the household”). In addition to poor schools, “cultural factors and norms . . . pull children toward the labor force.” *Id.*

15. See Kern, *supra* note 14, at 180. In addition to lacking the education necessary to have viable careers as adults, child laborers suffer from emotional pain and stunted development. *Id.* at 181.

16. GLOBAL TRADE, *supra* note 2, at 20. Amnesty International reports that “child labour is often a critical link in the cycle of deprivation and disadvantage that feeds other [human rights] abuses.” *Id.* This may be because child labor is typically performed to the exclusion of education, which is “a precondition for preparing children for working and living in a modern, market economy.” Canagarajah & Kielland, *supra* note 14, at 7. See also Robert A. Senser, *How the Global Economy Promotes Child Labor*, available at <http://www.senser.com/clali.htm> (last visited Nov. 11, 2007) (“The global economy . . . is drawing more and more [children] into various types of servitude.”).

17. See Marisa Anne Pagnattaro, *The “Helping Hand” in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. INT’L L. 845 (2004) [hereinafter Pagnattaro, *Helping Hand*].

18. ACTION AGAINST CHILD LABOUR, *supra* note 11, at 10. The ILO believes that effective programs to eliminate child labor “must be country specific and be based on a genuine commitment from within the country to address the problem.” *Id.* (emphasis omitted).

19. UNICEF is the division of the United Nations devoted to child welfare. About UNICEF: Structure and Contact Information, <http://www.unicef.org/about/structure/index.html> (last visited Nov. 11, 2007). As such, there is some overlap between the work of the ILO and that of UNICEF. Although the ILO is the agency primarily charged with overseeing international labor conditions, this Note

variety of techniques to eliminate child labor.<sup>20</sup> Until relatively recently, such programs operated outside of the infrastructure of the international trade system because trade agreements were traditionally viewed as purely economic instruments.<sup>21</sup> In 1992, the United States began conditioning new free trade agreements upon the adoption of certain standards for child labor.<sup>22</sup> The differences between the ILO and U.S. approaches suggest the strengths of one are the weaknesses of the other.

### A. *International Labor Standards and the ILO*

The ILO promulgates international labor standards, which are developed multilaterally by U.N. members.<sup>23</sup> A country is only bound by those ILO conventions that it ratifies.<sup>24</sup> Although the ILO is not the only U.N. agency to champion the rights of child laborers,<sup>25</sup> it is the primary

focuses on the work of the ILO. For a description of UNICEF's recent work to eliminate child labor, see *infra* note 25.

20. Approaches to reducing child labor may be differentiated by their reach and scope. Unilateral or national strategies, which the United States increasingly favors, allow one country to apply its laws and or labor standards in another country. Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labour Rights*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 179, 189 (Francesco Francioni ed., 2001). An example of a unilateral strategy is the U.S. Alien Tort Act, 28 U.S.C. § 1350, which gives foreign workers standing to sue their employers in U.S. courts. *Id.* at 189. Similarly, the Civil Rights Act of 1991, 42 U.S.C. § 2000-e, requires American companies to comply with U.S. labor laws even in foreign operations. *Id.*

In contrast, regional strategies involve agreement among a geographically defined group of countries to pursue similar child labor standards. *Id.* at 191. Free trade agreements represent regional strategies for eliminating child labor. *Id.* By leveraging free trade, one state may force another to improve its child labor laws. *Id.* Critics caution that regional solutions may fail if the trade agreement is poorly drafted. *Id.*

Finally, multilateral approaches are exemplified by international standards that are negotiated by a large number of nations and, in some cases, ratified by other nations. *Id.* at 191–92. ILO conventions and other U.N. actions are examples of multilateral approaches to curbing child labor abuses.

21. See, e.g., Kevin Kolben, *The New Politics of Linkage: India's Opposition to the Workers' Rights Clause*, 13 IND. J. GLOBAL LEGAL STUD. 225, 244–45 (2006). Less developed nations worry that more developed nations will use trade sanctions for economic protectionism rather than to achieve social justice. Kimberly Ann Elliot, Peterson Institute, Preferences for Workers? Worker's Rights and the U.S. Generalized System of Preferences, Speech for the Faculty Spring Conference at Calvin College, Grand Rapids, Michigan (May 28–30, 1998), available at <http://www.iie.com/publications/papers/elliott0598.htm>. In addition, "regional approaches may fragment the global trading system by grouping nations into trading blocs." McCrudden & Davies, *supra* note 20, at 191.

22. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. President George H.W. Bush signed NAFTA in 1992. Jessica C. Lawrence, *Chicken Little Revisited: NAFTA Regulatory Expropriations After Methanex*, 41 GA. L. REV. 261, 270 (2006).

23. About the ILO, *supra* note 3. As a U.N. agency, the ILO ensures that each member nation has the opportunity to shape any standard announced. *Id.*

24. ILO, ILO Mandate, <http://www.ilo.org/public/english/about/mandate.htm> (last visited Nov. 11, 2007); Pagnattaro, *Helping Hand*, *supra* note 17, at 847–48.

25. Most recently, UNICEF facilitated the signature, ratification, and accession of the

agency to have done so.<sup>26</sup> By “limit[ing] and delineat[ing] the decision-making of corporate actors,” ILO conventions seek to prevent the fabled “race to the bottom.”<sup>27</sup> The most recent ILO conventions to address child labor are ILO Convention No. 138,<sup>28</sup> which specifies minimum age requirements for various types of work,<sup>29</sup> and ILO Convention No. 182,<sup>30</sup> which seeks to eliminate the worst forms of child labor.<sup>31</sup> Eighty-nine years after the first ILO convention on child labor,<sup>32</sup> the exploitation of

Convention on the Rights of the Child, which addresses child labor both directly and indirectly. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc A/RES/44/25 (Sept. 2, 1990), available at <http://www2.ohchr.org/english/law/crc.pdf>. Article 32(1) of the Convention on the Rights of the Child declares “[T]he right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.” *Id.* art. 32(1). Under the Convention on the Rights of the Child, ratifying nations must establish standards for minimum age, hours of work, and conditions of employment. *Id.* art. 32(2)(a) & (b). The Convention further requires “appropriate penalties or other sanctions to ensure . . . effective enforcement.” *Id.* art. 32(2)(c). Other rights enumerated in the Convention on the Rights of the Child include protection from sexual exploitation (including prostitution and pornographic performance) (art. 34), protection from trafficking (art. 35), to education (art. 28), to rest and leisure (art. 31), and to “a standard of living adequate for the child’s physical, mental, spiritual, moral and social development” (art. 27).

26. See, e.g., Guy Standing, *Human Development*, in *CAN WE PUT AN END TO SWEATSHOPS?* 72 (Joshua Cohen & Joel Rogers eds., 2001).

27. Par Kamil Ahmed, *International Labor Rights—A Categorical Imperative?* 35 *REVUE DE DROIT* 145, 152 (2004). The proverbial race to the bottom occurs when corporations maximize their competitive edge and profits by exploiting cheap child labor and engaging in other labor abuses. *Id.*

28. ILO, Convention No. 138: Minimum Age, *convened on* June 6, 1973, available at <http://www.ilocarib.org.tt/childlabour/c138.htm> [hereinafter ILO Convention No. 138].

29. *Id.* ILO Convention No. 138 determines minimum age requirements for work based on how strenuous the labor is. The minimum age for light work is thirteen years, but a country may reduce that age to twelve years if economically necessary. *Id.* art. 7. Similarly, the minimum age for most types of work is fifteen years, but may be set at fourteen years based on economic pressures. *Id.* art. 2. The minimum age for hazardous and unhealthy work is set at eighteen years and cannot be reduced for any reason by signatory countries. *Id.* art. 3.

30. ILO, Convention No. 182: Worst Forms of Child Labour Convention, *convened on* June 1, 1999, available at <http://www.ilocarib.org.tt/childlabour/c182.htm> [hereinafter ILO Convention No. 182].

31. *Id.* Article 3 of ILO Convention No. 182 identifies seven categories of work which comprise the worst forms of child labor. *Id.* art. 3. These are (1) slavery, (2) trafficking of children, (3) debt bondage, (4) forced labor, (5) prostitution, pornography and pornographic performances, (6) illegal activities including drug trafficking, and (7) any other “work which, by its nature or the circumstance in which it is carried out, is likely to harm the health, safety or morals of the child.” *Id.* When a nation ratifies ILO Convention No. 182, the ILO helps the nation develop policies and programs to address that nation’s specific challenges. *Id.*

32. ILO, C5 Minimum Age (Industry) Convention, *convened on* Oct. 29, 1919, available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (follow “C5” hyperlink) (last visited Nov. 11, 2007) [hereinafter “ILO Convention No. 5”]. ILO Convention No. 5 restricted the work of children under the age of fourteen in certain industrial settings, such as mines and factories. *Id.* It was among the first group of conventions, all of which were adopted by the ILO on November 28, 1919. *About the ILO, Who We Are: History*, <http://www.ilo.org/public/english/about/history.htm> (last visited Nov. 11, 2007).

children continues at an alarming rate.<sup>33</sup> ILO conventions have been effective in defining universal minimum standards,<sup>34</sup> but they lack the power to involuntarily bind nations. As a result, these conventions do not adequately compel change because of problems in application and enforcement.

The ILO lacks the authority to require that all nations abide by the standards it promulgates. ILO conventions become binding upon a nation only upon voluntary ratification, and therefore do not apply to all countries.<sup>35</sup> Those nations that have not ratified child labor conventions include not only impoverished nations in the developing world, but also Western nations with robust economies.<sup>36</sup>

33. UNICEF Child Protection, *supra* note 4.

34. See, e.g., Robin Broad, *A Better Mousetrap? in CAN WE PUT AN END TO SWEATSHOPS?*, *supra* note 26, at 43, 44. Because of their global nature, ILO conventions have the potential to universally improve the fairness of trade by reducing exploitative employment practices, especially in developing nations. Seckman, *supra* note 4, at 675. See also *About the ILO, Who We Are: History*, *supra* note 32.

35. See, e.g., Seckman, *supra* note 4, at 686. As of December 27, 2006, 165 countries had ratified ILO Convention No. 182. ILOLEX, Database of International Labour Standards, <http://www.ilo.org/ilolex/english/convdisp2.htm> (follow "C182" hyperlink; then follow "See the ratifications for this Convention" hyperlink) (last visited Nov. 11, 2007). Similarly, only 147 nations had ratified ILO Convention No. 138. *Id.* (follow "C138" hyperlink; then follow "See the ratifications for this Convention" hyperlink) (last visited Nov. 11, 2007). See also *supra* note 25 and accompanying text.

36. See ILO, List of Ratifications of International Labour Conventions, available at <http://webfusion.ilo.org/public/db/standards/normes/appl> (follow "by convention" hyperlink; then follow "C182" hyperlink) (last visited Nov. 11, 2007) [hereinafter *ILO Convention 182 Ratifications*]; *Id.*, available at <http://webfusion.ilo.org/public/db/standards/normes/appl> (follow "by convention" hyperlink; then follow "C138" hyperlink) (last visited Nov. 11, 2007) [hereinafter *ILO Convention 138 Ratifications*].

For example, neither Australia nor the United States has ratified the Minimum Age Convention. *ILO Convention 138 Ratifications*, *supra*. Australia showed a similar reluctance to ratify ILO Convention No. 182, which it finally ratified in 2006. *ILO Convention 182 Ratifications*, *supra*.

Although the United States has not ratified the Minimum Age Convention, it has regulated child labor since 1938 with the Fair Labor Standards Act (FLSA). Fair Labor Standards Act, 28 U.S.C. §§ 201–219 (2006). FLSA both forbids the employment of children under the age of fourteen and limits the hours and types of work that may be performed by workers under eighteen years of age. *Id.*

In contrast, Australia lacks national child labor laws. See Patrick Parkinson, *The Child Labour Problem in Australia*, Defence for Children International—Australia (Sept. 2001), available at <http://www.dci-au.org/html/parkinson.html> [hereinafter Parkinson I]. Most child labor protections in Australia are found in narrowly-drawn state laws. Patrick Parkinson, *The Child Labour Problem in Australia*, AUSTL. CHILDREN'S RIGHTS NEWS (Defence of Children Int'l, Melbourne, Austl.), Sept. 2001, at 7 [hereinafter Parkinson II]. Australia's failure to enact national legislation to prevent or regulate child labor has been strongly criticized. Parkinson I, *supra*. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) also criticized Australia for its reluctance to be bound by international labor standards. American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), *Labour Rights and Child Labour Laws in Australia 2* (Sept. 2, 2003). The AFL-CIO points out that, "[w]hile Australia is a developed country with a relatively high standard of living and a vibrant, independent labor movement, it also has an imbalanced, inadequate system of

Enforcement presents another series of problems for ILO conventions, which are all too often only ratified symbolically. Enforcement mechanisms in ILO conventions “rel[y] on moral force” rather than more tangible sanctions to elicit compliance.<sup>37</sup> Such provisions are too weak to motivate ratifying nations to comply with international child labor standards.<sup>38</sup> Even with stronger enforcement provisions,<sup>39</sup> however, the ILO might nonetheless fail to impose stiff penalties on member nations for fear of losing international support and credibility.<sup>40</sup> Without the authority to bind all nations to their terms and to enforce those terms, ILO conventions alone are unlikely to eliminate child labor.

*B. The Interaction Between Trade Liberalization, Free Trade Agreements, and Social Change*

International trade may offer an alternative strategy for reducing child labor and enforcing international child labor standards.<sup>41</sup> Proponents of trade liberalization argue that both free trade<sup>42</sup> and free trade agreements<sup>43</sup>

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labor laws that fails to fully protect workers’ core rights.” *Id.* For more discussion of child labor in Australia, see *infra* notes 131–36 and accompanying text.

37. Schlossberg, *supra* note 4, at 49.

38. Seckman, *supra* note 4, at 686 (observing that “the ILO’s weak enforcement powers are a stumbling block for effective protection of all workers”); Trebilcock & Howse, *supra* note 4, at 274.

39. It has been suggested that enforcement of ILO conventions would improve if nations ceded to the ILO power akin to that given to the World Trade Organization (WTO). Seckman, *supra* note 4, at 693–98. Specifically, the WTO has the power to revoke trade concessions following an adjudicative decision that a state has violated a ratified ILO Convention. *Id.*

40. Trebilcock & Howse, *supra* note 4, at 274.

41. McCrudden & Davies, *supra* note 20, at 180–82. France and the United States initially lobbied to give the WTO the responsibility of enforcing international labor standards. *Id.* at 182. The history of the WTO and the decision to keep its functions separate from labor standards has been well developed elsewhere. See *id.* at 179–83; Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 126 INT’L LABOUR REV. 565 (1987). The debate about whether the WTO is the proper entity to regulate international labor standards is similarly well developed on both sides. For an excellent discussion of the debate, see Sarah H. Cleveland, *Human Rights Sanctions and the World Trade Organization*, in ENVIRONMENT, HUMAN RIGHTS, AND INTERNATIONAL TRADE 199–261 (Francesco Francioni ed., 2001).

42. Free trade exists when “[t]rade within [a] group [of nations] is duty free but members set their own tariffs on imports from non-members.” World Trade Organization, WTO Glossary, [http://www.wto.org/english/thewto\\_e/glossary\\_e/free\\_trade\\_area\\_e.htm](http://www.wto.org/english/thewto_e/glossary_e/free_trade_area_e.htm) (last visited Nov. 11, 2007).

43. A free trade agreement is usually “a bilateral arrangement between two governments which provides for mutual removal of tariff and other trade barriers with respect to goods and services originating in the other country (party to the agreement).” Avraham Azrieli, *Improving Arbitration Under the U.S.-Israel Free Trade Agreement: A Framework for a Middle-East Free Trade Zone*, 67 ST. JOHN’S L. REV. 187, 192 (1993). Free trade agreements typically address the economic factors necessary to remove trade barriers, such as duties, customs, and quotas. See Rachel D. Edsall, *Indirect Expropriation under NAFTA & DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations*, 86 B.U. L. REV. 931, 932–33 (2006); Urs Gasser, *Legal Frameworks and*

can eradicate child labor. Right or wrong, U.S. trade policy embraces this theory.<sup>44</sup>

### 1. Trade Liberalization and the Causes of Child Labor

Free trade, theoretically, can alleviate child labor by eliminating its causes.<sup>45</sup> More specifically, free trade reduces poverty and improves educational opportunities in developing nations by promoting economic growth.<sup>46</sup> In turn, child labor becomes superfluous to the economic vitality of the family unit and subsequently disappears.<sup>47</sup>

In practice, however, child labor persists despite extensive international trade liberalization. Like so many hypotheses, the prediction that free trade will reduce child labor breaks down when its necessary assumptions fail. First, the theory assumes that all members of a nation share in the economic boon of free trade.<sup>48</sup> A nation's poorest citizens, however, may never enjoy the economic benefits of free trade and instead remain

*Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 39, 41 (2006) (noting that free trade agreements may include clauses aimed at protecting intellectual property); Lawrence, *supra* note 22, at 270 (discussing requirements "to reduce trade distortions and extend protections to foreign businesses and investors"); Marie Kately St. Fort, Note, *A Comparison of the Rules of Origin in the United States, Under the U.S.-Canada Free Trade Agreement (CFTA), and Under the North American Free Trade Agreement (NAFTA)*, 13 *WIS. INT'L L.J.* 183, 183-84 (1994) (discussing rules of origin, quotas and tariffs in the context of free trade agreements).

44. Office of the United States Trade Representative, Mission of the USTR, [http://ustr.gov/Who\\_We\\_Are/Mission\\_of\\_the\\_USTR.html](http://ustr.gov/Who_We_Are/Mission_of_the_USTR.html) (last visited Feb. 14, 2007). The Office of the United States Trade Representative claims that free trade and free trade agreements can produce "higher living standards for families, farmers, manufacturers, [and] workers." *Id.*

45. Thomas J. Manley & Luis Laurodo, *International Labor Standards in Free Trade Agreements of the Americas*, 18 *EMORY INT'L L. REV.* 85, 87 (2004). *But see* Dexter Samida, *Protecting the Innocent or Protecting Special Interests? Child Labor, Globalization, and the WTO*, 33 *DENV. J. INT'L L. & POL'Y* 411, 432 (2005) (suggesting that "[i]ncreased globalization has not been and will not be a major determinant of the prevalence of child labor").

46. Manley & Laurodo, *supra* note 45, at 87 (observing that "[t]he macro-economic case for international trade liberalization is a powerful one. Trade . . . spreads the prosperity of productive employment."). Jonathan B. Wright compared historical trade strategies and resulting economic strength to conclude that regions that have "a high index of openness to trade," such as East Asia between 1965 and 1990, enjoyed high rates of economic development. Jonathan B. Wright, *Does Free Trade Cause Hunger? Hidden Implications of the FTAA*, 2 *RICH. J. GLOBAL L. & BUS.* 167, 168 (2001). In contrast, regions like Latin America, which attempted to replace imports with domestic industry, saw an increasing gap between the haves and the have-nots. *Id.* at 169. Regions with the least free trade, like sub-Saharan Africa, saw the lowest levels of economic development. *Id.* While conceding that "trade is [not] the only—or even the main—reason for the observed differences in economic growth rates," Wright maintains that, a nation's "openness to trade is most likely positively related to economic growth." *Id.*

47. Manley & Laurodo, *supra* note 45, at 87.

48. Wright, *supra* note 46, at 168.

impoverished.<sup>49</sup> Second, the theory assumes companies will not abase their employment practices in response to trade liberalization.<sup>50</sup> Unfortunately, free trade seems to encourage corporations to capitalize on the competitive advantage of cheap child labor.<sup>51</sup> As a result, child labor probably will not be eradicated solely by liberalizing international trade.

## 2. Free Trade Agreements and Child Labor

Unlike trade liberalization, free trade agreements have the potential to eliminate child labor by conditioning a nation's enjoyment of the economic bounty associated with free trade upon adherence to certain minimum standards for child protection.<sup>52</sup> Free trade agreements have an advantage over ILO conventions in that economic considerations may motivate otherwise recalcitrant nations to bind themselves to minimum child labor standards.<sup>53</sup> Additionally, free trade agreements offer more effective enforcement in the form of trade sanctions.<sup>54</sup>

49. *Id.* An equitable distribution of free trade proceeds may be possible if trade liberalization is accompanied by social and political reform. *Id.* Thus, "increased trade offers the promise, not the certainty" that economic growth will reduce child labor and other worker abuses. Harley Shaiken, *The NAFTA, a Social Charter, and Economic Growth*, in *NAFTA AS A MODEL OF DEVELOPMENT: THE BENEFITS AND COSTS OF MERGING HIGH AND LOW WAGE AREAS* 23 (Richard S. Belous & Jonathan Lemon eds., 1993).

50. See, e.g., Kathryn Abrams, *Third Annual Ruth Bader Ginsburg Lecture: The Global Impact of Feminist Legal Theory*, 28 T. JEFFERSON L. REV. 307, 315 (2006); Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 FORDHAM INT'L L.J. 386, 446 (2006); Paulette L. Stenzel, *Plan Puebla Panama: An Economic Tool that Thwarts Sustainable Development and Facilitates Terrorism*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 555, 581 (2006). *But see* Samida, *supra* note 45, at 421 (noting that empirical research shows that "increased globalization has not led to an increase in the prevalence of child labor"); Robert C. Shelburne, *An Explanation of the International Variation in the Prevalence of Child Labour*, 24 WORLD ECON. 359, 374-75 (2001) (reporting an empirical study finding increases in per capita gross national product is not correlated with increases in child labor).

51. Abrams, *supra* note 50, at 315; Stenzel, *supra* note 50, at 318.

52. Lenzerini, *supra* note 6, at 287.

53. McCrudden & Davies, *supra* note 20, at 191. The formation of the European Union (EU), which was dependent upon improved labor protections within member nations, affords an excellent example of an effective social clause. *Id.*

54. Weiss, *supra* note 7, at 718. The dispute resolution process that precedes trade sanctions may be as powerful a motivating force as the sanctions themselves. Jack I. Garvey, *Regional Free Trade Dispute Resolution as Means for Securing the Middle East Peace Process*, 47 AM. J. COMP. L. 147, 184 (1999).

The argument here is that the construction and implementation of trade disputes resolution can affect the relationship of security and economic integration. Its potential lies in the capacity to capitalize on economic self-interest by deflecting, depoliticizing and dampening disputes, thereby diminishing contradictions between security and regional economic development.

*Id.* *But see* Manley & Lauredo, *supra* note 45, at 113 (suggesting that the threat of trade sanctions "may in fact discourage use of the . . . dispute resolution mechanisms").

In spite of their potential, free trade agreements imperfectly regulate child labor. Social clauses may conceal protectionist intentions and, therefore, be invalid trade practices.<sup>55</sup> In addition, free trade agreements may not be specific enough to effect necessary changes in the content and enforcement of lax national child labor laws.<sup>56</sup> The real Achilles' heel in free trade agreements, however, is the practical problem of compliance and enforcement. Although free trade agreements are theoretically more enforceable than ILO conventions,<sup>57</sup> eliciting actual compliance depends on political and economic circumstances.

A country's political and economic climate mediates the priority it places on complying with a free trade agreement.<sup>58</sup> As governments change, so may a nation's commitment to the free trade agreement and the child labor protections it mandates.<sup>59</sup> In addition, a nation may not perceive trade sanctions as a real threat, especially when the United States is the enforcer. For one thing, trade sanctions "can be counter-productive in the trade regime," which makes their imposition economically unappealing.<sup>60</sup> Furthermore, other nations have good reason to doubt that

55. See, e.g., ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998). The risk that a social clause will be labeled protectionist is sometimes expressly addressed in free trade agreements, such as the CAFTA-DR, which states "labor standards should not be used for protectionist trade purposes." Dominican Republic Central America Free Trade Act ch.16, Aug. 5, 2004, 43 I.L.M. 514.

56. Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT'L L. 457, 458 (2004). In light of concerns about the specificity of labor standards contained in free trade agreements, the ILO's recent shift away from specific, well-defined standards to general, undefined principles is troubling. *Id.* at 477. As a result of this shift, "the vast majority of 'principles' proclaimed by international legal instruments hold a status which is significantly lower in the normative hierarchy than that of a human right." *Id.* Professor Alston has argued that the move from standards to principles "could be seen as a backward step, given that all of the relevant standards have long been recognized as human rights." *Id.* For a contrary opinion, see Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights*, 16 EUR. J. INT'L L. 439 (2005).

57. See *supra* notes 52–54 and accompanying text for a theoretical examination of enforcement mechanisms in free trade agreements.

58. See Standing, *supra* note 26, at 77. Former Chilean president General Augusto Pinochet's actions upon coming to power illustrate the impact of politics on labor conditions. *Id.* Upon taking office, Pinochet lowered labor standards and gutted labor organizations. *Id.* Then, "once workers' organizations were enfeebled, [Pinochet] allowed modified freedom of association." *Id.* at 77–78.

59. In 2006, many years after Pinochet's removal from power, the United States Department of Labor reported that Chile was working diligently to reduce incidences of child labor. BUREAU OF INTERNATIONAL AFFAIRS, U.S. DEP'T OF LABOR, UNITED STATES DEPARTMENT OF LABOR'S 2005 FINDINGS ON THE WORST FORMS OF CHILD LABOR 166 (2006), available at <http://www.dol.gov/ilab/media/reports/iclp/tda2005/tda2005.pdf> [hereinafter U.S. DOL 2005 FINDINGS ON THE WORST FORMS OF CHILD LABOR]. For more on child labor in Chile, see *infra* note 130 and accompanying text.

60. Claire R. Kelly, *Enmeshment as a Theory of Compliance*, 37 N.Y.U. J. INT'L L. & POL. 303, 330 (2005). In addition, critics worry that increased acceptance and regulation of trade liberalization undermines the "normative function" of trade sanctions as "instruments used to promote international

the United States would impose trade sanctions for child labor abuses.<sup>61</sup> For instance, the United States has thrice withdrawn from the ILO<sup>62</sup> and has refused to ratify certain ILO child labor conventions.<sup>63</sup> Moreover, the United States reduced domestic enforcement of its own child labor laws repeatedly between 2001 and 2005.<sup>64</sup> Finally, the United States' reservation of trade sanctions for only the most egregious violations militates against the risk that the U.S. will impose trade sanctions for child labor abuses.<sup>65</sup>

Notwithstanding these flaws, free trade agreements are a viable regional strategy for eliminating child labor.<sup>66</sup> As regional remedies, free trade agreements exchange the potential for effecting the sweeping, international change of ILO conventions for the more certain results of a program adapted to the relevant national causes of child labor.<sup>67</sup>

### III. UNITED STATES FREE TRADE AGREEMENTS: A SELECTIVE REVIEW

U.S. foreign policy reflects a “reluctan[ce] to conclude trade and investment agreements with States” that do not uphold certain labor standards.<sup>68</sup> For the past fifteen years, the United States has included in its

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rights compliance.” Cleveland, *supra* note 41, at 201. For instance, WTO trade policies may limit an individual nation's ability to levy trade sanctions for human rights violations. *Id.*

61. See GLOBAL TRADE, *supra* note 2, at 54. Specifically, “[t]he double standards displayed by the USA on the issue of human rights and labour standards has been a major reason why many observers have viewed its promotion of a social clause in trade agreements with such distrust.” *Id.*

62. Ahmed, *supra* note 27, at 161. The United States was not part of the ILO from 1919 to 1934, 1938 to 1944, nor 1977 to 1980. *Id.* Some believe that the United States uses the threat of withdrawal to compel favorable ILO policies. *Id.* at 162 (citing Drusilla K. Brown, *International Labor Standards in the World Trade Organization and the International Labor Organization* 3 (Dec. 1999)(Working Paper, on file with Tufts University)).

63. *ILO Convention 138 Ratifications*, *supra* note 36.

64. *The Government's Striking Decline in Child Labor Enforcement Activities*, A Child Labor Coalition Report 2 (Sept. 2006), available at <http://www.stopchildlabor.org/pressroom/CLC%20report%20Sept%202006.pdf>.

According to the Child Labor Coalition, the United States Department of Labor (DOL) reduced the number of child labor investigators from about forty-three full time employees in 2001 to just twenty-three full time employees in 2005. *Id.* Although the actual rate of child labor in the United States is unknown because the U.S. neither collects nor reports statistics on illegal domestic child labor, the Bureau of Labor Statistics reported that approximately 134 American workers under fourteen years of age were killed on-the-job between 1992 and 1998. *Id.* at n.8.

65. See Larry Luxner, Sprint Hangs Up on Workers, 17 *Multinational Monitor* No. 3 (Mar. 1996), available at <http://multinationalmonitor.org/hypermm0396.03.html>.

66. McCrudden & Davies, *supra* note 20, at 189.

67. *Id.*

68. Ahmed, *supra* note 27, at 151. See also CAMERON & TOMLIN, *supra* note 5, at 180. In 1997, the United States Congress signaled its commitment to using trade, free and otherwise, to prevent child labor when it amended the Tariff Act of 1930, 19 U.S.C. § 1307, to forbid the import of goods manufactured by “forced or indentured child labor.” Lenzerini, *supra* note 6, at 297.

free trade agreements social clauses “aimed at conditioning the enjoyment of trade advantages [on] respect [for] minimum international labour standards,” including those directed at child labor.<sup>69</sup> The first such agreement was the North American Free Trade Agreement (NAFTA).<sup>70</sup> NAFTA dealt with child labor in a side agreement, the North American Agreement on Labor Conditions (NAALC).<sup>71</sup> When NAALC failed to have the desired effect on child labor rates in Mexico, the United States responded by trying to improve the social clauses it negotiated.<sup>72</sup> The final text of the 2006 Andean Trade Promotion Agreement (ATPA) signals that the period of innovation has ended, ushering in the era of boilerplate social clauses.<sup>73</sup>

#### A. NAFTA and NAALC

When Bill Clinton won the presidency in 1992, his predecessor, President George H. W. Bush, had almost completed negotiations for free trade with Canada and Mexico.<sup>74</sup> The text of NAFTA reflects the United States’, and specifically the first Bush Administration’s, perception of free trade as a means to an economically beneficial end.<sup>75</sup> President Bush

69. Lenzerini, *supra* note 6, at 287.

70. NAFTA, *supra* note 22. Finalized in 1992, NAFTA entered into force on January 1, 1994. *Id.* art. 2203.

71. North American Agreement on Labor Conditions, U.S.-Can.-Mex., Sept. 13, 1993, 32 I.L.M. 1499 (1993) available at <http://www.naalc.org/english/agreement.shtml> [hereinafter NAALC].

72. Weiss, *supra* note 7, at 717.

73. The Andean Trade Promotion Agreement (ATPA) is a composite agreement, made up of both the Colombia Trade Promotion Agreement, U.S.-Colom., Nov. 22, 2006, \_\_\_ U.S.T. \_\_\_ [hereinafter CTPA], available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Colombia\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html) (last visited Feb. 18, 2008), and the Peru Trade Promotional Agreement, U.S.-Peru, Apr. 12, 2006, \_\_\_ U.S.T. \_\_\_ [hereinafter PTPA], available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html) (last visited Feb. 18, 2008).

74. CAMERON & TOMLIN, *supra* note 5, at 182.

75. See The Clinton Administration, *The NAFTA: Expanding U.S. Exports, Jobs and Growth*, Clinton Administration Statement on the North American Free Trade Agreement, PrEx 1.2: N 82 (July 1993) [hereinafter Clinton Administration Statement on NAFTA].

Although NAFTA was driven by economic considerations, the United States, and particularly the Clinton Administration, also saw free trade with Mexico as a way to reduce illegal immigration and drug trafficking. Wright, *supra* note 46, at 168. Warren Christopher, Secretary of State in the Clinton Administration, testified before Congress that “a growing Mexico economy . . . will be very helpful in reducing . . . illegal immigration.” *The North American Free Trade Agreement (NAFTA): Hearings before the H. Comm. on Foreign Affairs*, 103d Cong. 5 (1993) (statement of Warren Christopher, Secretary of State). See also Clinton Administration Statement on NAFTA, *supra*, at 4 (“NAFTA will gradually ease many of the pressures in Mexico that currently contribute to illegal immigration.”). The Clinton Administration also claimed that NAFTA would foster a positive atmosphere for bilateral efforts to fight the drug trade. *Id.* at 11.

signed NAFTA in December 1992 and, by the time President Clinton took office, it was too late to re-open the negotiations to address the new administration's concerns about labor conditions.<sup>76</sup> Fearing a political stalemate in the congressional ratification process, the three countries agreed to negotiate a side agreement to address labor standards.<sup>77</sup> On September 13, 1993, the United States, Canada, and Mexico signed NAALC, which purported to bind all three nations to certain minimum standards for child labor.<sup>78</sup>

### 1. *Child Labor Prohibitions in NAALC*

NAALC, which does not identify specific substantive requirements for child labor protections, has been criticized for being "too weak [and] poorly designed."<sup>79</sup> In lieu of specific standards, NAALC lists eleven principles to guide each nation's government.<sup>80</sup> One of the principles calls

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76. CAMERON & TOMLIN, *supra* note 5, at 182.

77. See generally Solidaridad de la Maquila, What is the North American Agreement on Labour Cooperation?, available at <http://en.maquilasolidarity.org/en/issues/trade/nafta/naalc> (last visited Jan. 23, 2008); CAMERON & TOMLIN, *supra* note 5.

Even before President Clinton was sworn in, the first Bush Administration considered the possibility of addressing labor conditions in a side agreement. In its report to President Bush, the U.S. Labor Policy Advisory Committee for Trade Negotiations ("Labor Policy Advisory Committee") scorned such an approach because the enforcement provisions in such side agreements would not include trade sanctions. The Report of the Labor Policy Advisory Committee for Trade on the North American Free Trade Agreement, Pr. Ex. 1.2:T67/3/LAC (Sept. 15, 1992) at 4. The Labor Policy Advisory Committee complained that the Administration's "Action Plan is nothing more than a list of promises." *Id.*

Trade sanctions were ultimately built into the enforcement provisions, but may only be levied if deemed appropriate by the three member nations. *Id.* See also NAFTA, *supra* note 22.

78. NAALC, *supra* note 71. NAALC created the North American Commission on Labor to "Foster discussion and better appreciation of worker rights and labor standards in each NAFTA country; Encourage domestic enforcement of national labor laws; and Promote the raising and strengthening of labor standards in North America." The Report of the Labor Policy Advisory Committee for Trade on the North American Free Trade Agreement, *supra* note 77, at 8. The Clinton Administration cautioned that, despite the promise inherent to NAALC, the agreement "cannot resolve overnight all . . . labor problems." *Id.*

79. Kolben, *supra* note 21, at 232.

80. NAALC, *supra* note 71. NAALC defines labor laws as those relating to:

(a) freedom of association and protection of the right to organize; (b) the right to bargain collectively; (c) the right to strike; (d) prohibition of forced labor; (e) labor protections for children and young persons; (f) minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements; (g) elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party's domestic laws; (h) equal pay for men and women; (i) prevention of occupational injuries and illnesses; (j) compensation in case of occupational injuries and illnesses; [and] (k) protection of migrant workers.

for the eradication of child labor.<sup>81</sup> NAALC encourages enforcement of national laws that comport with its eleven stated principles.<sup>82</sup> In order to preserve national sovereignty, the NAALC principles were tied neither to international labor standards nor to international law.<sup>83</sup> NAALC established a diplomatic and consensus-based dispute resolution and enforcement system.<sup>84</sup> A complaining nation may levy appropriate trade sanctions against either the United States or Mexico, but only if the offending nation fails to remedy the problem or to pay a monetary enforcement fine.<sup>85</sup> Canada is exempt from these trade sanctions.<sup>86</sup>

## 2. NAALC's Failure to Eliminate Child Labor in Mexico

Although NAALC was initially greeted with optimism,<sup>87</sup> it failed to reduce child labor rates.<sup>88</sup> Child labor remains a significant problem in Mexico<sup>89</sup> due, in part, to pervasive poverty in some Mexican

NAALC, art. 49(1)(b), available at <http://www.naalc.org/english/agreement7.shtml> (last visited Nov. 11, 2007). A detailed description of the eleven NAALC labor principles can be found in NAALC Annex 1 ("Labor Principles"), available at <http://www.naalc.org/english/agreement9.shtml> (last visited Nov. 11, 2007).

81. *Id.*

82. *Id.* See also *The North American Free Trade Agreement (NAFTA): Hearings before the H. Comm. on Foreign Affairs*, 103d Cong. 10 (1993) (statement of Lloyd Bentsen, Secretary of the Treasury) (testifying, before NAFTA became operable, that "Mexico has good, strong labor laws but enforcement has been a problem").

83. GLOBAL TRADE, *supra* note 2, at 52–53.

84. NAALC, Part 5, available at <http://www.naalc.org/english/agreement6.shtml> (last visited Nov. 11, 2007). NAALC relies upon an arbitration board to make findings of fact and to determine whether there was a violation of "occupation safety and health, child labor or minimum wage technical labor standards in a manner that is trade-related and covered by mutually recognized laws." NAALC, Part 5, art. 36(2). If it finds a violation, the arbitration panel may recommend a remedy. *Id.* The ultimate resolution of the dispute, however, is left to the parties themselves. NAALC, Part 5, art. 38.

85. NAALC, Part 5, art. 41. NAFTA trade benefits may only be revoked if the arbitral panel is unsuccessfully reconvened for the purpose of forcing the renegade party to comply with specific labor standards. *Id.*

86. Canada has ensured it will never be subjected to trade sanctions for labor violations by making any NAALC fines enforceable through Canadian courts, thus abrogating the need for additional sanctions. NAALC, Annex 41A.

87. See, e.g., *The North American Free Trade Agreement (NAFTA): Hearings before the H. Comm. on Foreign Affairs*, 103d Cong. 26 (1993) (answer of Warren Christopher, Secretary of State) ("I think our judgment . . . is that the trend [in Mexican human rights] is positive. I think that positive trend will be encouraged rather than discouraged by the approval of NAFTA."); Shaiken, *supra* note 49, at 25. ("It is clear that if Mexico manages its resources correctly, it could become a high-tech, export-oriented manufacturing base—a possibility that offers considerable promise for development.")

88. See David Bacon, *The Children of NAFTA: Labor Wars on the U.S./Mexico Border* 32 (2004); Joshua Briones, *Student Scholarship: Paying the Price for NAFTA: NAFTA's Effect on Women and Children Laborers in Mexico*, 9 U.C.L.A. WOMEN'S L.J. 301 (1999).

89. According to UNICEF, sixteen percent of Mexican children between the ages of five and

communities.<sup>90</sup> Mexican child labor also thrives because Mexico too seldomly enforces its excellent labor laws.<sup>91</sup> NAALC's enforcement provisions are too weak to compel Mexico to enforce its laws,<sup>92</sup> partially because NAALC bound all three countries to easily erodable principles.<sup>93</sup>

NAALC's non-adjudicatory enforcement system does not motivate participant nations, in particular Mexico, to fulfill their child protection obligations.<sup>94</sup> First, NAALC protections are limited almost exclusively to unionized workers,<sup>95</sup> but most children work in non-unionized jobs like domestic servitude.<sup>96</sup> Second, the costs of adjudication may deter those children who do have standing from asserting their rights under NAALC.<sup>97</sup> Third, children, especially those who leave school to work at an early age, may not be capable of notifying participant nations of abuses because they lack the resources and skills to communicate with foreign leaders.<sup>98</sup> Finally, trade sanctions may only be imposed if systemic noncompliance is found, all but eliminating the most powerful incentive for actively combating child labor.<sup>99</sup>

fourteen years were engaged in child labor between 1999 and 2005. UNICEF, At a Glance: Mexico—Statistics, [http://www.unicef.org/infobycountry/mexico\\_statistics.html#30](http://www.unicef.org/infobycountry/mexico_statistics.html#30) (last visited Nov. 11, 2007); UNICEF *The State of the World's Children 2006* 130 (2005), available at [http://www.unicef.org/publications/files/SOWC\\_2006\\_English\\_Report\\_rev\(1\).pdf](http://www.unicef.org/publications/files/SOWC_2006_English_Report_rev(1).pdf). See also Briones, *supra* note 88, at 309 (estimating that five million Mexican children are employed in violation of NAFTA and NAALC). Figures for the United States and Canada are not available from UNICEF.

90. Bacon, *supra* note 88, at 35, 215. In his 2004 exposé of NAFTA's impact on laborers, David Bacon noted that "the Mexican government's Secretariat of Labor and Social Forecasting estimates that eight hundred thousand children under the age of fourteen work in different sectors of the economy." *Id.* at 33.

91. Briones, *supra* note 88, at 309. Mexican law prohibits employment of children who are under fourteen years of age. *Id.* (citing Ley Federal de Trabajo (The Federal Labor Law), Tomo CCXCIX, No. 26 (1970)).

92. See Weiss, *supra* note 7, at 702–11; Manley & Lauredo, *supra* note 45, at 105.

93. Weiss, *supra* note 7, at 704.

94. Bacon, *supra* note 88, at 32. In 1996, human rights workers in the Mexicali Valley tried to organize workers to put pressure on the Mexican government to enforce child labor laws in onion fields. *Id.*

95. Briones, *supra* note 88, at 319.

96. SweatShop Watch, Frequently Asked Questions, <http://www.sweatshopwatch.org/index.php?s=18> (last visited Nov. 11, 2007) ("Even those who find jobs in favorable working conditions are outside the social safety nets of family, school, trade union, employment or welfare laws.").

97. Juan de Nigris, *Trade Liberalization and Mexico, in NAFTA AS A MODEL OF DEVELOPMENT: THE BENEFITS AND COSTS OF MERGING HIGH AND LOW WAGE AREAS* 165 (Richard S. Belous & Jonathan Lemco eds., 1993).

98. See Briones, *supra* note 88, at 320. Practical considerations may impair the ability of a child to draw another nation's attention to child labor abuses. *Id.* For example, "[a] woman or child who earns less than thirty-five cents an hour does not have the money he/she needs to eat, much less the money to travel across international borders to complain about his/her employers." *Id.*

99. *Id.* at 321. The high standard delineated by NAALC, "that enforcement officials abused their discretion and that the decision not to enforce compliance was due to factors other than a reasonable decision regarding allocation of resources," makes it still more difficult to initiate trade sanctions. *Id.*

Other problems with NAALC stem from the treaty's reliance on principles rather than on specific, quantifiable standards and time-measured goals.<sup>100</sup> NAALC may also have resulted in poorer working conditions by obviating some of Mexico's best labor laws.<sup>101</sup> Problems both with NAALC's enforcement and substance continue to harm Mexico's children.

### *B. Three Rounds of Post-NAFTA Social Clauses*

In the fifteen years since NAFTA was signed, the United States has entered into free trade agreements with a number of countries, including Jordan, Chile, and Australia.<sup>102</sup> Each agreement contains a social clause that specifically addresses child labor. Early on, the United States tried to improve the social clauses it negotiated in response to NAALC's failure to curb child labor in Mexico.<sup>103</sup> In the latest proposed free trade agreement, the ATPA, such innovation has all but ceased.

#### *1. Round One: Jordan*<sup>104</sup>

In 2000, the United States signed a free trade agreement with the Republic of Jordan.<sup>105</sup> In many respects, the U.S.-Jordan Free Trade Agreement resembles NAFTA and NAALC. For instance, the majority of the agreement focuses on traditional trade issues, such as customs and

(citing Stephen F. Diamond, *Labor Rights in the Global Economy: A Case Study of the North American Free Trade Agreement*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 216–18 (Lance A. Compa & Stephen F. Diamond eds., 1996)). Under NAALC, the mere knowledge of an incident of child labor is insufficient to activate trade sanctions. *Id.*

100. See, e.g., Manley & Laredo, *supra* note 45, at 104.

101. Michael Joseph McGuinness, *The Politics of Labor Regulation in North America: A Reconsideration of Labor Law Enforcement in Mexico*, 21 U. PA. J. INT'L ECON. L. 1, 3 (2000).

102. See Office of the United States Trade Representative, *Bilateral Trade Agreements*, [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html) (last visited Nov. 11, 2007).

The only U.S. free trade agreement to predate NAFTA is the United States' agreement with Israel, which was finalized in 1985. Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America, U.S.-Isr. Apr. 22, 1985, KAV 973, available at [http://tcc.export.gov/Trade\\_Agreements/All\\_TraderAgreements/exp\\_005439.asp](http://tcc.export.gov/Trade_Agreements/All_TraderAgreements/exp_005439.asp). The United States-Israel Free Trade Agreement is a purely economic instrument and does not include a social clause. *Id.*

103. See, e.g., Weiss, *supra* note 7, at 717.

104. Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, KAV 5970, available at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Jordan/asset\\_upload\\_file250\\_5112.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf) [hereinafter U.S.-Jordan Free Trade Agreement].

105. *Id.* at 19.

duties.<sup>106</sup> Moreover, both agreements preserve national sovereignty by requiring the nations to enforce their existing laws rather than mandating improvement of child labor laws.<sup>107</sup> Also, both the U.S.-Jordan Free Trade Agreement and NAALC state that, in principle, the two nations will work to eliminate domestic child labor, but neither agreement requires actual progress towards that goal.<sup>108</sup>

Despite the many similarities between the U.S.-Jordan Free Trade Agreement and NAALC, variations in the later agreement were “intended to serve as a response to widespread criticism of the NAALC.”<sup>109</sup> The most obvious difference between the two agreements is formalistic. Child labor is addressed in a social clause in the body of the U.S.-Jordan Free Trade Agreement, while NAALC was a side agreement to a free trade agreement.<sup>110</sup> Substantively, the U.S.-Jordan Free Trade Agreement also differs from NAALC in that it includes an anti-degradation clause<sup>111</sup> and creates a more agile enforcement scheme.<sup>112</sup>

The anti-degradation clause in the U.S.-Jordan Free Trade Agreement enjoins the parties from relaxing existing legal protections against child labor to leverage a trade advantage.<sup>113</sup> In contrast, NAALC undermined some of Mexico’s worker protection laws.<sup>114</sup> The U.S.-Jordan Free Trade Agreement also suggests that national laws should comport with

106. See, e.g., Grace V. Chomo, *Free Trade Agreements between Developing and Industrialized Countries: Comparing the U.S.-Jordan FTA with Mexico’s Experience under NAFTA* (U.S. International Trade Comm’n, Office of Economics, Working Paper No. 2002-01-B, Jan. 2002), available at [http://hotdocs.usite.gov/docs/pubs/research\\_working\\_papers/EC200201B.PDF](http://hotdocs.usite.gov/docs/pubs/research_working_papers/EC200201B.PDF).

107. See U.S.-Jordan Free Trade Agreement, *supra* note 104, art. 6, §§ 3–4. Deference to national sovereignty is taken a step further in section 4(b), which allows either party to not enforce labor laws “where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.” *Id.*

108. *Id.* The only place where specific workers’ rights are addressed is in the definition of “labor laws,” which may include those “statutes and regulations” addressing “a minimum age for the employment of children.” *Id.* The looseness of this language would probably permit Jordan to elect not to enact minimum age laws or, alternatively, to set a minimum age requirement so low that child protection is merely illusory.

109. Weiss, *supra* note 7, at 717.

110. U.S.-Jordan Free Trade Agreement, *supra* note 104, art. 6. See also Weiss, *supra* note 7, at 713–14.

111. U.S.-Jordan Free Trade Agreement, *supra* note 104, art. 6(2).

112. *Id.* art. 17.

113. *Id.* art. 6(2). Specifically,

The Parties recognize that it is inappropriate to encourage trade by relaxing domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party.

*Id.* In addition, the agreement requires both the United States and Jordan to “effectively enforce [their] labor laws, through a sustained or recurring course of action or inaction.” *Id.* art. 6(4)(a).

114. McGuinness, *supra* note 101, at 3.

international labor standards, including ILO Conventions,<sup>115</sup> without regard for national sovereignty.<sup>116</sup>

The dispute resolution and enforcement mechanisms in the U.S.-Jordan Free Trade Agreement also differ from those in NAALC.<sup>117</sup> Specifically, disputes between the parties are initially resolved through non-binding adjudication.<sup>118</sup> If a dispute is not resolved quickly enough, the offended party may impose “any appropriate and commensurate measures,” including trade sanctions.<sup>119</sup>

Eight years after the U.S.-Jordan Free Trade Agreement became effective, there is no way to know whether child labor rates have increased, decreased, or remained the same. Jordanian child labor statistics are nonexistent<sup>120</sup> and the U.S.-Jordan Free Trade Agreement does not require the collection of such data. The U.S.-Jordan Free Trade Agreement’s impact on child labor might alternatively be deduced from developments in Jordanian child labor law after the free trade agreement went into effect. Although Jordan has complied with the agreement’s anti-degradation clause, it has not enacted stricter child labor laws in the years since it signed the U.S.-Jordan Free Trade Agreement.<sup>121</sup> Although

115. *Id.*; U.S.-Jordan Free Trade Agreement, *supra* note 104, art. 6(3).

116. *Id.* The U.S.-Jordan Free Trade Agreement limits the role of international child labor law to that of establishing “a floor for substantive norms, which should be provided under domestic law. Domestic law provides the benchmark for effective enforcement and anti-relaxation, the two most readily enforceable obligations.” Weiss, *supra* note 7, at 716.

117. *See* Weiss, *supra* note 7, at 718. Although this Note treats these changes as potentially beneficial, not everyone agrees. Marley S. Weiss has questioned the efficacy of enforcement mechanisms in the U.S.-Jordan Free Trade Agreement, observing that the agreement lacks “NAALC type due process, access to the tribunal, and other labor law procedural commitments.” *Id.*

118. U.S.-Jordan Free Trade Agreement, *supra* note 104, art. 17. Under the U.S.-Jordan Free Trade Agreement, disputes between the parties are reviewed by a three-member dispute settlement panel. *Id.* Each country selects one of the panel members; the third member, the chairperson, is jointly appointed by the two nations. *Id.*

119. *Id.* art. 17(2)(b). The vagueness of this provision calls into question the likelihood that trade sanctions ever could be imposed for child labor violations.

120. The ILO estimated that, in 2002, less than one percent of ten to fourteen year-olds living in Jordan were engaged in child labor. BUREAU OF INTERNATIONAL LABOR AFFAIRS, U.S. DEP’T OF LABOR, THE U.S. DEPARTMENT OF LABOR’S 2004 FINDINGS ON THE WORST FORMS OF CHILD LABOR 253 (2005), available at <http://dol.gov/ilab/media/reports/iclp/tda2004/tda2004.pdf> (last visited Nov. 11, 2007) [hereinafter U.S. DOL 2004 FINDINGS ON THE WORST FORMS OF CHILD LABOR]. In 2005, however, the United States Department of Labor International Affairs Division reported that the rate of child labor in Jordan is unknown. U.S. DOL 2005 FINDINGS ON THE WORST FORMS OF CHILD LABOR, *supra* note 59, at 259.

121. In 1996, four years before the U.S.-Jordan Free Trade Agreement was finalized, Jordan raised the minimum working age from thirteen to sixteen. U.S. DOL 2005 FINDINGS ON THE WORST FORMS OF CHILD LABOR, *supra* note 59, at 261. In 2003, Jordan similarly raised the minimum working age for hazardous jobs from seventeen to eighteen years. U.S. DOL 2004 FINDINGS ON THE WORST FORMS OF CHILD LABOR, *supra* note 120, at 254. The operation of the U.S. Free Trade

Jordanian officials investigated approximately three thousand claims of child labor in 2002, none of the employers were sanctioned in accordance with Jordanian law.<sup>122</sup> Thus, the effectiveness of the U.S.-Jordan Free Trade Agreement as a tool for eliminating child labor in that country is questionable.

2. *Round Two: Chile*<sup>123</sup> *and Australia*<sup>124</sup>

In 2003 and 2004, the United States finalized free trade agreements with Chile and Australia, respectively.<sup>125</sup> The differences between the 2003 and 2004 agreements and their predecessors underline the United States' ongoing attempts to find better ways to address child labor without impairing the sovereignty of the participant nations.<sup>126</sup>

Working conditions are addressed through virtually identical social clauses in the U.S.-Chile and U.S.-Australia Free Trade Agreements.<sup>127</sup> The social clauses continue the trend of addressing child labor with greater specificity, yet neither agreement identifies specific or measurable standards for child labor.<sup>128</sup> For instance, both agreements specifically refer to ILO Convention No. 182 (worst forms of child labor) more as a principle to be borne in mind when governing than as a specific labor standard to be met.<sup>129</sup> In addition, both agreements encourage the nations to proactively and cooperatively address new or particularly resilient labor problems, such as child exploitation.<sup>130</sup>

Agreement probably did not precipitate this change in Jordanian labor law, although free trade negotiations may have played some role.

122. *Id.*

123. United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, KAV 6375, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html) [hereinafter U.S.-Chile Free Trade Agreement].

124. United States-Australia Free Trade Agreement, U.S.-Austl. May 18, 2004, KAV 7141, available at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Australia\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html) [hereinafter U.S.-Australia Free Trade Agreement].

125. U.S.-Chile Free Trade Agreement, *supra* note 123; U.S.-Australia Free Trade Agreement, *supra* note 124.

126. See Manley & Laredo, *supra* note 46, at 98.

127. Compare U.S.-Chile Free Trade Agreement, *supra* note 123, Ch. 18 (Labour), and U.S.-Australia Free Trade Agreement, *supra* note 124, Ch. 18 (Labour), with U.S.-Jordan Free Trade Agreement, *supra* note 104, art. 6. Even a glance at the three treaties leads the viewer to conclude that later trade agreements are more detailed than their predecessors.

128. U.S.-Chile Free Trade Agreement, *supra* note 123, Ch. 18; U.S.-Australia Free Trade Agreement, *supra* note 124, Ch. 18.

129. U.S.-Chile Free Trade Agreement, *supra* note 123, arts. 18.6, 18.8(d); U.S.-Australia Free Trade Agreement, *supra* note 124, art. 18.7.

130. U.S.-Chile Free Trade Agreement, *supra* note 123, Annex 18.5; U.S.-Australia Free Trade Agreement, *supra* note 124, art. 18.5. The continuing trend towards emphasizing child labor as a

There is no evidence that U.S. free trade agreements with Chile and Australia have had a beneficial impact on child labor rates in either country. In Chile, which collects and reports child labor data, incidences of the worst forms of child labor actually increased after the U.S.-Chile Free Trade Agreement was signed.<sup>131</sup> Thus, the U.S.-Chile Free Trade Agreement has not resulted in a dramatic decrease in exploitative child labor but, in fact, may be correlated with its rise.

Unlike Chile, Australia does not collect child labor statistics per se.<sup>132</sup> The rate of workplace injuries to Australian children, however, suggests that child labor is more than an incidental problem.<sup>133</sup> In addition, each of the worst forms of child labor, including child soldiers, likely occurred in Australia as recently as 2004.<sup>134</sup> Australia has no national child labor laws<sup>135</sup> and was much criticized for its long-time refusal to ratify ILO Convention Nos. 138 and 182.<sup>136</sup> When the United States could have leveraged trade liberalization to force Australia to improve its child labor

discrete area of workers' rights is evident in the location of the labor cooperation mechanism in the agreement. In the U.S.-Chile Free Trade Agreement, the labor cooperation mechanism is included in an Annex. U.S.-Chile Free Trade Agreement, *supra* note 123, Annex 18.5. A similar clause is found in the body of the later-negotiated U.S.-Australia Free Trade Agreement. U.S.-Australia Free Trade Agreement, *supra* note 124, art. 18.5, suggesting that the labor provisions were thought to be more central to the agreement than before.

131. In 2003, the ILO estimated that three and one half percent of five-to-fourteen year-old Chileans were employed. U.S. DOL 2005 FINDINGS ON THE WORST FORMS OF CHILD LABOR, *supra* note 59, at 166.

In 2005, the United States Department of Labor noted that employment of Chilean boys in sexually-exploitative jobs was on the rise. *Id.* (citing ECPAT International, *Chile*, in ECPAT INTERNATIONAL, Jan. 14, 2004, Child Prostitution, available at [http://www.ecpat.net/eng/Ecpat\\_inter/projects/monitoring/online\\_database/index.asp](http://www.ecpat.net/eng/Ecpat_inter/projects/monitoring/online_database/index.asp) (follow "Chile" hyperlink; then follow "profile of commercial sexual exploitation of children" hyperlink; then follow "show" hyperlink)).

132. In its advisory paper to the United States on the proposed U.S.-Australia Free Trade Agreement, the AFL-CIO noted that "the Australian Government has refused to make any commitments to ensuring effective collection, monitoring and analysis of data related to the 'worst forms of child labor.'" AFL-CIO, *Labor Rights and Child Labor Laws in Australia* 4 (Sept. 2, 2003), available at [http://www.actu.labor.net.au/public/papers/laborrights/australia\\_labor\\_rights\\_comments\\_02\\_09\\_2003.rtf](http://www.actu.labor.net.au/public/papers/laborrights/australia_labor_rights_comments_02_09_2003.rtf) [hereinafter AFL-CIO, *Labor Rights*].

133. According to the Australian National Occupational Health and Safety Commission, 21,000 Australian children under fifteen years of age reported work-related injuries or ailments to that agency in 2001. National Occupational Health and Safety Commission (Austl.), *Hospitalisations due to Work-Related Injury in Australia* (2001-2002) 4-5 (2004), available at [http://www.ascc.gov.au/NR/rdonlyres/C65C38F4-4BD\(-45A9-8601-FF7FA013ED2B/0/NHMDReport200001.pdf](http://www.ascc.gov.au/NR/rdonlyres/C65C38F4-4BD(-45A9-8601-FF7FA013ED2B/0/NHMDReport200001.pdf). For the same period, an additional 310,000 injuries were reported by workers between fifteen and twenty-one years of age. *Id.* See also Australian Clearinghouse for Youth Studies, *Australian Youth Facts and Stats*, <http://www.youthfacts.com.au/index.php?option=displaypage &Itemid=253&op=page#injuries01> (last visited Nov. 11, 2007).

134. AFL-CIO, *Labor Rights*, *supra* note 132, at 4-7.

135. Parkinson II, *supra* note 36, at 7.

136. *Id.* Australia finally ratified ILO Convention No. 182 in 2006 but has yet to ratify ILO Convention No. 132. See *supra* note 36.

laws, it instead gave Australia an easy out. The U.S.-Australia Free Trade Agreement explicitly states that Australia's obligation to protect children's "internationally recognized labor . . . rights" is met "through laws . . . that regulate age levels for compulsory education."<sup>137</sup> The fiction perpetuated by the U.S.-Australia Free Trade Agreement, that child labor does not happen in these Westernized countries, impairs efforts to eradicate child labor by perpetuating the myth that child labor is the curse of less-developed nations.<sup>138</sup>

### 3. Round Three: Peru,<sup>139</sup> Colombia<sup>140</sup> and Perpetuity

Both Peru and Colombia admit they have moderate child labor problems.<sup>141</sup> In 2006, President George W. Bush sent the ATPA to Congress for ratification.<sup>142</sup> Unlike its predecessors, the ATPA's child labor provisions are not innovative. Instead, the social clause in the ATPA is virtually identical to those in the U.S.-Chile and U.S.-Australia Free Trade Agreements.<sup>143</sup> That is, the parties agree to enforce their own child labor laws in a manner consistent with ILO Convention No. 182.<sup>144</sup> The ATPA has not yet been ratified by the United States Congress and may be politically stalled.<sup>145</sup> Shortly after their victory in the 2006 election, Congressional Democrats asked the Office of the United States Trade

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137. U.S.-Australia Free Trade Agreement, *supra* note 124, art. 18.7(1), nn.18–65.

138. *See, e.g.,* Ahmed, *supra* note 27, at 153–55 (discussing the difference in labor protections found in more developed and less developed countries); ASDCI, *supra* note 10, at 4.

139. PTPA, *supra* note 73.

140. CTPA, *supra* note 73.

141. The most recent statistics available about Peruvian child labor date from 1994, when 16.5% of all Peruvian children between six and fourteen years old were employed. U.S. DOL 2005 FINDINGS ON THE WORST FORMS OF CHILD LABOR, *supra* note 59, at 496. Both poverty and poor educational opportunities present significant problems in Peru. *Id.* Colombian child labor rates are slightly lower, with an estimated 10.4% of children between five and fourteen years of age employed. *Id.* at 172.

142. Press Release, Office of the U.S. Trade Representative, United States and Colombia Sign Trade Promotion Agreement (Nov. 22, 2006), available at [http://ustr.gov/Document\\_Library/Press\\_Releases/2006/November/United\\_States\\_Colombia\\_Sign\\_Trade\\_Promotion\\_Agreement.html](http://ustr.gov/Document_Library/Press_Releases/2006/November/United_States_Colombia_Sign_Trade_Promotion_Agreement.html); Press Release, Office of the U.S. Trade Representative, United States and Peru Sign Trade Promotion Agreement (Apr. 12, 2006), available at [http://ustr.gov/Document\\_Library/Press\\_Releases/2006/April/United\\_States\\_Peru\\_Sign\\_Trade\\_Promotion\\_Agreement.html](http://ustr.gov/Document_Library/Press_Releases/2006/April/United_States_Peru_Sign_Trade_Promotion_Agreement.html).

143. Compare U.S.-Chile Free Trade Agreement, *supra* note 123, Ch. 18, and U.S.-Australia Free Trade Agreement, *supra* note 124, Ch. 18, with PTPA, *supra* note 73, Ch. 17 and CTPA, *supra* note 73, Ch. 18.

144. CTPA, *supra* note 73, art. 17.5; PTPA, *supra* note 73, art. 17.5.

145. *See Snubs and Opportunities; Latin America and the United States*, ECONOMIST (U.S. Edition), Nov. 25, 2006, at 37–38.

Representative to reopen talks with Colombia and Peru to address concerns about labor rights.<sup>146</sup>

With the fate of the ATPA unknown, the Office of the United States Trade Representative is in the process of negotiating nine more free trade agreements.<sup>147</sup> Some of the countries with which the United States is negotiating, such as Thailand, are well-known havens for child exploitation.<sup>148</sup> To curb pervasive child labor with a free trade agreement, it is vital that the content and enforcement of the social clause be faultless.

#### IV. DISCUSSION

Child labor is a growing international problem.<sup>149</sup> Existing U.S. free trade agreements do not do enough to reduce and eliminate child labor. Although the United States has noticeably improved enforcement mechanisms in free trade agreements since NAALC, commensurate development in the substance of the child labor provisions has not occurred. In emphasizing national sovereignty, U.S. free trade agreements substitute formalistic enforcement and anti-degradation requirements for empirical standards.

Assuming, as this Note does, that U.S. free trade agreements can effect real and positive change in the lives of exploited child workers, the question becomes how best to improve social clauses. The trend towards substituting boilerplate language to describe vague principles in lieu of standards adapted to national conditions is troubling and should not be perpetuated by the United States.

Human rights experts agree that national solutions are necessary to eliminate child labor.<sup>150</sup> In fact, this is precisely what makes regional

146. *Id.*

147. According to the Office of the United States Trade Representative, the United States is currently negotiating bilateral free trade agreements with Malaysia, Oman, Panama, the Republic of Korea (South Korea), Thailand, and the United Arab Emirates. Updates on the trade negotiations may be accessed on the United States Trade Representative's website, [http://ustr.gov/Trade\\_Agreements/Bilateral/Section\\_Index.html](http://ustr.gov/Trade_Agreements/Bilateral/Section_Index.html) (last visited Nov. 11, 2007). Information about the United States' current negotiation of multilateral free trade agreements with the Enterprise for ASEAN, the South African Customs Union, and the FTAA, may be accessed at [http://ustr.gov/Trade\\_Agreements/Regional/Section\\_Index.html](http://ustr.gov/Trade_Agreements/Regional/Section_Index.html) (last visited Nov. 11, 2007).

148. Kern, *supra* note 14, at 181. Thailand is rife with child prostitution. *Id.* In Bangkok alone, an estimated 800,000 girls under the age of fifteen labor as prostitutes. *Id.* at 181 (citing Jodi L. Jacobson, *Yes Slavery*, *WORLD WATCH* 34 (Jan/Feb. 1992)).

149. *See, e.g.*, Senser, *supra* note 16.

150. ILO, *The End of Child Labour: Within Reach, Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work* 10 (2006), available at <http://www.ilo.org/public/english/standards/reim/ilc/pdf/rep-i-b.pdf>. According to the ILO, "it is the policy choices made by governments rather than poverty levels alone that explain why certain countries have

programs to eliminate child labor, such as those found in U.S. free trade agreements, so effective. A free trade agreement that uses boilerplate language to describe child labor protections forfeits the benefits afforded by a regional solution. The United States must not succumb to the temptation of addressing the important problem of child labor with easy and uncontroversial boilerplate language. Instead, the United States must condition future free trade agreements upon the development and implementation of programs that will concretely address a nation's actual child labor problem.

The shift to specific, objective, and measurable standards is a natural outgrowth of abandoning boilerplate language. Nebulous principles allow nations to abuse the privilege of free trade with the United States by not complying with its conditions. To avoid the danger of similar manipulation of finite and detailed standards, the United States must add specific goals for the gradual reduction and elimination of child labor to its free trade agreements. Assessment of the suitability of continuing trade should be tied to deadlines for achievement of these child labor reduction goals. In this way, the United States may harness the free trade agreement's power to effect real social change and avoid becoming trapped in a perpetual free trade agreement with a noncompliant nation.

In order to set specific and measurable goals for the gradual elimination of child labor, reliable child labor statistics must be collected. The dearth of valid and reliable information about child labor rates<sup>151</sup> must be rectified. The United States could condition free trade upon the regular collection and reporting of child labor data, though such a direct requirement may be seen as impermissibly impairing national sovereignty. Alternatively, U.S. free trade agreements could require participation in the ILO's Statistical Information and Monitoring Programme on Child Labor (SIMPOC).<sup>152</sup> Thus, the United States would both avoid the appearance of

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managed to reach a critical threshold in achieving universal education and with it child labour elimination." *Id.* See also ILO, *Facts on Child Labour 2* (2006), available at [http://www.ilo.org/public/english/standards/ipecc/about/globalreport/2006/download/2006\\_fs\\_childlabour\\_en.pdf](http://www.ilo.org/public/english/standards/ipecc/about/globalreport/2006/download/2006_fs_childlabour_en.pdf); Ahmed, *supra* note 28, at 162; JENNIFER FEE, LESSONS LEARNED WHEN INVESTIGATING THE WORST FORMS OF CHILD LABOUR USING THE RAPID ASSESSMENT METHODOLOGY 6-7 (2004) (discussing the importance of local and national buy-in the collection of child labor data).

151. FEE, *supra* note 150, at iii. Child labor statistics are difficult to collect because of the "hidden, sometimes illegal or even criminal nature" of child labor and, consequently, are not always valid indicators of a nation's actual child labor rates. *Id.*

152. ILO, *International Programme on the Elimination of Child Labour: IPEC, Child Labour Statistics, SIMPOC*, <http://www.ilo.org/public/english/standards/ipecc/simpoc/index.htm> (last visited Feb. 11, 2007). SIMPOC helps nations collect valid data on child labor rates using a variety of methods including rapid assessment, which is designed to ferret out covert child labor. *Id.*

impeding another nation's sovereignty and ensure the availability of reliable child labor statistics for assessing the propriety of continuing free trade. To do so, the United States likely would need to improve its own child labor surveys, a small price to pay for major strides towards eliminating child labor.

#### V. CONCLUSION

U.S. free trade agreements offer a viable approach for eliminating child labor. These free trade agreements are in danger, however, of succumbing to the Siren's call of easy and uncontroversial boilerplate language. If the United States intends to leverage the economic spoils of free trade to eradicate child labor, it must improve the substantive child labor provisions in its free trade agreements. First, the United States must insist on child labor clauses adapted to the relevant national and regional stressors which actually cause the problem. Such country-specific drafting must include specialized, measurable, and enforceable child labor standards. Second, continued free trade with the United States must be conditioned upon concrete reductions in child labor rates. Third, to aid in the development of reasonable goals, the United States must also require the regular collection of child labor data through a program such as the SIMPOC.

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